The Supreme Court of Ireland, judgement of 27 July 2004 (2)[1]

Insolvency – Regulation nr. 1346/2000 – concurrent insolvency proceedings in Ireland and Italy – request for preliminary rulings from the Court of Justice – 1. article 2 – time of opening of the proceedings –2. article 3 – centre of main interests – 3. article 16 – recognition

147/04

Murray CJ – Denham J – McGuinness J – Geoghegan J – Fennelly J

In the matter of Eurofoods ifsc limited and in the matter of the companies acts 1963 to 2001
[Nem Diss, Separate judgment given by Fennelly J. relating to recognition of the Italian judgment]

JUDGMENT OF THE COURT delivered by FENNELLY J on the 27th day of July, 2004.

Eurofood IFSC Limited (hereinafter "the Company"), a company incorporated and registered in Ireland and part of the Parmalat Group of companies is insolvent. The High Court (Kelly J) has made a winding up order and appointed a liquidator. In doing so, he interpreted Council Regulation (EC) No 1346/2000. He held that the centre of main interests of the Company was in Ireland. He declined recognition, on grounds of public policy, to a judgment of an Italian court, which had already made an order placing the Company in extraordinary administration under Italian law and determining that the centre of main interests was in Italy.

The Appellant before this Court is the extraordinary administrator appointed by the Italian Court. It is clear that this Court, in order to be able to give judgment on the appeal, must refer questions for preliminary rulings on the interpretation of the Council Regulation to the Court of Justice.

The Facts regarding Eurofood

The following facts are not disputed, with the exception of the extent to which Board meetings of the Company were held in Dublin.

The Company was incorporated in Ireland as a company limited by shares on the 5th November, 1997. It has a paid up capital of US$ 100,000 and €2.54. The registered office of the Company is at 2 Harbourmaster Place, International Financial Services Centre, Dublin 1. It is a wholly owned subsidiary of Parmalat SpA (hereinafter "Parmalat") a company incorporated in Italy. The Company's principal objective was the provision of financing facilities for companies in the Parma1at group.

The International Financial Services Centre (hereinafter "IFSC") was established in 1987 at Custom House Dock in Dublin to provide a location for internationally traded financial services, including banking, asset financing, fund management and administration and specialised insurance operations. These may be provided only to non-resident persons or bodies. Incorporation within IFSC confers certain tax benefits, subject to strict compliance with a regulatory regime including supervision by:

- The Minister for Finance;
- The Irish Financial Services Regulatory Authority;
- The Revenue Commissioners, i.e., the body charged with the collection of taxes;

[1] Casenote by P. TORREMANS in this issue, p. 115-121.

- The Director of Corporate Enforcement;
- The Central Bank.

The Company, as it was required by law to do, carried on business at the IFSC at Custom House Docks, Dublin. In order to enjoy the tax benefits flowing from that fact, it required, and did in fact acquire, a certificate from the Minister for Finance pursuant to section 39B(2) of the Finance Act 1980, as inserted by section 30 of the Finance Act, 1987. That certificate authorized the Company to operate as an agency treasury centre and was limited to the provision of financing facilities to the Parmalat Group. Amongst other conditions, it required that the activities of the Company be carried on at IFSC and that the records and accounts of the business be available for inspection by the Revenue Commissioners. The Company was required to pay tax in Ireland on any income arising from its trading transactions.

Bank of America NT and SA, (hereinafter "Bank of America",) a bank established in the United States of America, but with branches, inter alia, in Dublin, London and Milan managed the day-to-day administration of the Company in accordance with the terms of an administration agreement of 1997.

Up to December 2003, there were four directors of the Company. Two of these were Irish and based in Ireland and two were Italian and based in Italy. One, Ms Catherine Meenaghan, was an employee of Bank of America. The Appellant states that the Italian directors were executive directors and that the Irish directors were non-executive. However, as a matter of law, all are appointed simply as directors. No such distinction appears in the Articles of Association of the Company. One of the Italian directors resigned on 12th December 2003 and the other on 20th January 2004. Under the Articles of Association, Parmalat, as holding company has power, by notice in writing, to remove and appoint directors.

According to the report of the Provisional Liquidator, all Board meetings of the Company were held in Dublin with two Irish directors or their nominees present at all times. The Italian directors usually attended in person, but sometimes communicated by telephone. The evidence before this Court includes very detailed minutes of two meetings of the Board of Directors, held at 2 Harbourmaster Place, Custom House Dock, Dublin on 18th September 1998 at which both Italian directors attended. Mr Fausto Tonna took the Chair and Mr Luciano del Soldato also attended. Those meetings approved the two large financial transactions listed below, respectively note issues to Venezuelan and Brazilian companies in the Parmalat Group.

The Appellant has disputed the extent to which Board meetings were held in Ireland. In an affidavit he, states:

> "[T]*here were twelve significant Meetings/Written Resolutions prior to the insolvency of the Parmalat group of companies in December 2003. It would appear that only five were held in Ireland, two of these had only one Irish director present, five were by telephone and the two written Resolutions included the significant Written Resolution of 8th August 2001 in respect of the Swaps Transaction, which was in effect directed by the Bank of America. Both Written Resolutions were passed under the hand of two Italian and one Irish director. The last two Board meetings held in December in December 2003 and January 2004 were physically held in Dublin with two Irish directors present but at this stage the two Italian directors were in custody in Italy.*"

Mr Wayne Porrit, for Bank of America, has sworn that in "*fact, all but one of the meetings of the Board are stated in their minutes to have been held in Ireland and were attended by both Irish and Italian directors.*" He has produced a table, setting out details of fourteen meetings between November 1997 and January 2004. The one exception mentioned describes the location of the meeting as: "*various locations… by phone.*" Mr Fausto Tonna is recorded as being present on six occasions and by phone on four occasions. Mr Luciano del Soldato was present on five occasions and on the phone on four. On some occasions the Irish directors were recorded as attending "*by phone*" but usually as simply being present.

The audited financial statements of the Company were prepared by Grant Thornton, Chartered Accountants, Dublin, in accordance with Irish law and accounting standards.

The Company engaged in three large financial transactions which were described as the Brazilian, Venezuelan and Swap transactions respectively. These were as follows:

a) on 29th September 1998 the Company issued notes by way of private placement in an aggregate amount of US$80,000,000 (to provide collateral for a loan by Bank of America to Venezuelan companies in the Parmalat group)
b) on 29th September 1998 the Company issued notes by way of private placement in an aggregate amount of US$100,000,000 (to fund a loan by the Company to Brazilian companies in the Parmalat group).
c) there was a "Swap" agreement with Bank of America dated 10th August 2001.

The liabilities of the Company under the first two transactions were guaranteed by Parmalat.

The creditors of the Company under the first two transactions, hereinafter called "*the note holders*" are now owed in excess of US$122 million. It is common case that the Company is unable to pay its debts.

