FEBRUARY 2025 NO. 3

SERVIS-TERMINAL LLC V DRELLE

[2025] EWCA Civ 62

KEY TAKEAWAYS:

1. An unrecognised foreign judgment is not capable of providing the basis of a bankruptcy petition.
2. An unrecognised judgment has "no direct operation" in this jurisdiction and so cannot be used as a "sword".
3. An obligation to make a payment imposed by an unrecognised foreign judgment does not constitute a "debt" for the purpose of s267 Insolvency Act 1986.
4. There is a distinction between a judgment that confirm an underlying debt (for a liquidated sum payable immediately or at some certain, future time) and a judgments that creates the debt.
5. Similarly to the "revenue rule", these consequences stem from the exercise of sovereign power.

ISSUE

Whether a bankruptcy petition can be presented on the basis that a payment ordered by a foreign Court has not been made in circumstances where the foreign judgment has not been the subject of recognition proceedings in this jurisdiction.

FACTUAL BACKGROUND

The Appellant (Drelle) was formerly the CEO of Servis-Terminal LLC (the Company), which is incorporated in Russia. The Company, having been declared bankrupt (insolvent) by a Russian Court, its Trustee in Bankruptcy brought proceedings against the Appellant for breach of duty as a director in relation to a loan. It was alleged by the Company that the Appellant had failed to act in good faith or reasonably when, as a director of the Company, he had procured the loan. The Company claimed that the Appellant was liable to compensate it for the losses it had suffered on the loan. The Russian Court gave judgment in favour of the Company and the appeal was unsuccessful. The Company served on the Appellant, who was by now resident in London, a statutory demand under s268(1)(a) of the Insolvency Act 1986. The Company subsequently presented a bankruptcy petition against the Appellant, which came before ICC Judge Burton in June 2022.

POSITION OF FOREIGN JUDGMENTS IN THIS JURISDICTION

"A judgment of a court of a foreign country…has no direct operation in England but may

(1) be enforceable by claim or counterclaim at common law or under statute, or

(2) be recognised as a defence to a claim or as conclusive of an issue in a claim."

Rule 45, Dicey, Morris and Collins on the Conflict fo Laws, 16th ed.

FIRST INSTANCE HIGH COURT

[2023] EWHC 506 (Ch)

Insolvency and Companies Court Judge Burton

Held that the debt claimed in the petition was not subject to a genuine and substantial dispute.

Accordingly, ICC Judge Burton made a bankruptcy order against Mr Drelle.

FIRST APPEAL HIGH COURT

[2024] EWHC 521 (Ch)

Richards J

Held that the fact that the Russian judgment had not been the subject of recognition proceedings in this jurisdiction did not prevent it from being the basis of a bankruptcy petition.

Richards J further declined to interfere with ICC Judge Burton's conclusion that the alleged debt was not otherwise subject to a substantial dispute.

APPEAL DISMISSED

GROUNDS OF APPEAL

Four grounds of appeal advanced.

The first is to the effect that, NOT HAVING BEEN RECOGNISED IN THIS JURISDICTION, THE JUDGMENT COULD NOT FOUND A BANKRUPTCY PETITION.

The remainder relate to whether the conclusion that the alleged debt was not the subject of substantial dispute can be impugned for other reasons.

The remedy sought was the setting aside of the judgment.

COURT OF APPEAL JUDGMENT

Newey LJ, Popplewell LJ and Snowden LJ

WAS THE RUSSIAN JUDGMENT CAPABLE OF PROVIDING THE BASIS FOR A BANKRUPTCY PETITION?

DEFENCE OR "SWORD"?

Dicey, Morris & Collins' RULE 51 confirms that a foreign judgment can be determinative on a point even in the absence of recognition or registration.

However, rule 51 is concerned with "DEFENCES".

Any use of an unrecognised and unregistered judgment as a "SWORD", including presentation of a bankruptcy petition founded on it, is OBJECTIONABLE.

