International Corporate Rescue

Published by

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Centre for Commercial Law

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Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:
Subscription prices 2024 (6 issues)
Print or electronic access:
EUR 730.00 / USD 890.00 / GBP 560.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

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In the matter of Valeriy Ernestovich Drelle [2024] EWHC 521 (Ch), or How to Chase Foreign Debtors in England based on Unrecognised Foreign Debt

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Synopsis

The case of *Valeriy Ernestovich Drelle* [2024] EWHC 521 (Ch) presents an interesting English precedent from the High Court of Justice on appeal that can be availed of by foreign creditors when considering debt recovery options and prospects of chasing their debtors in England by commencing bankruptcy proceedings based on a foreign money judgment which has not been previously 'validated' via recognition in the targeted 'enforcing' jurisdiction.

The key matter it deals with is the interpretation of 'debt' for the purposes of s267 of the Insolvency Act 1986, and particularly whether a foreign judgment that hasn't undergone recognition proceedings can underpin a bankruptcy petition in England.

Important takeaway of this case is drawing a distinction between 'enforcement' and 'bankruptcy' and concluding that presentation of a bankruptcy petition does not constitute 'enforcement' of the foreign judgment, and thus recognition, which is usually needed to use (enforce) a foreign debt 'as a sword', should not be a requirement for bankruptcy petition purposes, as long as the prerequisites of 'debt' are met.

Therefore, unrecognised foreign judgment is deemed not to prevent the judgment constituting a 'debt'. Rather, the absence of recognition only presents a barrier to enforcement of the judgment in the particular jurisdiction that is no different in nature to the barrier to enforcement that faces a creditor who has an English trade debt, but no judgment.

At the same time, it is accepted that a bankruptcy petition cannot successfully be founded on a debt, based on a foreign judgment, that is subject to a *bona fide* dispute on substantial grounds. Thus, in the absence of recognition proceedings, should there be grounds to infer that the foreign judgment *may* be impeachable on grounds of fraud, being contrary to public policy or opposed to natural justice, the impeachability of the foreign debt judgment would have to be subject to consideration within recognition proceedings.

Factual background – Russian element

In December 2011 the Russia-incorporated Lender Company, Servis-Terminal LLC, provided a significant loan to the Russian borrower (Debtor), Fort Steiton LLC, which was backed by personal guarantees from the Debtor's owner, Mr Motylev.

Following the default on the loan, in August and December 2016, the Lender Company obtained money judgments in the Russian Federation (RF) against the new Debtor[1] and Mr Motylev (as a personal guarantor), under which they both were held jointly and severally liable to the Lender Company for the loan. However, the enforcement of the awarded sums was rather illusory, which entailed ongoing foreign asset-tracing attempts.[2]

Thus, the initial case which started with a default on a significant commercial transaction in the RF, followed by unsuccessful debt enforcement attempts, ultimately led to the corporate bankruptcy (liquidation) of the Lender Company, being in search for alternative recovery options elsewhere.

In search for such options to fulfil the insolvency estate of the Lender Company for further distribution to the creditors, the Russian insolvency trustee (liquidator) pursued a claim in the RF against the then CEO and one of shareholders of the Lender Company, Mr Valeriy Drelle (Mr Drelle), a Russian national.

In May 2019 Mr Drelle was held liable in the RF for RUB 2 billion in losses[3] to the Lender Company for his

Notes

1 On 5 November 2014 the initial debt (loan obligations) was assigned to a new Debtor – Intercom Capital LLC, the Russia-incorporated entity, controlled by Mr Motylev.

2 With Mr Motylev's further personal bankruptcy in April 2017, the recovery of the debt against him as a personal guarantor was a pending issue for the Lender Company.

3 Article 53(3) of the Civil Code of the Russian Federation: 'a person who by virtue of the law or the constitutional documents of a legal entity acts on its behalf must act in good faith and reasonably in the interests of the legal entity it represents. Unless otherwise provided by the law

failure to act *in good faith* or reasonably in the interests of the Lender Company, when acted as its CEO. Namely, Mr Drelle was deemed to have facilitated the procurement by the Lender Company of a *de facto* unsecured loan to the Debtor by failing to give due consideration to obtaining sufficient security for such a loan, together with his failure to verify the financial solvency and capabilities of the Debtor and its personal guarantor, Mr Motylev, and omission to obtain the shareholders' approval of a major (loan) transaction.

Thus, on obtaining the Russian money judgment against Mr Drelle, a Russian liquidator pursued bankruptcy proceedings against him in England, where Mr Drelle was residing then.