Parmalat

Parmalat Spa, the parent of the Company, while incorporated in Italy, has operated through subsidiary companies in more than thirty countries worldwide. Its turnover in the year 2002 was in excess of €7.5 billion. It has been the subject of a well-publicized worldwide insolvency crisis and is the subject of legal and regulatory investigations in several countries.

Insolvency Proceedings in Ireland

On the 27th January, 2004, Bank of America presented to the High Court a petition for the winding up of the Company, alleging that the Company was insolvent and claiming a debt due to it of in excess of US$3.5 million. Although there was, in the affidavits filed before the High Court, some dispute concerning that debt, the Appellant did not address any arguments to that court on that issue and has not appealed against the High Court decision on the point. In any event, as the Appellant accepts, it is not necessary to resolve the issue, because other creditors represented by Metropolitan Life Insurance on behalf of the note holders have indicated their willingness to take over the petition of Bank of America, a procedure which is permitted under the Companies Acts. Bank of America, on 27th January 2004, also applied, ex parte, for the appointment of a provisional liquidator at the same time as it presented the petition.

In its affidavit grounding the petition, Bank of America expressed concern that an attempt would be made to move the centre of main interests of the Company, for the purposes of Council Regulation (EC) No 1346/2000, from Ireland to Italy. It claimed that the centre of main interests was in Ireland.

The High Court (Lavan J) duly appointed Mr Pearse Farrell as Provisional Liquidator to the company with powers to:

a) to take possession of all of the assets of the Company;
b) to manage the affairs of the Company;
c) to open a bank account in the name of the Company; and
d) to retain the services of a solicitor.

The High Court, at that stage, did not determine the issue of centre of main interests. The Provisional Liquidator took up his appointment and notified the creditors of the fact. He took steps to preserve the assets of the Company and to investigate its affairs. He also notified the Appellant, Dr Enrico Bondi, who had then been appointed as the Extraordinary Administrator of Parmalat in Italy.

The Petition of Bank of America for the winding-up of the Company was heard in the High Court (Kelly J) from the 2nd to the 4th March 2004. Bank of America, the provisional liquidator, the note holders and the Director of Corporate Enforcement were represented. Kelly J, in a judgment of 23rd March 2004, decided that:

1. Insolvency proceedings had been opened in Ireland at the date of the presentation of the petition.
2. The centre of main interests of the Company was and is in Ireland and therefore the proceedings opened in Ireland as of the 27th January 2004 were main insolvency proceedings within the meaning of the Regulation.
3. The purported opening of main insolvency proceedings by the Civil and Criminal Court of Parma (hereinafter "the Parma court") was contrary to Recital 22 and Article 16 of the Insolvency Regulation and could not alter the fact that main insolvency proceedings were already extant in Ireland.

4. The failure of the Extraordinary Administrator to put the creditors of the Company on notice of the hearing before the Parma court despite that court's directions on the matter and the failure to furnish the Provisional Liquidator with the petition or other papers grounding the application until after the hearing had taken place, all amounted to a lack of due process, such as to warrant the Irish Courts refusing to give recognition to the decision of the Parma court under Article 26 of the Regulation.

In the light of these conclusions and in circumstances where the Company was grossly insolvent Mr Justice Kelly made a winding up order in respect of the Company and appointed the provisional liquidator as liquidator. He did not recognize the decision of the Parma Court of 20th February.

Insolvency proceedings in Italy

Parmalat was discovered in late 2003 to be in deep financial crisis. This led to the insolvency of many of its key companies.

On the 23rd December 2003 the Italian Parliament passed into law decree No. 347 which permits of extraordinary administration of companies. On the 24th December 2003, Parmalat was admitted to extraordinary administration proceedings by the Italian Ministry of Productive Activities. The Appellant was appointed as extraordinary administrator. On the 27th December 2003 the Parma Court confirmed that Parmalat was insolvent and placed it in extraordinary administration.

This Court has been informed on behalf of the Appellant that the object of the procedure of extraordinary administration is to permit the economic and financial restructuring of companies on the basis of a recovery programme over a period of less than two years. It applies only to large companies, i.e., those with more than 1,000 employees and debts of no less than €1 billion. The Appellant must produce a report within 180 days.

On 10th February 2004, the Parma Court made an order in which it fixed 17th February 2004 as the date for the hearing of a petition concerning the insolvency of the Company. In its order, it directed that notice of the application be served on interested parties. The facts surrounding these proceedings are set out in more detail in the separate judgment of Fennelly J, with which the other members of the Court agree. That judgment concerns the recognition of the judgment of the Parma Court.

On 20th February the Parma Court gave judgment opening insolvency proceedings concerning the Company, declaring the Company to be insolvent, determining that its centre of main interests was in Italy and appointing the Appellant as extraordinary administrator.

The Appeal

The Appellant has appealed to this Court against the decision of the High Court. The principal subjects of argument on the hearing of the appeal were:

- Whether insolvency proceedings had been first opened in Ireland or Italy;
- Whether the centre of main interests of the Company was in Ireland or Italy;
- Whether there was such an absence of fair procedures leading up to the decision of the Parma Court that its decision should not be recognised.

This Court has received written and oral submissions in connection with the appeal from counsel for the Appellant as well as for Mr Pearse Farrell, the Provisional Liquidator, Bank of America, as Petitioning Creditor, the note holders, led by Metropolitan Life Insurance and the Director of Corporate Enforcement. The Provisional Liquidator, while expressing his continued willingness to act, considered it inappropriate for him to make submissions on the first two issues, but stated, particularly in oral submissions, that the conclusions of the High Court on the third point, namely the failure to respect fair procedures at the Parma Court, were fully warranted.

It was generally agreed, at the hearing of the appeal, that this Court would be obliged to refer questions relating to these issues to the Court of Justice for preliminary ruling pursuant to Article 234 of the Treaty Establishing the European Community as applied by Article 68 of that Treaty.

Submissions on the opening of insolvency proceedings

Counsel for the Appellant, Mr Bill Shipsey, Senior Counsel, made, as his principal submission that insolvency proceedings had been first opened in Italy, by the judgment of the Parma Court of 20th February. The concept had to be given an autonomous Community-law meaning. The function of the Regulation is to allocate jurisdiction between Member States. Jurisdiction to open main insolvency proceedings is not in the Member State in which application is first made but rather where the company has its centre of main interests. He submitted that the appointment of a provisional liquidator is not the opening of insolvency proceedings for the purposes of Article 3 of the Regulation. A provisional liquidator is appointed to preserve the assets and is, in reality, a temporary administrator, who may be removed before the making of a winding-up order. Most importantly, counsel says that the inclusion of "provisional liquidator" in Annex C of the Regulation is not relevant since there is no relevant proceeding in Annex A, and the winding up commences only when an order to that effect is made.

