Bank of Baroda v Maniar & Anor
Bank of Baroda v Maniar & Anor [2019] EWHC 2463 20th September 2019
England and Wales
High Court (Commercial Court)

Key Words
Recognition of foreign insolvency proceedings; applicable law; the rule in *Gibbs;* co-operation; preventive restructuring; Irish Examinership procedure; European Insolvency regulation; creditors meetings; debt settlement arrangements; service; notice.

Summary of Facts of the Case

The claimant was an Indian bank operating in the UK, which had entered into a credit facility with ACCHL in 2005, an Irish registered company of which the Defendants were directors. In 2010, the Defendants each entered into deeds of guarantee in respect of the liability of the company to the Bank. The guarantee deeds were subject to English law.

In 2015, ACCHL entered into an Examinership procedure, under the Irish Companies Act. Under this procedure, a scheme of arrangement was approved, and the Bank was subsequently sent a cheque for €13,057.97. Under s. 548 of the Companies Act 2014, the liability of a debt of third persons (in this case a guarantee) is not affected by compromise or by scheme of arrangement. In order for a creditor to enforce liability of a debt, it has to provide sufficient notice of its intentions before the creditors meeting takes place (s. 549, CA 14). The Bank's solicitors sent a letter to the Defendants containing their offers pursuant to s. 549, but the letters were not delivered as the Defendant's home address was vacant. The Bank's solicitors also sent an email to the Defendants and the company's solicitors, but this email bounced back as undeliverable.

Having thought that the Defendants had received sufficient notice, the Bank proceeded to issue a claim for the remaining €426,754.83 due under the guarantee. In 2017, the Defendants also entered into debt settlement arrangements (DSAs) under the Irish Personal Insolvency Act 2012, which were approved by the Irish court. During the DSA process, the Bank's claim against the Defendants was included as a liability. The Bank thus received a distribution of €1,434.74 from the DSA.

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Subsequently, the Bank brought proceedings under English law for enforcement of the guarantee. The Defendants argued that they had not received notice under s.549, which with the conclusion of the Examinership, the liability of ACCHL to the bank was therefore extinguished.

There were also arguments surrounding the effect of the Irish law and whether the English court were bound to give effect to s. 549 of the Companies Act 2014 and to the DSA under article 4 of the EIR, which states that 'the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened'. Here, the Bank sought to rely on the well-established common law rule set out in *Antony Gibbs and sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, known as the rule in *Gibbs,* which states that a debt governed by English law cannot be discharged or compromised by a 'foreign' insolvency proceeding.

Ultimately, the issues of the claim turned on four points:

(a) whether the English court must recognise the Examinership process and if so whether s. 549 of the Irish Companies Act 2014 which pertains to Examinership must be applied;

(b) whether absence of proper notice under s. 549 would defeat the claim;

(c) if so, whether proper notice was given (or should be deemed to have been given);

(d) what the effect is of the DSAs.

Cooperation and/ or Coordination Issue

Recognition of foreign insolvency proceedings, and specific provisions of those proceedings – English court required to give effect to Irish law under the EIR, despite the existence of the rule in *Gibbs.*

Resolution

Regarding the effect of s. 549 of the Irish Companies Act, the Bank sought to rely on the rule in *Gibbs* and the decision of Knowles J in *Edgeworth Capital Luxembourg Sarl v Maud* [2015] EWHC 3464 therefore arguing that s. 549 does not fall within the ambit of "the law applicable to insolvency proceedings" to which Article 4(1) of EIR applies. This would therefore render s.549 a provision that the Court does **not** have to give effect to under English law.

Even though the guarantee was part of English law, the English court ultimately found that it was bound under article 4 of the EIR to give effect to Irish law and the Irish insolvency proceedings. Accordingly, the provisions of s. 549 concerning liability of third parties for creditors and in particular the issue of the guarantees in this case, was held to be part of the '*law applicable to the insolvency proceedings'* under art. 4 of the EIR, due to the potential effect of s. 549 on a creditor's meeting and the sufficient connection between this notice and conduct of the Examinership procedure. Therefore, the Court found that failure to comply with the s. 549 notice procedure would be fatal to the action of enforcing the guarantees in the English courts. [Paras 108-111].

The Court found that the Bank was obliged to prove that they had given notice to the Defendants under Irish law [para 132-133], and ultimately held that proper notice was not given. [133-137]. Thus, the guarantees were held to be unenforceable and the claim by the Bank failed. The Court also held that it was not only open for the English court to exercise the discretion of the Irish court

in their determination of whether there was proper notice given, but also necessary for the court to do so, as a matter of applying Irish law [para 143].