Insolvency and Companies Court at first instance – bankruptcy petition in England

The bankruptcy petition against Mr Drelle in England was presented on 14 October 2020 and it was based on the final Russian money judgement, which had not been subjected to any prior registration or recognition proceedings in England, which would typically be needed to 'extend' its binding force in the targeted 'enforcing' jurisdiction.

Mr Drelle attempted to oppose the Insolvency and Companies Court (ICC) Judge Burton making a bankruptcy order against him on the basis that the Russian money judgment was not recognised in England, so it could not be used (enforced) in English jurisdiction by presenting the bankruptcy petition, and that in any case the Russian judgment was subject to a genuine and substantial dispute, suggesting grounds for it to be impeached.[4]

Given that none of Mr Drelle's arguments was convincing enough, and having found that the debt claimed in bankruptcy petition was not subject to a genuine and substantial dispute,[5] on 31 March 2023 the ICC Judge Burton rendered the bankruptcy order against Mr Drelle, under which he was adjudged bankrupt in England.

High Court – on appeal

Mr Drelle, as the Appellant, tried to appeal against his adjudication as bankrupt by raising, *inter alia,* the following key issues on appeal before Richards J:[6]

1) Whether the Lender Company was entitled to present a bankruptcy petition pursuant to s267 of the Insolvency Act 1986 based on the 'debt' which had not been recognised by an English court, i.e. whether the Russian money judgment constituted a 'petition debt' since it had not been the subject of recognition proceedings in England? ('Debt & Debt Recognition/Enforcement Point');
2) Whether the conclusion that the debt was not subject to any genuine and substantial dispute so to render it impeachable for fraud was correct? ('Alleged Fraud Point').

The Alleged Fraud Point is not subject to a detailed analysis for the purposes of this article, and it nevertheless was dismissed by the Appellate court.

The Debt Recognition/Enforcement Point

The Appellant's suggestion that failure to take recognition proceedings means that the Lender Company is precluded from using (enforcing) the Russian money judgment 'as a sword' in the English courts by taking bankruptcy proceedings,[7] failed.

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or a contract, he/she shall, at the request of the founders (participants) of the legal entity, reimburse the losses caused by him/her to the legal entity'.

4 Suggesting that the largest creditor, Gazprom Neft (GPN), which was funding these proceedings, is ultimately owned by the Russian State, and was able to influence the judiciary in the Russian Proceedings such that the judges in those proceedings were partial. Moreover, Mr Drelle asserted that there were a number of substantive and procedural errors in the Russian Proceedings leading to an irresistible inference that they arose from a miscarriage of justice as a result of GPN and state interests affecting them.
*Rule 48 of Dicey, Morris & Collins on the Conflict of Laws (*Rule 51 in the most recent edition): 'A foreign judgment, which is final and conclusive on the merits and not impeachable under any of Rules 49 to 52 is conclusive as to any matter thereby adjudicated upon, and cannot be *impeached* for any error either (1) of fact or (2) of law.
Rule 50 of Dicey: A foreign judgment relied upon as such in proceedings in England, *is impeachable* for fraud. Such fraud may be either (1) fraud in the part of the party in whose favour the judgment is given; or (2) fraud on the part of the court pronouncing the judgment.
Rule 51 of Dicey: A foreign judgment is impeachable on the ground that its enforcement or, as the case may be, recognition, would be contrary to public policy.
Rule 52 of Dicey: A foreign judgment may be impeached if the proceedings in which the judgment was obtained were opposed to natural justice.

5 [2023] EWHC 506 (Ch) (Judgment dd. 09 March 2023, In the High Court of Justice, Business and Property Courts of England and Wales, Insolvency and Companies List (CHD), before Insolvency and Companies Court Judge BURTON, Petitioner: Servis-Terminal LLC, RF, and Respondent: Mr Valeriy Ernestovich Drelle), at [141].

6 [2024] EWHC 521 (Ch) (Judgment dd. 11 March 2024, In the High Court of Justice Business and Property Courts of England and Wales on appeal from the Insolvency and Companies (ICC Judge BURTON) Insolvency and Companies List; before Mr Justice RICHARDS).

7 [2024] EWHC 521 (Ch), para 32

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Richards J, sitting on appeal, was far from being convinced that the presentation of a bankruptcy petition constitutes 'enforcement' and rejected that argument.