Counsel for the petitioning creditor, Bank of America, Mr Michael Collins, Senior Counsel, submitted that insolvency proceedings were opened in Ireland on the appointment of the provisional liquidator. This is based on the appointment of the provisional liquidator and his inclusion in Annex C and, secondly, by virtue of the rule of Irish law that the winding up is "*deemed to commence at the time of the presentation of the petition for winding up.*"(Section 220(2) of the Companies Act, 1963). The "*judgment opening proceedings*" includes "*the decision of any court empowered to open such proceedings or to appoint a liquidator*." The latter includes a provisional liquidator, as listed in Annex C. Contrary to the argument of the Appellant, he submitted that, by virtue of Article 4(1) of the Regulation, the effects of insolvency proceedings, including their commencement date, are to be governed by national law. He refers to the definition in Article 2(f) the Regulation of "*the time of opening of proceedings*" as "*the time at which the judgment opening the proceedings becomes effective, whether it is a final judgment or not.*" These arguments were also, in effect, advanced by the note holders.

Mr Collins advanced an additional argument in favour of the proposition that main insolvency proceedings were opened at the time of presentation of the petition. In this respect, he claimed that the Central Office of the High Court should be considered as falling within the "broad meaning" of the term "court" for the purposes of the Regulation, as seen in recital 10, which also says that "*insolvency proceedings do not necessarily involve the intervention of a judicial authority.*" Article 2(d) provides that "court" shall "*mean the judicial body or any other competent body empowered to open insolvency proceedings or to take decisions in the course of such proceedings.*" The Central Office were required to check the petition before receiving it and a Registrar had to fix a date for hearing.

Submissions on Centre of Main Interests

The Appellant, relying principally on the opening of proceedings in Italy, presented only brief arguments on the appeal regarding the determination of the issue of centre of main interests. In his notice of appeal, he claims that the learned High Court judge erred in law on the facts in embarking on this issue when the Parma Court had already determined it and when no argument was addressed to

him (Kelly J) by the Appellant. In his written submissions on the appeal, he relies on the fact that this issue has been determined by the Parma Court. He says that the presumption based on the location of the registered office was rebutted, stating that: "*as is evident from the affidavits filed the Company was a financial vehicle for other companies in the group.*" This appears to be a reference to an affidavit sworn by the Appellant on 20th February 2004, in which he places reliance on the judgment of the Parma Court delivered on that day. In addition, the Appellant referred to the history of the Board meetings of the Company, which has already been quoted in detail above. He also stated that the Company had no employees in Ireland. In a further affidavit, sworn on 1st March, the Appellant replied to an affidavit sworn by Ms Jacqueline Jenkins on behalf of the note holders, stating that the fact that the security documentation for the notes was governed by Irish regulatory authorities and Irish tax law did not mean that the centre of main interests of the Company was in Ireland. He stated:

> "*The availing of the fiscal regime established in the Irish Financial Services Centre by the Company in issuing its bonds in the United States is not and could not per se amount to the conducting of the administration of the interest of the Company on a regular basis in the IFSC. Overwhelming evidence was presented to the Court in Parma that the persons who administered the Company and made decisions with regard to the Company were at all times based in Italy.*"

Bank of America and the note holders argued on the appeal in support of the determination by the High Court that the centre of main interests was in Ireland. Counsel pointed to recital 13 of the Regulation, which states that the centre of main interests "*should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.*" Counsel relied on the matters of fact which have been summarised above. He placed particular emphasis on the place of the registered office, the conduct of Board meetings in Ireland and the clear perception of the main creditors of the Company that they were dealing with a Company located in Ireland and subject to Irish fiscal and regulatory provisions. The note holders state that the Company was very specifically established in Dublin to take advantage of the particular fiscal and regulatory regime of the IFSC and that, for this purpose, the day to day affairs of the Company were required to be and were in fact conducted within the Custom House Dock area pursuant to a management agreement with the Bank of America. They submit that the perception of creditors is a crucial factor in determining a company's centre of main interests.

Matters to be decided by this Court

It is clear that this Court, in order to give judgment on this appeal, must refer certain questions relating to the three main areas of dispute for preliminary ruling to the Court of Justice. In order to assist that Court in its task, it will include the following matters in its decision referring those questions:

- Its findings on relevant matters of relevant fact;
- Its rulings on certain matters of Irish law;
- Its views on certain aspects of the questions being referred.

The Facts

The facts set out above regarding the history of the Company, of Parmalat and of the history of the Irish and Italian proceedings are not in dispute except in one respect.

The only disputed issue of fact concerned the extent to which Board meetings of the Company were held in Dublin. In the view of this Court, the evidence is overwhelming that these meetings were properly and regularly held in Dublin and this Court so finds. There were fourteen Board meetings between November 1997 and January 2004. It seems certain that the first of these can be ignored as it took place before the Company changed its name to Eurofood as part of the Parmalat Group. In the case of twelve of the remaining thirteen meetings, the minutes record the meeting as taking place at one or another address in Dublin. Ten meetings were attended by at least two directors in person and

an eleventh by one. On five occasions, one or more of the Italian and of the Irish directors communicated with the meeting by telephone.

On one occasion only the meeting was conducted entirely by telephone. This was a perfectly regular and permissible practice. It did not alter the fact that, as recorded in the minutes in all but one case, the meetings were held in Ireland. It is notable that the two largest of the only three transactions ever effected by the Company were approved at a meeting of the Board in Dublin at which both Italian and Irish directors. No Board meeting was held in Italy.

The Appellant's statement, on affidavit, that only five of what he describes as "*twelve significant Meetings/Written resolutions*" were held in Dublin is incorrect and contrary to the clear evidence. The Appellant has produced no evidence to support it.

The Appellant has described the Italian directors as "executive directors" and the Irish directors as "non-executive directors." The Articles of Association of the Company recognizes no such distinction. There is no basis for such distinction, as a matter of law. He also says that the Company had no Irish employees, which is correct. However, one of the Irish directors, Ms Catherine Meenaghan, was an employee of Bank of America, which was responsible for the day to day management of the Company, pursuant to the terms of a comprehensive written administration agreement. The Bank of America thereby effectively undertook to be responsible for the entire administration of the Company. This took place in Ireland. This was perfectly normal and regular.

This Court is satisfied that the Company complied fully with all the legal and regulatory requirements imposed by Irish company and tax and financial-services law. These included observance of the requirements of the certificate issued to it by the Minister for Finance, the filing of annual returns with the Companies Office and the auditing of annual financial statements. Its business was properly and regularly conducted at the IFSC in Ireland. The Appellant has not, in fact, with the sole exception of the matter of the location of Board meetings, already mentioned, alleged any irregularity in any of these respects.