This is because the principle that a foreign judgment "has no direct operation in England" reflects the common law's aversion to enforcing a FOREIGN EXERCISE OF SOVEREIGN POWER.

WHAT CONSTITUTES A "DEBT" UNDER s267 IA 1986?

The "REVENUE RULE", that the courts of one country will not enforce the tax laws of another (see Government of India v Taylor [1955] AC 491), has a similar root and is a "particular manifestation of a more fundamental rule, that an assertion or exercise of the sovereign right of a foreign state will not be enforced by an English court" (Professor Briggs).

There can be no doubt that the "revenue rule" precludes presentation of a bankruptcy petition in respect of a foreign tax liability. It must therefore serve to prevent a foreign tax from being regarded as a "debt" in respect of which a petition could be presented notwithstanding the fact that nothing to that effect is expressed in s267(2)(b) insolvency Act 1986.

That supports the contention that an unrecognised foreign judgment, which has NO "DIRECT OPERATION" because it arises from an exercise of sovereign power , is likewise not to be seen as giving rise to a "debt" capable of founding bankruptcy proceedings.

DISTINCTION BETWEEN JUDGMENTS THAT CONFIRM THE UNDERLYING DEBT AND THOSE THAT CREATE THE DEBT.

If the underlying debt is for a liquidated sum and payable immediately (or at some certain, future time), the creditor may present a petition based on the underlying debt. It would not be necessary to first obtain a judgment.

CREDITORS INELIGIBLE TO PETITION

The fact that a person in whose favour a foreign Court has given judgment could not resort to direct execution in the absence of recognition of registration would equally prevent him from "resorting to the bankruptcy court as an alternative means of enforcement" (Fletcher, The Law of Insolvency, 5th edition., para 6-027).

If the fact that the foreign judgment has not been recognised means that, in the eyes of English law, there is no debt which can be pursued, that surely means that there is no debt in respect of which a statutory demand can be properly served.

CONCLUSIONS

Where there is no statutory provision to contrary effect, a bankruptcy petition cannot be presented in respect of a foreign judgment which has not been the subject of recognition proceedings.

While an unrecognised judgment may be determinative for certain purposes, it will have "no direct operation" in this jurisdiction and so cannot be used as a "sword", whether as regards direct execution or as the basis of a bankruptcy petition.

An obligation to make a payment imposed by an unrecognised foreign judgment is not enforceable as such in this jurisdiction and, in the eyes of the law of England and Wales, does not constitute a "debt" for the purposes of s267(1) or s267(2)(b) of the Insolvency Act 1986.

A foreign tax will not gives rise to such a "debt". No more will an unrecognised foreign judgment, which similarly involves an exercise of sovereign power.

OUTCOME

NOT HAVING BEEN THE SUBJECT OF RECOGNITION PROCEEDINGS, THE RUSSIAN JUDGMENT WAS NOT CAPABLE OF PROVIDING THE BASIS FOR A BANKRUPTCY PETITION AND, ACCORDINGLY, THE BANKRUPTCY ORDER WHICH ICC JUDGE BURTON MADE SHOULD BE SET ASIDE AND THE PETITION DISMISSED.

Lord Justice Newey, para 56

THE OTHER GROUNDS OF APPEAL

The other grounds of appeal advanced go to whether there is a GENUINE AND SUBSTANTIAL DISPUTE IN RESPECT OF THE DEBT alleged to arise from the Russian judgment.

Newey LJ felt that, as the Judge hearing any recognition claim will need to consider matters afresh, OBITER OBSERVATIONS on the basis of different evidence and contentions would be MORE LIKELY TO HINDER THAN TO ASSIST.

ALEXANDER'S PRACTICE ENCOMPASSES INSOLVENCY, ARBITRATION AND COMMERCIAL CHANCERY. THIS INCLUDES CONSIDERABLE CROSS-BORDER AND OFFSHORE EXPERIENCE.

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