Moreover, Richards J found more convincing fundamental reasons for the recognition & enforcement point to fail. Namely, that 'in s267 of the Insolvency Act, Parliament has legislated to determine which claims can found the presentation of a bankruptcy petition… Parliament's answer is that *only 'debts'* that satisfy the requirements of s267 can found a bankruptcy petition. Therefore, the question is what 'debt' means […]'.[8] Also, Richards J reasoned that the Parliament has chosen, in s267(1) and s267(2) of the Insolvency Act, to define the nature of claims that can found a bankruptcy petition by reference to the concept of a 'debt', and thus he did not consider that there was any suggestion that Parliament intended 'that well-known concept to be coloured by reference to the respective treatment of registrable or non-registrable foreign judgments. After all, the focus of s267 is not on foreign judgments at all; it is on 'debts".[9]

The debt point

Under Section 267 of the Insolvency Act, to satisfy 'debt' requirements, it is needed that at the time of the petition the following is present:

(a) the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level (i.e. £5,000),

(b) the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured,

(c) the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay, and

(d) there is no outstanding application to set aside a statutory demand served (under section 268 below) in respect of the debt or any of the debts.

All of the above 'debt' requirements were satisfied at the time of bankruptcy petition.

Persuasive authority

Richards J relied on the judgment of Chadwick J in *Bishopsgate Investment Management Limited v Maxwell (1993) Times, 11 February* as a persuasive authority that suggested that an inability to take court proceedings to enforce a claim for a liquidated sum does not prevent that claim from constituting a debt. In his judgment, Chadwick J confirmed that the Insolvency Act had changed the law from that previously applicable under the Bankruptcy Act 1914. Following the Insolvency Act, a 'debt' for the purposes of s267 did not need to result from a final order or judgment of an English court. Thus, a trade debt is in principle capable of founding a bankruptcy petition even though, until judgment is obtained on that debt, it will not be possible to 'enforce' it.[10]

Thus, it was concluded on appeal that an unrecognised foreign judgment does not prevent the judgment constituting a 'debt'. Rather, the absence of recognition 'presents a barrier to enforcement of the judgment in the particular jurisdiction of England and Wales that is no different in nature to the barrier to enforcement that faces a creditor who has an English trade debt, but no judgment'.[11]

Further, Richards J noted the judgment in *Sun Legend Investments Ltd v Jade Yuk Kuen Ho* [2013] BPIR 533, by District Judge Musgrave, sitting in the Birmingham County Court, which dealt with an identical issue, but concerned a Hong Kong judgment. In that case the debtor opposed the making of a bankruptcy order on the basis that the creditor was not entitled to present a bankruptcy petition based on sums due under that judgment *until after* successful recognition proceedings. It was concluded that *Sun Legend* was in a position no different from any other creditor who sought to pursue bankruptcy without holding an English judgement, and that a bankruptcy petition *does not constitute enforcement* of the Hong Kong judgment. As the bankruptcy jurisdiction since 1986 is a separate jurisdiction involving a class remedy, there is no requirement for an English judgment as a precondition to proceeding with a petition.[12]

Conclusion

The Appellate court *In the matter of Valeriy Ernestovich Drelle* [2024] EWHC 521 (Ch) dismissed the appeal on all grounds and upheld the High Court's decision at first instance, affirming, *inter alia*, that an unrecognised foreign judgment could constitute a 'debt' for the purposes of bankruptcy proceedings under the Insolvency Act 1986. The court confirmed that recognition or registration proceedings were not prerequisites to

Notes

8 [2024] EWHC 521 (Ch), para 34
9 [2024] EWHC 521 (Ch), para 49
10 [2024] EWHC 521 (Ch), para 44
11 [2024] EWHC 521 (Ch), para 45
12 [2024] EWHC 521 (Ch), para 46

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presenting a bankruptcy petition based on a foreign money judgment.

Key observation & impact

It is common ground and a general rule that to enforce a foreign court judgment abroad, such a judgment would typically need to be recognised (or registered – depending on a foreign law) in a jurisdiction where the enforcement is being sought, as otherwise its original binding force shall not be extended to the 'enforcing' jurisdiction to use it 'as a sword'.

This case demonstrates a somewhat 'novel' approach to determining when recognition is needed when it comes down to the question of commencement of bankruptcy proceedings in England. The key emphasis here is that bankruptcy petitioning should not be equated to enforcement. Once both are distinguished, the question of recognition of a foreign money judgment forming 'a debt' as a prerequisite for bankruptcy petitioning, shall fail.

Therefore, the observance of a 'recognition route' shall not be required for the purposes of commencing bankruptcy proceedings, which do not constitute enforcement, against the debtor residing in England, as long as the prerequisites of a 'debt' under the Insolvency Act 1986 are met, and provided no genuine and substantive triable dispute (inferring possible impeachability of the foreign judgment) exist.

The approach taken in this case would ease the access of foreign creditors to English jurisdiction when pursing debt recovery strategies via bankruptcy proceedings. It is a welcome decision for foreign creditors, unlike foreign debtors residing and hiding from their creditors in English jurisdiction.

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