Matters of Irish law

This Court addresses the following matters of Irish law:

- The consequences of the appointment of a Provisional Liquidator;
- The function of the Central Office of the High Court;

The Companies Act, 1963 governs the appointments of liquidators. Section 225 of that Act provides:

"*For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, the court may appoint a liquidator or liquidators.*"

That power relates to the appointment of a liquidator at the time when a winding up order is being made. Section 226 additionally provides:

"*(1) Subject to subsection (2), the court may appoint a liquidator provisionally at any time after the presentation of a winding-up petition and before the first appointment of liquidators.*

(2) Where a liquidator is provisionally appointed by the court, the court may limit and restrict his powers by the order appointing him."

The grounds for appointment of a Provisional Liquidator are usually that the assets of the Company are in danger and that it is necessary to take action to prevent them from being dissipated. The creditor applying for such an appointment must produce evidence to satisfy the court that there are sufficient grounds for the appointment. The order appointing the provisional liquidator must state the nature of and give a short description of the property which he is required to take into his possession and the duties he is required to perform.

A provisional liquidator, once appointed, is obliged to "*take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.*"

(section 229(1) of the Act). The legal effect of the appointment of a Provisional Liquidator is that the directors of the company no longer have any power to deal with assets of the Company covered by the order of the court.

The date of commencement of a winding up is dealt with by section 220(2) of the Act, which provides that "*…the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.*"

It does not necessarily follow from the fact that a winding up petition has been presented or even that a Provisional Liquidator has been appointed that a winding up order will in fact be made. Section 216 provides that on "*hearing a winding-up petition, the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit…*" The presentation of the petition and the order for winding up are distinct. A principal function of the relation-back provision of section 220(2) is to confer validity on any acts that have been performed by a provisional liquidator following his appointment at the time of the presentation of the petition.

The Rules of the Superior Courts contain provisions regarding the presentation of winding up petitions. A petition for the winding up of a company must be "*presented and retained at the Central Office…*" of the High Court. That Office assigns a number to the case and a Registrar is obliged to appoint the time and place at which the petition is to be heard and may alter or vary that time. However, no Registrar has any power to open a hearing or to make any substantive order on the matter. In the view of this Court, it is manifest that the Central Office of the High Court is not a body independent of the Court. It is the administrative office of the Court. The acts referred to in the rules are ministerial acts only and involve no adjudicative act of any sort in the course of insolvency proceedings. The Court does not consider that the Central Office of the High Court has any power to "*open insolvency proceedings*".

Consideration of the Issues

The conflict which has arisen between the decisions of the Irish and Italian courts concerns, in the first instance, the question of whether insolvency proceedings were opened in Ireland with the presentation of the petition and the appointment of the Provisional Liquidator on 27th January or with the order of the Parma Court on 20th February determining that the Company was insolvent and ruling that the centre of main interests of the Company was in Italy.

Opening of Insolvency Proceedings

The Regulation applies, according to Article 1.1, to "*collective insolvency proceedings which entail partial or total divestment of a debtor and the appointment of a liquidator.*" Article 2(a) says that these proceedings are listed in Annex A. That Annex includes "*compulsory winding up by the court,*" in the case of Ireland. The petition presented to the High Court on 27th January was such a proceeding. Moreover, the appointment of the Provisional Liquidator on 27th January did involve at least a "partial divestment" of the debtor, insofar as it deprived the directors of their powers and required the Provisional Liquidator to take possession of the Company's property. Although the petition presented on 27th January was indeed one for such compulsory winding up, no order for winding up was made on that date. Nonetheless, it is clear that the petition was for a winding up of the Company within the meaning of Article 1.1 and Annex A. If and when a winding up order is made—and one has been made by the High Court, subject to the effects of the Regulation--- the effect of section 220(2) of the Companies Act, 1963 is that the order is deemed to have been made on 27th January. Thus, so far as Irish law is concerned, the proceedings are deemed to have been opened on 27th January 2004. A question of interpretation, therefore, arises as to the effect of this provision.

Whether the presentation of the petition and more particularly the appointment of the Provisional Liquidator on 27th January constituted the opening of insolvency proceedings depends on the interpretation of certain definitions in the Regulation. In particular, the term "*judgment*" in relation "*to the opening of insolvency proceedings or the appointment of a liquidator*" is defined in Article 2(e) as including "*the decision of any court empowered to open such proceedings or to appoint a liquidator.*" The word "*liquidator,*" in the case of Ireland, by virtue of Article 2(b) and Annex C,

includes a provisional liquidator. Article 2(e) does not, however, refer to a judgment appointing a liquidator, but to a judgment by a court "empowered" to make such an appointment. The question, therefore, is whether an order appointing a provisional liquidator, which appears clearly to be a judgment within the meaning of Article 2(e), is to be considered as a judgment opening insolvency proceedings, entitled to recognition pursuant to Article 16. It is not clear whether Article 2(e) intends to create a distinction, for the purposes of Article 16, between the opening of insolvency proceedings and the appointment of a liquidator. The definition of the appointment of a liquidator as a "judgment" does not appear to serve any purpose within the Regulation if it does not benefit from the recognition provided by Article 16. Moreover, the appointment of a liquidator is an essential component of the notion of collective insolvency proceedings within Article 1.1 of the Regulation.

Bank of America also relies strongly on Article 2(f), which defines the "*time of the opening of proceedings*" as meaning "*the time at which the judgment opening the proceedings becomes effective, whether it is a final judgment or not.*" There is no doubt that, as a matter of Irish law, the order appointing the Provisional Liquidator, even if not a final judgment became effective on 27th January. That argument is of assistance to Bank of America, provided that it can be shown that the expression, "time of the opening of proceedings," as defined is relevant to determining the priorities between the opening of proceedings where conflicting orders are made in two Member States. The expression does not appear in Article 16, which lays down the principle of recognition. It appears only in Articles 5 and 7, which deal with the preservation of certain third-party rights either *in rem* or by way of reservation of title. However, the Virgos-Schmit report (point 66) says that this expression is "*very important, since many questions are settled by reference to it.*" The question is whether this definition was intended to have effect on the determination of priorities between proceedings purporting to open insolvency proceedings in two Member States.

In all these circumstances, this court requires preliminary rulings from the Court of Justice to enable it to give judgment on whether the Irish Court first opened insolvency proceedings.

Centre of Main Interests

It is unnecessary to repeat the history of the Company. This is set out in detail earlier in this judgment. In the view of this Court, the evidence overwhelmingly leads to the conclusion that the centre of main interests of the Company was in Ireland at all times prior to its insolvency. The concept of centre of main interests is, of course, one of Community law. However, its assessment is predominantly a matter of fact.

Recital 13 states:

> "*The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.*"

Article 3.1 states:

> "*The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.*"

It is common case that the presumption is in favour of the country of the registered office, in this case Ireland. The burden should, therefore, be on those who assert the contrary to bring cogent proof.

