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

ARTICLE

Cross-Border Insolvency and the Immovables Rule

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Synopsis

This article examines how the 'immovables rule' intersects with the practice of modern cross-border insolvency under English common law. The English conflict of laws position holds that rights to land are governed by the law and courts of the country where the land is located (the *lex situs*). However, in cross-border insolvency, the principle of modified universalism encourages English courts to assist foreign liquidation proceedings to achieve a unified asset distribution. The Supreme Court addressed the tension between these principles in *Kireeva v Bedzhamov* [2024] UKSC 39 ('*Kireeva*').

This article discusses certain aspects of English law for general informational purposes only. However, Harney Westwood & Riegels do not practise English law and the contents should not be construed as legal advice on English law.

Introduction

On one hand, one of the cornerstones of the English conflict of laws is that (a) questions as regards rights to and interests in land and other immovable property are governed by the law of the country in which the property is situated (the *lex situs*), and (b) that jurisdiction to decide those questions belongs to the courts of that country.

On the other, within the context of cross-border insolvency the basic principle of modified universalism requires that 'English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution' (*Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21 at para [30]). The Supreme Court had to resolve what happens when these two positions conflict in *Kireeva*.

Kireeva v Bedzhamov: the facts

The main background facts can be summarised briefly:

a. The respondent, Mr Bedzahmov, was a Russian national who left Russia in 2015 and had lived in the United Kingdom since 2017. He acquired an interest in a property in Belgrave Square, London which had substantial value.

b. During 2016 two judgments were awarded against him in by the Russian courts. In 2018 the Russian courts declared Mr Bedzahmov bankrupt and appointed Ms Kireeva, the appellant, to a position which was the equivalent of a trustee in bankruptcy under English law.

c. In 2021, the English courts granted formal recognition to Ms Kireeva at common law as the trustee in bankruptcy of Mr Bedzahmov under Russian law.

d. The issue which was ultimately appealed all the way to the Supreme Court was whether the English courts could assist the Russian bankruptcy trustee with respect to the property in Belgrave Square or whether such assistance was precluded by the immovables rule.

Seeking recognition and assistance: English law

There are three ways under English law that a foreign insolvency official can formally seek recognition and assistance from the courts in this country: (1) under the Insolvency Act 1986, s. 426; (2) pursuant to the Cross-Border Insolvency Regulations 2006; or (3) at common law. However in this case neither of the first two options were available. The provisions under section 426 only apply to designated countries, and Russia is not so designated. And the Cross-Border Insolvency Regulations 2006 would apply to officials appointed in the country where the debtor has 'the centre of its main interests'. But, in this case, Mr Bedzahmov had left Russia years before the bankruptcy proceedings. Hence the Russian bankruptcy trustee was solely reliant upon recognition and assistance under the common law rules.

The judgment

Common law required to fill the statutory lacuna

Lord Lloyd-Jones and Lord Richards gave a joint judgment with which all the other members of the court

agreed. They noted that if the application for recognition had been granted either under section 426 or pursuant to the Cross-Border Insolvency Regulations 2006 then a foreign trustee in bankruptcy could have power to deal with immovable property in England because the relevant language was, in each case, expressed in terms wide enough to include immovable property (at para [53] and para [60]). But in the absence of express language making such provision in a statute or statutory instrument, the position with respect to recognition at common law fell to be adjudicated solely according to the common law rules and subject to the normal application of the immovable property rule.

The appointment of a bankruptcy trustee by the Russian courts was, in effect, an exercise of sovereign authority by a foreign court in relation to the execution of a judgment (para [32]). They cited with approval the remarks of Lord Templeman in *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368 at p 428 ('There is undoubtedly a domestic and international rule which prevents one sovereign state from changing title to property so long as that property is situate in another state') and Lord Hoffman in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30, [2004] 1 AC 260 Lord Hoffmann at para [54]:

> 'The execution of a judgment is ... a seizure by the state of an asset of the judgment debtor to satisfy the creditor's claim. And it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state.'

The authorities relating to the 'immovable rule'

The court reviewed the immovable property rule itself and its rationale, both under English law and noting that a number of foreign jurisdictions had a largely identical rule presumably for largely identical reasons. They cited with approval the remarks of Farwell LJ in *Re Hoyles* [1911] 1 Ch 179 at pp 185-186:

> '[n]o country can be expected to allow questions affecting its own land, or the extent and nature of the interests in its own land which should be regarded as immovable, to be determined otherwise than by its own Courts in accordance with its own interests'.

They also noted that whilst the rule had a number of exceptions with respect to the willingness of English courts to deal with matters relating to immovable property overseas, it admitted none when it came to recognising the power of foreign courts to deal with immovable property within this country. Although the English courts have in the past been prepared to modify the application of the immovables rules through judicial decisions (notably in *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1979] AC 508), they felt the refusal of the House of Lords to modify the rule itself in that case was significant. They were also mindful to the comments of Lord Collins in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 at para [128] of the risks of 'a radical departure from substantially settled law' in relation to the application of settled conflict of laws principles within the context of cross-border insolvency.

