JUDGMENT OF THE COURT (Fifth Chamber)
16 December 1999 *

In Case C-198/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Industrial Tribunal, Bristol, United Kingdom, for a preliminary ruling in the proceedings pending before that tribunal between

G. Everson,

T.J. Barrass

and

Secretary of State for Trade and Industry,

Bell Lines Ltd (in liquidation),

on the interpretation of Article 3 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23),

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: L. Sevón, President of the First Chamber, acting as President of the Fifth Chamber, C. Gulmann, J.-P. Puissochet, P. Jann and M. Wathelet (Rapporteur), Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Messrs Everson and Barrass, by M. Tether, Barrister, instructed by Pattinson & Brewer, Solicitors,

— the United Kingdom Government, by M. Ewing, of the Treasury Solicitor's Department, acting as Agent, and M. Hoskins, Barrister,

— the Irish Government, by M.A. Buckley, Chief State Solicitor, acting as Agent, E. FitzSimons, C. O hOisin and C. O'Rourke, BL,

— the Italian Government, by Professor U. Leanza, Head of the Legal Service in the Ministry of Foreign Affairs, acting as Agent, and G. Aiello, Avvocato dello Stato,

— the Netherlands Government, by M.A. Fierstra, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by D. Gouloussis, Legal Adviser, and N. Yerrell, a national civil servant on secondment to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Messrs Everson and Barrass, represented by M. Tether; the United Kingdom Government, represented by M. Ewing and M. Hoskins; the Irish Government, represented by M. Cush, SC, and C. O hOisin; the Italian Government, represented by G. Aiello; the Netherlands Government, represented by M.A. Fierstra; and the Commission, represented by D. Gouloussis and N. Yerrell, at the hearing on 6 July 1999,

after hearing the Opinion of the Advocate General at the sitting on 9 September 1999,

gives the following

Judgment

1 By order of 6 May 1998, received at the Court on 25 May 1998, the Industrial Tribunal, Bristol, referred to the Court for a preliminary ruling under Article 177

of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 3 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23, hereinafter 'the Directive').

2 That question has arisen in a dispute between Messrs Everson and Barrass, on the one hand, and the Secretary of State for Trade and Industry ('the Secretary of State'), on the other, concerning payment of outstanding claims following the insolvency of their employer, Bell Lines Ltd ('Bell').

The legal framework

Community law

3 The Directive is intended to guarantee employees a minimum level of protection under Community law in the event of the insolvency of their employer, without prejudice to more favourable provisions existing in the Member States. To that end, it requires Member States to establish an institution which will guarantee payment of outstanding claims to workers whose employer has become insolvent.

4 According to Article 1(1), the Directive applies:

'to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1).'

Article 2(1) of the Directive provides:

'For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency:

(a) where a request has been made for the opening of proceedings involving the employer's assets, as provided for under the laws, regulations and administrative provisions of the Member State concerned, to satisfy collectively the claims of creditors and which make it possible to take into consideration the claims referred to in Article 1(1), and

(b) where the authority which is competent pursuant to the said laws, regulations and administrative provisions has:

— either decided to open the proceedings,

— or established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.'

6 Article 3 of the Directive requires Member States to take the measures necessary to ensure that guarantee institutions guarantee payment of employees' outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a given date.

7 Article 5 of the Directive provides as follows:

'Member States shall lay down detailed rules for the organisation, financing and operation of the guarantee institutions, complying with the following principles in particular:

(a) the assets of the institutions shall be independent of the employers' operating capital and be inaccessible to proceedings for insolvency;

(b) employers shall contribute to financing, unless it is fully covered by the public authorities;

(c) the institutions' liabilities shall not depend on whether or not obligations to contribute to financing have been fulfilled.'

National legislation

8 Part XII of the Employment Rights Act 1996 ('the 1996 Act') is intended to transpose the Directive into domestic law in the United Kingdom.

9 According to the referring tribunal, the 1996 Act does not contain any express provision governing the situation in which a company which has a commercial presence in the United Kingdom and employs workers there but which is incorporated in another Member State becomes insolvent under the law of that other State.

The dispute in the main proceedings

10 Bell, at present in liquidation, is a company incorporated under Irish law with its registered office in Dublin. It carried on business as a shipping agent, in particular from various business addresses in the United Kingdom, and employed 209 persons in the United Kingdom for whom employer's and employees' social security contributions were paid into the National Insurance Fund.

11 In July 1997 the High Court of Ireland made an order that Bell be wound up on grounds of insolvency and appointed a liquidator. The High Court of Justice

(England and Wales), Queen's Bench Division, recognised the appointment of the liquidator within the context of judicial cooperation in matters of insolvency and appointed joint special managers to assist in the winding up of Bell's affairs in the United Kingdom.

12 Bell's employees in the United Kingdom were dismissed. Most of them applied to the Secretary of State under Part XII of the 1996 Act for payment in respect of arrears of pay, outstanding holiday pay and compensatory payments in lieu of notice. Those applications were rejected on the ground that the 1996 Act, interpreted in the light of the judgment in Case C-117/96 *Mosbæk* v *Lønmodtagernes Garantifond* [1997] ECR I-5017, did not impose any obligation to make such payments.