Moreover, there are two elements in Recital 13, both of which need to be considered.

Firstly, the centre of main interests should be where the Company has conducted the administration of its interests on a regular basis. This Court has found, as a fact, that the Company has at all times conducted its business lawfully and regularly in Ireland. It has complied fully with all the legal and regulatory requirements imposed by Irish company, tax and financial-services law. The Appellant has not contended to the contrary except in respect of the holding of Board meetings. This Court has resolved any conflict of fact against the Appellant on this issue. The Appellant has produced

no evidence at all for his assertion that only five meetings were held in Ireland. His assertion is to the contrary of the available evidence. It is particularly striking that the two Board meetings, which approved the two transactions, which represented the overwhelming bulk of the business ever done by the Company, took place in Dublin, with both Italian directors in attendance. Accordingly, so far as the very extensive evidence before the High Court and this Court is concerned, the Company clearly conducted the administration of its business fully and regularly in Ireland.

Secondly, the centre of main interests must be such as is ascertainable by third parties. The note holders have placed before the High Court very detailed evidence of the lengths to which they went to satisfy themselves of the legal and financial character of the Company and of the regulatory environment in which it operated. They clearly did not believe that they were transacting business with a company whose centre of main interests was in Italy. Insofar as this matter is relevant, it also tends to show that the centre of main interests was in Ireland.

It is then necessary to consider the matters upon which the Appellant relies to rebut the presumption. These matters are principally, if not entirely:

- The Company was a wholly-owned subsidiary of Parmalat;
- The sole object of the Company was the provision of finance for companies in the Parmalat Group;
- The Company's policy was decided at Parmalat headquarters in Italy, by Parmalat executives and the Company exercised no independent decision-making function.
- The Company had no employees in Ireland.
- The liability of the Company to the note holders was guaranteed by Parmalat.

By reason of these matters, the Appellant claims that the Company was a mere financial vehicle for Parmalat, that it had only a formal office in Ireland and that its exclusive point of reference the interests of the parent the Company.

These submissions are of a very far-reaching character so far as the fundamentals of company law are concerned. It is perfectly normal and to be expected that subsidiary companies in a group will pursue and give effect to group policy. Parent companies form subsidiaries either in their own states of incorporation or in other states for a wide variety of business, commercial and tax reasons. Those subsidiaries are required to respect the now very complex legal, financial and regulatory regimes of their states of incorporation. It seems to this Court to be deeply inimical to the need for respect for corporate identity and respect for the rules of law (including Community law rules) relating to companies that the separate existence of such companies should be ignored.

Of particular importance, in the present case, is the compelling evidence placed before the High Court and this Court, which demonstrates the very serious extent to which the principal, indeed the only, creditors relied on legal and financial advice that the Company was a company incorporated in Ireland at the IFSC and subject to all the controls and regulation that that entailed. It would have very serious implications for the future of international corporate structures if it were to be accepted that the test for centre of main interests were to be ultimate financial control by a parent company rather than legal and corporate existence.

Insofar as this Court can make a judgment on the matter, it is clear that the centre of main interests of the Company was at all relevant times in Ireland.

Questions for preliminary ruling

The Supreme Court finds that it is necessary for the purposes of giving judgment on the appeal pending before it to seek preliminary rulings from the Court of Justice on a number of questions. It does not propose to refer any question relating to the contention that the Central Office of the High Court has power to open main insolvency proceedings, since the Court finds that it is quite clear that it does not. The questions listed below include a question relating to the issue of recognition of the judgment of the Parma Court, which arises from the separate judgment of Fennelly J.

The Court has been persuaded that it is a matter of great urgency to have rulings on these questions. The appointment by the Irish Court of a Liquidator and by the Italian Court of an Extraordinary Administrator in respect of the same Company will render it impossible, in practice, to

administer the assets of the Company, to the detriment of the creditors. The Court respectfully requests the Court of Justice to accord special priority to the matter.

The following are the questions:

1. Where a petition is presented to a court of competent jurisdiction in Ireland for the winding up of an insolvent company and that court makes an order, pending the making of an order for winding up, appointing a provisional liquidator with powers to take possession of the assets of the company, manage its affairs, open a bank account and appoint a solicitor all with the effect in law of depriving the directors of the company of power to act, does that order combined with the presentation of the petition constitute a judgment opening of insolvency proceedings for the purposes of Article 16, interpreted in the light of Articles 1 and 2, of Council Regulation (EC) No 1346 of 2000?

2. If the answer to Question 1 is in the negative, does the presentation, in Ireland, of a petition to the High Court for the compulsory winding up of a company by the court constitute the opening of insolvency proceedings for the purposes of that Regulation by virtue of the Irish legal provision (section 220(2) of the Companies Act, 1963) deeming the winding up of the company to commence at the date of the presentation of the petition?

3. Does Article 3 of the said Regulation, in combination with Article 16, have the effect that a court in a Member State other than that in which the registered office of the company is situate and other than where the company conducts the administration of its interests on a regular basis in a manner ascertainable by third parties, but where insolvency proceedings are first opened has jurisdiction to open main insolvency proceedings?

4. Where,

a) the registered offices of a parent company and its subsidiary are in two different member states,

b) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the member state where its registered office is situated and

c) the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary,

in determining the "centre of main interests", are the governing factors those referred to at b) above or on the other hand those referred to at c) above?'

5. Where it is manifestly contrary to the public policy of a Member State to permit a judicial or administrative decision to have legal effect in relation persons or bodies whose right to fair procedures and a fair hearing has not been respected in reaching such a decision, is that Member State bound, by virtue of Article 17 of the said Regulation, to give recognition to a decision of the courts of another Member State purporting to open insolvency proceedings in respect of a company, in a situation where the court of the first Member State is satisfied that the decision in question has been made in disregard of those principles and, in particular, where the applicant in the second Member State has refused, in spite of requests and contrary to the order of the court of the second Member State, to provide the provisional liquidator of the company, duly appointed in accordance with the law of the first Member State, with any copy of the essential papers grounding the application?

JUDGMENT delivered on the 27th day of July 2004 by FENNELLY J.

The main judgment of this Court delivered today concerning the reference of questions for preliminary ruling to the Court of Justice sets out fully the background facts relating to Eurofoods IFSC Limited (hereinafter "the Company") and the history of the proceedings. This judgment is concerned only with the appeal from the judgment of the High Court insofar as that Court decided that the decision of the Parma Court of 20th February 2004 should not be recognized.

In his judgment of 23rd March 2004, Kelly J, in the High Court, decided primarily that the Civil and Criminal Court at Parma (hereinafter "the Parma Court") did not have jurisdiction to open insolvency proceedings in respect of the Company, since, as he held, such proceedings had already been opened in this jurisdiction. He also held that the centre of main interests of the Company was in Ireland and not in Italy.