In support of their application counsel for the Russian bankruptcy trustee relied upon *Re Kooperman* [1928] WN 101, (1928) 13 B&CR 49. In that case a trustee in a Belgian bankruptcy was appointed as the receiver of immovable property in England owned by the bankrupt. That case was widely cited in textbooks in cross-border insolvency for the proposition upon which the appellants relied: that the court had power to appoint a foreign bankruptcy trustee as an equitable receiver over immovable property in this country. But the Supreme Court was unimpressed, noting that the first instance decision was unopposed, and that Astbury J did not give a reasoned judgment. They noted that no other reported case supported the granting of such a power, and they held *Re Kooperman* to have been wrongly decided.

Accordingly, the Supreme Court, affirmed (at para [69]):

> 'It follows that the common law does not recognise the Property as being part of the assets that are within the scope of the Respondent's bankruptcy in Russia. As a matter of English law, his interests in the Property are unaffected by the Russian bankruptcy order. Therefore, subject to any statutory provision to contrary effect, it is not open to an English court to take steps to deprive the Respondent of his interests in the Property in favour of the Appellant as trustee in the Russian bankruptcy.'

Analysis: the Supreme Court's judgment

The decision reaffirms the doctrinal purity of the immovables rule within the English conflict of laws, but will be seen as a further blow to the concept of modified universalism at the hands of conflicts lawyers. The Supreme Court seemed to anticipate that their decision was likely to be criticised on that basis, both for the practical effect of the ruling and also on a similar basis that the decision in Rubin was criticised for undermining universalism. Their Lordships noted the surprising effects of their ruling (at para [110]):

> 'It may be said, with some justification, that the application of the immovables rule in the case of a foreign bankruptcy produces a surprising result in leaving the bankrupt's immovable property in this country to be enjoyed by the bankrupt or to be taken in

execution by individual creditors on a first come, first served basis, when in a bankruptcy under the laws of both this country and the foreign state (in this case, Russia), immovable property would form part of the bankrupt's estate.'

Respectfully, it may be that a third option is more likely: that the overseas creditors of the bankrupt would commence parallel bankruptcy proceedings within this jurisdiction to appoint an English bankruptcy trustee and thereby take advantage of the automatic vesting provisions in relation to real property under the Land Registration Act 2002, s. 27(5)(a) and section 306 of the Insolvency Act 1986. That would be the very antithesis of modified universalism – resulting in two independent bankruptcies under the laws of two different jurisdictions doubling the costs of administration and requiring (for the English bankruptcy at least) the application of the Hotchpot rule to try and do justice between the two different pools of claimants and assets. That outcome seems all the more invidious because of the inconsistency – it will only arise when an application or recognition falls under the common law rules, but not when it falls granted either under section 426 or pursuant to the Cross-Border Insolvency Regulations 2006.

There are two further criticisms which might respectfully be made of their Lordships' decision:

a. First, their decision was heavily predicated on the importance of the immovable rule as a matter of public policy, both in this country and elsewhere. But Parliament has already seen fit to make inroads into the rule twice in this area of law. That is also true in the two other countries which Lord Lloyd-Jones and Lord Richards considered in their judgment – Australia and the United States – both of which have also adopted the UNCITRAL Model Law on Cross-Border Insolvency which underpins section 426. Their judgment arguably overstates how immutable that principle is.

b. Secondly, it was central to their Lordships' judgment that the execution of the judgment of a foreign court is a sovereign act and should not affect immovable property rights in this country. But the Supreme Court gave little weight to the fact that the application was for the appointment of an equitable receiver by the courts of this country, and that such orders operate *in personam* against a respondent within the court's jurisdiction. In *Masri v Consolidated Contractors International (UK) Ltd (No. 2)* [2008] EWCA Civ 303, [2009] QB 450 Lawrence Collins LJ affirmed that a receivership order 'has effect as an injunction restraining the judgment debtor from receiving any part of the property which it covers ... but it does not vest the property in the receiver' (para [53]). In the same case he also cited with approval the comments in Snell's Equity (31st ed.) at para 17-25 that the appointment of an equitable receiver 'was not 'execution' in the ordinary sense of the word, but a form of equitable relief for cases where execution was not possible.' Although the immovables rule relates to possession (which a receivership order clearly does affect) as well as title, the outcome is nevertheless an uncomfortable one.

If the position is now that a judge in this country has no power to make an equitable receivership order to assist a foreign judgment creditor (whether that judgment creditor is a single creditor or a class representative of a class of creditors) in relation to immovable property in England in which the judgment debtor has an interest, then that suggests some potentially far reaching implications with respect to the power of the English courts to help judgment creditors chase down the assets of recalcitrant debtors within this country, both inside and outside of insolvency situations. If it really is the case that the appointment of an equitable receiver over land in this country in support of execution of a foreign judgment is precluded by the immovables rule, then the implications of that may stretch out beyond the cross-border insolvency regime.

Conclusion

In their decision their Lordships stressed that it would not be proper for the courts to cut down the application of the immovables rule within English law - that was a job for Parliament. But it is possible that their decision will have the opposite effect and expand the effect of the rule beyond what was previously understood.

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