With respect to the effect of the DSA, the Bank sought to rely on the rule in *Gibbs* and the exception to art 4 of the EIR which is provided for under art 15 (*lis pendens*), which states that "The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending". The Bank therefore argued that the Court should apply English law to decide the effect of the DSA procedure on these proceedings.

However, the Defendants sought to rely on the case of *Re OJSC International Bank of Azerbaijan* [2018] EWHC 59 (Ch), which effectively qualifies the rule in *Gibbs,* by holding that '[i]f the relevant creditor submits to the foreign insolvency proceedings the Gibbs rule does not apply.' [para 165]. The Defendants also argued that art 15 of the EIR must be read in light of recital 23 of the EIR, and therefore art 15 only applies to the relevant procedural law where there is *lis pendens* and has no effect on the substantive law [para 169].

The Court found in favour of the Defendants. The Court held that this was an issue of substantive law, which therefore required the law of the Member State in which proceedings occurred to be applied, namely Irish law, in virtue of the EIR [para 171- 174]. Thus, art 15 did not apply in this case.

Applicability to Preventive Restructuring

Because this case deals with the recognition of foreign (Irish) insolvency proceedings, in this case the Irish Examinership process, which is a preventive restructuring proceeding covered by the EIR Recast (listed under Annex A), this case is of importance to this emerging area of law concerning cross border preventive restructuring in the European context.

The case is of particular interest when considering the applicability of rules which are used to prevent co-operation or recognition of foreign insolvency proceedings, such as the rule in *Gibbs.* Prior to this case, the rule in *Gibbs* may have been applicable in a case such as this. However, it now seems that the EIR Recast and the obligations therein take precedence over the rule in *Gibbs* where there are cases that deal with recognition of foreign insolvency proceedings. Therefore, co-operation and recognition must be adhered to. This case therefore challenges the relevance of previous English cases enforcing the rule in Gibbs in non-EU situations, such as the decisions in *Bakhshiyeva v Sberbank of Russia* [2018] EWHC 59 (Ch) and *Re OJSC International Bank of Azerbaijan* [2018] EWHC 59 (Ch).

Importantly, this case demonstrates the range of rules and methods which can be utilised by parties to try and become exempt from insolvency processes, particularly from the rules and provisions set out under the EIR (now EIR Recast). Domestic or common law rules such as the rule in *Gibbs* which are pleaded by parties will likely continue to pose issues with the application of European preventive restructuring law, ultimately hindering the broader need for recognition and co-operation to occur in insolvency proceedings.

Undoubtedly, the case brings a level of clarification to the responsibility of the English courts regarding the recognition of foreign insolvency proceedings of another Member State. In this respect, the case will be of relevance to members of the judiciary and practitioners who are seeking to determine the applicability of foreign insolvency proceedings of another Member State, notwithstanding common law principles which seek to prevent this, such as the rule in *Gibbs.* The case highlights the importance of the co-operation and recognition obligations which exist under

the EIR, and now the EIR Recast, and the need for courts and practitioners to adhere to these obligations.

It is important to note that this case could have potentially turned on the application of relevant articles of the EIR (now the EIR Recast) as a central point in the argument. In determining the applicability of s. 549 and whether the English court is bound to give effect to Irish law, the argument regarding application of art. 4 of the EIR was brought in a secondary point by the Defendants, with Dicey's Principle on the Conflict of Laws being used as the main point of their argument. Had the EIR and the relevant provisions been utilised as the central argument, this would essentially negate the need to utilise Dicey's Principle and other legal principles in this case.

Applicability of Existing Rules and Guidelines

Though the case relies upon the EIR, the interpretation of these articles would still apply at present, when considering the EIR Recast. Article 4 of the EIR now corresponds to article 7 of the EIR Recast and article 15 now corresponds to art 18 of the EIR Recast (though this is reworded slightly to include arbitral proceedings also). Similarly, the Irish Examinership procedure which was listed in the EIR is still listed under Annex A of the EIR Recast.

If a case of this nature were to take place in the future in the English courts, it would be likely to have a similar outcome. With respect to England and Wales, the recently created UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (2018), though not yet implemented, would similarly override the *Gibbs* rule.

Domestic rules of the type similar to Gibbs in other member states will be similarly affected.