In addition, he held that the court should not give recognition to the judgment of the Parma Court. He relied on the provisions of Article 26 of Council Regulation (EC) No 1346/2000 ("the Regulation"). He said that the affidavit evidence showed that the creditors of the company were not heard on the application, "*despite the Parma Court apparently having directed that all interested parties ought to be.*" The learned judge continued:

> "*The certificate holders were not given the opportunity of putting the evidence before the Parma Court which they placed before this court. The evidence demonstrated their perception as a third party as to the centre of main interests of Eurofood. They organised their business on the basis that they were dealing with an Irish company subject to Irish law, which was being administered in Ireland with its centre of main interests in this jurisdiction. The advice which they took and the business decisions made were all on this basis.*"

The learned judge then referred to general principles of law regarding the right to a fair hearing. He cited the decision of the Court of Justice in Krombach v Bamberski [2000] ECR I-1935 regarding the interpretation of Article 27.1 of the Brussels Convention. Applying those principles to the facts, he found that "*the creditors of Eurofood were not heard on the petition and no proper opportunity was given them to be heard in the Parma Court*". He went on to refer also to the manner in which the Provisional Liquidator was put on notice. He said:

> "*He was notified after close of business on Friday 13th February that there would be a hearing before the court in Parma at midday on Tuesday 17th February. He was not furnished with the petition or the other papers grounding the application until after the hearing before the Parma Court had actually concluded. This lack of due process appears to me, quite apart from the other considerations, to warrant this court refusing to give recognition to the decision of the Parma Court.*"

The Appellant, Dr Enrico Bondi, the Extraordinary Administrator appointed by the Parma Court, in his Notice of Appeal to this Court, alleges that the learned High Court judge "*misdirected himself in his interpretation of Article 26 of the Regulation and in particular in finding that there had been a breach of public policy or fundamental principles in the conduct of the proceedings in the Parma Court.*"

The High Court judgment proceeds on the basis that there was an absence of a fair hearing at the Parma Court both in respect of the creditors and of the Provisional Liquidator.

Article 26 of the Regulation provides:

> "*Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that state's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.*"

Before addressing this matter further, I consider that it is necessary to restate the relevant facts, which are of particular relevance to the issue of recognition.

On 24th December 2003, an extraordinary administrator, Dr Enrico Bondi, the Appellant, was appointed in Italy to Parmalat Spa, the parent of the Company.

On 23rd January 2004, the Company wrote to its creditors giving notice of the possibility of appointment by Parmalat of new directors and that this might impact on the location of Eurofood's management and the jurisdiction in which procedures might be commenced. Both Italian directors had, by then, resigned.

On 27th January 2004, Bank of America presented its petition to the High Court in Ireland. On an ex parte application, that court appointed Mr Pearse Farrell (hereinafter "Mr Farrell") to be Provisional Liquidator of the Company. It gave him powers to:

1. Take possession of the assets of the Company
2. Manage the affairs of the Company
3. Open a bank account in the name of the Company
4. Retain the services of a solicitor

One of the grounds on which the petitioning creditor sought the appointment of a Provisional Liquidator was its fear that an effort might be made to transfer the "*centre of main interests*" of the Company to Italy in order to facilitate the inclusion of the Company in an Italian insolvency process, which would be "*main proceedings*," so as to exclude the jurisdiction of the Irish courts. The High Court (Lavan J) did not determine the issue of "*centre of main interests*" when making the order appointing a Provisional Liquidator. The legal consequences of the appointment of a provisional liquidator are described in the main judgment of this Court delivered today. They are, in particular, that the directors are no longer empowered to conduct the affairs of the Company. The provisional liquidator represents and is bound to protect the interests of all creditors and to take possession of the assets.

On 30th January 2004, Mr Farrell notified the certificate holders and the Appellant of his appointment.

On 9th February 2004, the Italian Ministry of Productive Activities ("Ministero delle Attivita Produttive) admitted the Company, as a group company, to the extraordinary administration of Parmalat Spa. On 10th February, the Parma Court made an order in which it acknowledged the filing of a petition to declare the insolvency of the Company. It scheduled a hearing before the court in camera for 17th February and directed that a "*copy to be sent to the petitioner for the communication to the parties interested to attend, if necessary also by fax, not later than 48 hours before the hearing.*" (the foregoing is based on an English translation exhibited in the proceedings). The word "copy" clearly refers to the petition, as no other document is referred to in the order. The reason given for the urgency was "*in order not to jeopardise the measures aimed at protecting the creditors.*"

On 10th February 2004 Mr Farrell received a fax communication from Parmalat Spa purporting to appoint three new Italian directors to the Board of the Company and to remove one Irish director, Ms Catherine Meenaghan, with immediate effect.

On Friday 13th February 2004 at approximately 17:15 Irish time, Mr Farrell, without any prior notice from or communication from the Appellant, was personally served by the Irish solicitors for the Appellant with a copy, dated 13th February of the notice of an urgent hearing before the Parma Court on Tuesday 17th February at 12 noon (11:00 Irish time). Mr Farrell was not, however, served, as would have been normal in this jurisdiction, and as had been clearly ordered by the Parma Court, with any copy of the petition or copies of the papers upon which the extraordinary administrator proposed to rely. As will be mentioned later in this judgment, the Appellant does not dispute this fact. The Appellant has exhibited what he describes as the "documentation grounding the application" with his affidavit in these proceedings. It appears that nineteen documents were annexed. None of these were served on or made available to Mr Farrell.

On 16th February, the Bank of America, the petitioning creditor, relying on a report of an investigation by the of the affairs of the Company, which showed it to be insolvent, applied to the High Court for an order to bring forward the date of the hearing of the winding-up petition. This application was apparently prompted by the impending application in the Parma Court. The High Court refused this application but granted liberty to Mr Farrell to appear in the proceedings before the

Parma Court. Both the petitioning creditor and Mr Farrell were clearly conscious of the desire and intention of the Appellant to open main insolvency proceedings in Italy.

Mr Farrell was legally represented before the Parma Court. However, despite what he has described as "*repeated written and verbal requests*" to the Appellant from Mr Farrell's Italian lawyers, he had not received any of the documents filed with the Parma Court. Nonetheless, he filed a "*defence brief*" with the court on 17th February 2004. In this, he argued that he was not allowed to defend and argue properly during the hearing, since he had not been served with the petition, which he said was a breach of his constitutional right to defend. Mr Farrell, through his Italian lawyers, asked the court for an adjournment of the hearing. This was refused by the court. The Parma Court, therefore, embarked on the hearing of the Appellant's application in the knowledge that Mr Farrell had not received any copies of the essential papers. The court entered on discussion and argument regarding the issue of centre of main interests of the Company. The hearing lasted about one hour. The parties were given permission to file further briefs before 11:00 on 19th February. However, the presiding judge stated that the court was not prepared to defer decision to a date, which would allow the Irish court to determine the matter first. The court also allowed Mr Farrell's Italian lawyers to photocopy the petition and the attached documentation on the court file. Due to time constraints, and limited photocopying facilities, Mr Farrell's lawyers had to be selective in the documents, which they copied. Mr Farrell's lawyers and those of the Appellant agreed before the court a deadline of 7 pm on 18th February for service by fax of the second brief.

