English Law Creditors Bound by Irish Scheme of Arrangement

October 9, 2023

Executive Summary

In a radical departure from settled case law, the English High Court has eroded the protections of English law creditors guaranteed by the Rule in Gibbs[1].

In *Silverpail Dairy (Ireland) Unlimited Company v. McCarthy [2023] EWHC 895 (Ch)*, the English High Court applied Irish law to English governed law debt claims, including unpaid amounts owing to HM Revenue and Customs (HMRC), so as to bind English law creditors to an Irish law scheme of arrangement. The only parties represented were the Irish examiner and the Irish company.

This decision is dangerous precedent for creditors who rely on the status of their English law governed claims to protect them from foreign restructuring processes. It serves as a stark reminder: creditors who wish to protect their positions must seek representation and argue their case before the court. None of the English law creditors argued their case before the court.

It is beyond the scope of this advisory to discuss the merits of the Rule in Gibbs. Policy and the latest issues the UK Parliament are considering as regards the Rule in Gibbs were discussed in our August 2022 advisory: "Debtors Must Continue to Consider English Restructuring Processes to Secure a Global Solution".

The Decision

The court granted a so-called "Letter of Request" for assistance "as to the binding effect on the English creditors of the proposals approved by the [Irish] court" under an Irish scheme of arrangement. The Letter of Request was presented by the Irish High Court under section 426(4) and (5) of the Insolvency Act 1986 (UK) (the IA).

In granting the request, the High Court made no reference to the seminal decision of 2012 by the Supreme Court on these issues and which has been affirmed by the Supreme Court as recently as 2018[2]: *Rubin v. Eurofinance SA and New Cap Reinsurance Corporation (in liquidation), and another v. AE Grant and others* [2012] UKSC 46 (New Cap). Rather, the court relied on the 1997 decision of *Re Business City Express Limited* [1997] 2 BCLC 510. Nor did it refer to the helpful obiter of Lord Collins in New Cap as regards the correct approach to construing s.426(4) and (5).

The Rule in Gibbs is so entrenched in English law that the Supreme Court went so far as to say that any decision to overturn Gibbs lies, not with it, but with Parliament[3].

The Court's Error

Section 426(4) and (5) IA permits courts in designated jurisdictions[4] to apply to a "court in the United Kingdom" for assistance in an insolvency proceeding. It gives the English court discretion to apply either English law or the foreign law in relation to the matters specified in the request.

1 The Rule in Gibbs is authority for the proposition that a debt may only be compromised or discharged by the law governing that debt

2 *Re OJSC international Bank of Azerbaijan [2018] EWCA Civ 2802*

3 *Azerbaijan*

4 The Republic of Ireland is included as a designated jurisdiction.

The Irish court requested that the English court give assistance.

At first blush, ss.426(4) and (5) seems to apply. However, a consideration of New Cap shows that it is not as straight-forward as it may seem.

In *New Cap*, counsel made submissions to the effect that section 426(4) and (5) IA operated as an exception to The Rule in Gibbs. Although the Supreme Court did not need to decide the point[5], Lord Collins considered it at length and reasoned that section 426(4) and (5) did not go so far. His judgment for the majority is obiter on this point but nevertheless persuasive, and arguably authoritative for the High Court in a case such as this. As discussed further below, it is also difficult to cavil with his reasoning as a matter of statutory construction.

To understand the parameters of subsections (4) and (5), it is important to read them together with subsection (1). The salient words are ***our emphasis***:

> *(1)* **An order made** *by a court* ***in any part of the United Kingdom*** *in the exercise of jurisdiction in relation to insolvency law* ***shall be enforced in any other part of the United Kingdom*** *as if it were made by a court exercising the corresponding jurisdiction in that other part. …*
>
> *(4) The* ***courts*** *having jurisdiction in relation to insolvency law* ***in any part of the United Kingdom shall assist the courts*** *having the corresponding jurisdiction* ***in any other part of the United Kingdom or any relevant country or territory****.*
>
> *(5) …* ***a request made*** *to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory* ***is authority for the court*** *to which the request is made* ***to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court*** *in relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.*

In *New Cap*, Lord Collins focused on the difference in language used in the three subsections.

He noted that Subsection (1) concerns *enforcing* orders made by courts in different parts of the UK only. Subsection (4) and (5), on the other hand, concern the giving of *assistance* to a court in the UK or a relevant country; ***not*** to the enforcement of orders of courts in other parts of the UK or in ***foreign countries***. Lord Collins reasoned that, if subsections (4) and (5) were to be read as giving the court power to enforce judgments of courts in foreign countries, it would by implication make subsection (1) entirely redundant for the enforcement of a court order made in a different part of the UK.

Section 426 is therefore not a pathway to circumventing *Gibbs*. The areas for which subsection (5) apply fall short of enforcing, or having the effect of enforcing, orders granted by foreign courts in circumvention of Gibbs. Matters within subsection (5) include granting an administration order; appointing a receiver; granting orders for the examination of officers; granting access to documents; and making a declaration recognising the rights and title of a foreign officeholder.

Facts

Silverpail Dairy (Ireland) Unlimited Company (Company), which is a manufacturer of ice cream in Ireland, ran into financial troubles in late 2022 "*due to a number of factors, including the consequence of the COVID-19 pandemic, followed by increased energy and commodity prices and delays in its supply chains*".

After petition for appointment, Shane McCarthy (Examiner) was appointed as examiner of the Company on 4 January. The scheme of arrangement (Scheme) proposed by the Examiner, which included fresh investment and a provision for unsecured creditors to be "*paid at five percent of their agreed debt*", was approved by the requisite majorities in the voting classes on 24 March. Confirmation was given by the Irish High Court on 31 March, with the Scheme to be effected on 5 April and most payments to be paid within 14 days.

[5] This was because the Supreme Court decided that the relevant parties had submitted to the jurisdiction of the foreign court: submission to jurisdiction is one of the few exceptions to The Rule in Gibbs.

Simultaneously, the High Court of Ireland issued letters of request to the High Court of Northern Ireland and the High Court of England, requesting assistance pursuant to section 426 of the IA 1986. If this relief was not granted, there was a concern that the Scheme, as put forward by the Examiner, would not be binding in the UK, as there were "*19 unsecured creditors of the Company in England and Wales with total debts of over €400,000*". More than 80 percent of this was due to HMRC.

Conclusion

In applying Irish law to the English law claims, it is difficult to view the so-called assistance as anything less than having the ***effect of enforcing*** on the English law creditors the Irish court order sanctioning ("*confirming*" within the Irish framework) the Irish scheme of arrangement.

Creditors should be conscious of the dangerous precedent set by this case. In future such cases, they remain silent at their peril.

As we said in our earlier bulletin, it remains to be seen how the UK Parliament will implement the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

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