13 The applicants in the main proceedings worked for Bell's branch at Avonmouth, near Bristol. That branch was registered with the Registrar of Companies for England and Wales under section 690A of and Schedule 21A to the Companies Act 1985. Those rules implement, within the domestic law of the United Kingdom, the branch registration requirements laid down in Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36). That registration, however, did not have the result of conferring legal personality on the Avonmouth branch.

14 Before the referring tribunal, the applicants in the main proceedings maintained that their situation was distinguishable from that in *Mosbæk* inasmuch as Bell had established a permanent commercial presence in the United Kingdom, was registered in that Member State for tax, customs and social security purposes, and had paid social security contributions in the United Kingdom in respect of its employees working there.

15 The Secretary of State contended, on the other hand, that, in so far as the proceedings for collective satisfaction of creditors' claims had been commenced in Ireland, the Irish guarantee institution was responsible for settlement of the claims. Moreover, that approach had the advantage that it involved the guarantee institution of only one Member State, in accordance with the objective of the Directive.

16 The national tribunal held, in the light of the judgment in Case C-106/89 *Marleasing* v *La Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8, that, applying the principles of interpretation of national law, the 1996 Act did not impose an obligation on the Secretary of State to indemnify the applicants in the main proceedings. It decided to stay proceedings and to ask the Court to answer the following question:

'Where

(i) an employee works in one Member State for an employer incorporated in another Member State; and

(ii) the employer has a branch in the Member State in which the employee works, and that branch is registered under the national provisions implementing Council Directive 89/666/EEC (the Eleventh Company Law Directive), although it is not incorporated and does not have legal personality separate from that of the employer, in that Member State; and

(iii) both the employer and the employee are required to make social security contributions in the Member State in which the employee works,

under Article 3 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, which guarantee institution is responsible for the payments thereby due; is it

(a) the guarantee institution in the Member State in which insolvency proceedings have been commenced, or

(b) the guarantee institution in the Member State in which the employee works and in which the employer has a permanent commercial presence?'

The question submitted for a preliminary ruling

17 By its question, the referring tribunal is in substance asking which is the competent guarantee institution, under Article 3 of the Directive, for ensuring payment of outstanding wage claims in the case where the employees in question were employed in a Member State by the branch of a company incorporated under the laws of another Member State, in which that company has its registered office and in which it was placed in liquidation.

18 According to the United Kingdom Government, the competent guarantee institution is that of the Member State in which the decision was taken to open proceedings for the collective satisfaction of creditors' claims or in which it was established that the undertaking had been definitively closed down. That interpretation, which accords with the judgment in *Mosbæk* and has the merit

of being clear and simple, should be of general application in all cases where the insolvent employer is incorporated in a Member State other than that in which the employees reside and were employed.

19 In contrast, the applicants in the main proceedings and the Irish, Italian and Netherlands Governments, together with the Commission, submit that, in accordance with the purpose of the Directive, the obligation to pay employees the amounts owing to them rests with the guarantee institution of the Member State in which they were employed and in which the employer had a permanent commercial presence. In this regard, the facts of the present case are clearly distinguishable from those of *Mosbæk*, since Bell not only had a branch in the United Kingdom and was registered there in accordance with Directive 89/666, but also had offices or other assets in that Member State and paid its workers through its branch, collecting the taxes and social security contributions payable under United Kingdom legislation.

20 It is important at the outset to note that the purpose of the Directive is to guarantee a minimum of protection for employees adversely affected by the insolvency of their employer. So far as the content of that guarantee is concerned, Article 3 of the Directive imposes an obligation to ensure payment of employees' outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a given date.

21 Where the employer is established in a single Member State, the Directive requires that the competent guarantee institution for the purposes of paying employees' outstanding claims be that of the Member State of the place of establishment.

22 Where, as in the main proceedings in this case, the employer has several places of establishment in different Member States, it is necessary, for the purpose of determining the competent guarantee institution, to refer, as an additional

criterion and in the light of the social objectives of the Directive, to the place in which the employees are employed. That will in most cases correspond to the social and language environment with which they are familiar.

23 In the main proceedings here, in contrast to the position in *Mosbæk*, where the insolvent employer did not have any establishment in the territory of the Member State in which the employee was working, the employer concerned was established within the territory of the United Kingdom, since it had a branch in Avonmouth employing more than 200 persons, including the applicants in the main proceedings. In such a case, the institution which must settle any outstanding claims is that of the Member State within whose territory the branch is established.

24 The answer to the question referred must therefore be that where the employees adversely affected by the insolvency of their employer were employed in a Member State by the branch established in that State of a company incorporated under the laws of another Member State, where that company has its registered office and in which it was placed in liquidation, the competent institution, under Article 3 of the Directive, for payment to those employees of outstanding claims is that of the State within whose territory they were employed.

Costs

25 The costs incurred by the United Kingdom, Irish, Italian and Netherlands Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Industrial Tribunal, Bristol, by order of 6 May 1998, hereby rules:

Where the employees adversely affected by the insolvency of their employer were employed in a Member State by the branch established in that State of a company incorporated under the laws of another Member State, where that company has its registered office and in which it was placed in liquidation, the competent institution, under Article 3 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, for payment to those employees of outstanding claims is that of the State within whose territory they were employed.

Sevón Gulmann Puissochet

Jann Wathelet

Delivered in open court in Luxembourg on 16 December 1999.

R. Grass D.A.O. Edward

Registrar President of the Fifth Chamber