In the event, Mr Farrell filed a second defence brief and the Appellant a counter brief prior to the decision of the court on 20th February 2004. There was, however, no further hearing. It is clear from the affidavits filed in these proceedings that the parties, at the hearing on 17th contested both the question of whether the Irish court had already "*opened*" insolvency proceedings and the issue of centre of main interests. At that time, Mr Farrell, as Provisional Liquidator, had been denied sight of any of the papers grounding the application.

The Civil and Criminal Court of Parma delivered its written judgment on 20th February 2004. That judgment deals principally, if not entirely, with the issue of where the "centre of main interest" of the Company lay. It includes several references to the arguments of Mr Farrell. For the purpose of ruling on the present issue of possible non-recognition of that judgment on grounds of public policy, it would be quite inappropriate to pass any comment on the court's views on that issue, which may present itself before another judicial forum. It suffices to say that the Parma Court appears to have considered Mr Farrell's arguments on their merits.

It is also necessary to consider the position of the largest creditors of the Company, the certificate holders.

Ms Jacqueline Jenkins has sworn an affidavit making specific complaint that the certificate holders were unrepresented before the Parma Court. She says that they were given no opportunity to outline to that court their perception in relation to the centre of main interests of the Company. The appellant did not notify them of the intended application. Notice was received by them via Mr Farrell on Sunday 15th February. Ms Jenkins says that she does not believe Mr Farrell was in a position to explain the perception of the certificate holders, which was "*so crucial to the determination of the centre of main interests*." They did, however, write a brief letter to the Provisional Liquidator setting out their perception on this issue and that was an exhibit to the second defence brief before the court. Ms Jenkins' affidavit contains the evidence referred to by the learned High Court judge on this issue.

Moreover, the petitioner, Bank of America, makes complaint in its submissions to this Court that it "*understood from conversations between the Provisional Liquidator and the Appellant's Irish solicitors that the petitioner was not an interested party for the purpose of appearing in the Italian proceedings.*" This is stated in an affidavit of Mr Diarmuid Connaughton, an executive of the petitioner, who does not state, however, that the petitioner was prevented from appearing before the Italian court.

The Appellant, in reply, points out that, having been informed of the impending hearing by the Provisional Liquidator, the certificate holders were aware of the proposed hearing and that there was nothing to prevent them being represented. He claims that they appear to have been satisfied that the Provisional Liquidator could put the case fully to the Italian court.

In his submissions to this Court, the Appellant says that he satisfied the requirements of the Parma Court by notifying Mr Farrell of the intended application, as the latter represents all creditors. This, he says, is demonstrated by the fact that the Italian court embarked on the matter without requiring that further notices be given. Both the petitioner and the certificate holders were, in fact, aware of the hearing, having been informed by Mr Farrell. Both are very large, according to the Appellant, organisations, which would have had no difficulty instructing lawyers to appear at very short notice. They appear, in fact, to have decided to allow their interests to be represented by Mr Farrell. In fact, they could even have appeared after the judgment of the Parma Court. Under Italian procedure, it is possible to apply to the same court to set aside its earlier order. The Appellant does not, however, offer any explanation for his undisputed denial of any copies of the essential papers grounding his application to Mr Farrell.

Mr Farrell, in his written submissions to this Court, supported by the certificate holders, says that, without question, the manner in which the Parma Court proceeded seriously circumscribed his ability to participate effectively in the proceedings and that the decision of the court was rendered in the absence of detailed evidence from the certificate holders. He emphasises, in particular, that the court made it clear that it was determined to render its decision before the date on which the petitioner's petition came before the High Court.

The certificate holders strongly criticise the proceedings of the Italian court, especially the haste with which it proceeded so as to open insolvency proceedings before the High Court could hear the winding-up petition. Since they represented 70-75% of the Company's indebtedness, they should have been put on notice. They rely on those provisions of the Regulation which indicate that the centre of main interests should correspond to the place where the debtor conducts and administers its business so that it is known to third parties.

Consideration of the Issue

The task of this Court, on this appeal, is to decide whether recognition of the decision of the Italian court would be contrary to Irish public policy. The provisions of Article 26 of the Regulation are matters of Community law. Insofar as the decision of this Court involves an interpretation of that Article, the Court will be obliged to refer any such question for preliminary ruling to the Court of Justice of the European Communities. However, it is for this court to decide the issue of Irish public policy. It is only if it comes to the conclusion that the decision of the Parma Court should not, as matter of Irish public policy, be recognised that it will need to consult the Court of Justice. It is also the function of this Court to make any findings of relevant fact.

The principle of fair procedures in all judicial and administrative proceedings is, in Irish law, a principle of public policy of cardinal importance. It derives both from the rules of natural justice of the common law and from constitutional guarantees of personal and individual rights.

The dictum of Gannon J as to the scope of this fundamental principle, in State (Healy) v Donoghue [1976] I.R. 325, at page 335, has been repeatedly approved. It is:

> "*Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given. By mentioning these I am not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence*."

These principles apply to all forms of proceedings, civil and criminal. In an appropriate case, they may be invoked both by bodies corporate and by non-citizens. There would be no doubt at all, in my opinion, insofar as principles of Irish law are applicable, that Mr Farrell, as the Provisional Liquidator, appointed by the Irish court, and bound, as such, to represent the interests of the creditors of the Company was entitled to receive fair notice of the intended application of the Appellant. Equally, there is no doubt that both the petitioner and the certificate holders have the right to rely on

these principles, if this Court holds that they were deprived of the right to a fair hearing to which they were entitled.

The question of recognition arises in a context of international law. In Irish law, where a person, which includes both natural and legal persons, is liable to be affected by a decision to be made by a court or tribunal, that person is entitled to reasonable notice of the nature of the decision which is sought and of the evidence to be used in applying for it. Failure of a court or an administrative body to respect these rights will lead the courts to exercise their rights of Judicial Review and to quash or annul any decision made in such circumstances. This Court should, therefore, approach the present matter by asking itself whether an Irish superior court, faced with a decision made by an Irish judicial or administrative body in like circumstances, would quash or set aside that decision.

The facts which ground the complaint made by Mr Farrell and the certificate holders are not in dispute. The Appellant does not contest, in particular, that he did not provide Mr Farrell with any copy of the petition or other supporting papers either before or during the hearing at the court in Parma on 17th February or that he was repeatedly asked for these papers by Mr Farrell's Italian lawyers. The Appellant has had ample opportunity to respond to Mr Farrell's complaints about the unfairness of the procedures as set out in his affidavit of 23rd February. The Appellant swore a further affidavit, prior to the High Court hearing, on 1st March. In that he replied to the affidavit of Ms. Jenkins, but he made no attempt to contest Mr Farrell's evidence. More remarkably, at the hearing of the appeal in this Court, counsel for the Appellant was specifically invited by this Court to explain why his client had refused to supply Mr Farrell with any copy of the petition. Counsel's answer was that he had no instructions on the matter. I find this extremely difficult to understand, since the learned High Court judge had ruled that the decision of the Parma Court should not be recognised as having been reached in breach of the rights to due process of Mr Farrell and of the certificate holders. Indeed, the Appellant was specifically appealing against that decision. It is clear, therefore, that the Appellant instructed his counsel to appear before this court without offering any explanation for his extraordinary behaviour in refusing to provide Mr Farrell with the essential documents necessary to defend the interests of the creditors of the Company before the Parma Court. Furthermore, it is not contested that the Parma Court was determined to proceed with the hearing on 17th February and to render its decision before the Irish High Court could make a winding-up order, an attitude clearly adopted at the behest of the Appellant. The Appellant must clearly have known that, by refusing to furnish him with the essential documents, he was putting Mr Farrell at a severe disadvantage at the hearing in Parma. His silence on the issue before this Court provides eloquent support for that conclusion.

The position of the certificate holders is slightly different. It is not clear that the Parma Court intended that they be served with the papers. They were, of course, as that Court stated in its decision, by far the largest creditors of the Company. It is not clear, however, whether that fact suffices to entitle them to notice. Small creditors may be no less grievously affected by the insolvency of its debtor. Furthermore, there is force in the point made by the Appellant that the certificate holders were amply funded and equipped to ensure representation before the Court at Parma on 17th February, if they had chosen to do so.

In reaching a conclusion on the question of whether Irish public policy manifestly requires that the decision of the Italian Court be recognised, all the circumstances must be considered. It is not possible to refrain from criticising the behaviour of the Appellant in the strongest terms. He failed, without explanation, to serve Mr Farrell with any copies of the petition or other papers grounding his application to the Court in Parma. He further declined to do so in spite of several verbal and written requests from Mr Farrell's Italian lawyers. This placed Mr Farrell in the difficult, certainly the embarrassing, position of having to get the permission of the judges to photocopy the documents on the Court file. Finally, the Appellant, in full knowledge of these complaints, instructed counsel to appear before this Court on appeal from the judgment of Kelly J in the High Court without offering any explanation for this extraordinary behaviour.

Against this concern about the behaviour of the Appellant, a number of other matters have to be weighed in the balance. It is commonplace that, in the case of the insolvency of large enterprises action often has to be taken as a matter of great urgency. The accounting experts in this field and the firms of lawyers who represent them are accustomed to meeting short deadlines, to preparing complex documents and evidence for the courts overnight and over week-ends, at least where interim or

interlocutory proceedings are concerned. Even there, however, opposing parties are entitled to sight of the papers to be used against them. Furthermore, parties are always entitled to reasonable time and notice where final orders of great importance are concerned. The case of Parmalat Spa and its associated companies is the most notorious large-scale insolvencies in the world in recent times. Clearly, the competing interests in Ireland and Italy were determined to endeavour to have the Company's insolvency administered in their own respective jurisdictions. The Parma Court did indeed, subject to its self-imposed deadline, facilitate Mr Farrell by providing some access to documents, but only after the hearing had effectively taken place. Its judgment shows that it considered the arguments of both parties. It is to be noted, with some concern, however, that it made no reference, in that judgment, to the refusal of the Appellant to serve Mr Farrell with a copy of the petition, as it had required him to do.

Mr Farrell says that he was seriously circumscribed in his ability to participate in the hearing in Parma, because of the absence of any copy of the petition. This cannot be denied and is not seriously contested by the Appellant.

This Court accepts that this must have been so. The shortness of the notice is one matter. Mr Farrell seems to have reacted extremely well in such a short time. However, he was deprived, apparently deliberately, of the essential documents grounding the Appellant's application to the Court. In a like situation, this Court would not allow a corresponding decision of any court or administrative body under its jurisdiction to stand. It would consider the want of fair procedures in itself as so manifestly contrary to public policy that it would regard it as having been made without jurisdiction and, consequently, void. Nor would that result be cured by the fact that the decision could be reopened before the same court. Such a fundamental failure to observe fair procedures would taint the entire proceeding.

This Court notes that, as stated in Recital 22 to the Regulation, "*recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust*" and that "*grounds of non-recognition should be reduced to the minimum necessary.*" It must, however, be an intrinsic element in the "principle of mutual trust" that the decision whose recognition is sought has been made in respect for the "*general principle of Community law that everyone is entitled to fair legal process,*" as stated by the Court of Justice in its judgment in Krombach v Bamberski (paragraph 26). The judgment in that case also states

> "*42. … it follows from a line of case-law developed by the Court on the basis of the principles referred to in paragraphs 25 and 26 of the present judgment that observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question (see, inter alia, Case C-135/92 Fiskano v Commission [1994] ECR I-2885, paragraph 39, and Case C-32/95 P Commission v Lisrestal and Others [1996] ECR I-5373, paragraph 21).*
>
> *43. The Court has also held that, even though the Convention is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, it is not permissible to achieve that aim by undermining the right to a fair hearing (Case 49/84 Debaecker and Plouvier v Bouwman [1985] ECR 1779, paragraph 10).*
>
> *44. It follows from the foregoing developments in the case-law that recourse to the public-policy clause must be regarded as being possible in exceptional cases where the guarantees laid down in the legislation of the State of origin and in the Convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the ECHR. Consequently, Article II of the Protocol cannot be construed as precluding the court of the State in which enforcement is sought from being entitled to take account, in relation to public policy, as referred to in Article 27, point 1, of the Convention, of the fact that, in an action for damages based on an offence, the court of the State of origin refused to hear the defence of the accused person, who was being*

prosecuted for an intentional offence, solely on the ground that that person was not present at the hearing."

I am satisfied that it would be manifestly contrary to public policy, as a matter of Irish law, to give recognition to the decision of the Parma Court, on the ground that Mr Farrell was not given the protection of fundamental aspects of fair procedures by being refused any copy of the petition or any other papers which the Appellant intended to place before that Court for the purpose of the opening of insolvency proceedings.

I therefore agree with the conclusion of Kelly J that the decision of the Parma Court should not be recognized. Nonetheless, having decided this matter of Irish law, it is incumbent on this Court to refer a question on this subject to the Court of Justice for preliminary ruling pursuant to Article 234 of the Treaty establishing the European Communities as modified by Article 68 of the Treaty. Such a question is included with the other questions being referred in the judgment of the Court delivered today.