IRELAND

Maples Group

Callaghan Kennedy and John Breslin

'True sales' in receivables financing

The Court of Appeal's decision in *Bank of Ireland v Eteams (International)* brings further important legal clarity for all forms of receivables finance transactions, as well as the 'true sale' opinions given by lawyers in the context of such deals.

Eteams (International Limited) had entered into a receivables financing agreement with the Bank of Ireland. The terms of the agreement were typical for an invoice discounting/debt factoring transaction: the company sold customer receivables to the Bank at a discount, the Company agreed to collect those receivables on behalf of the Bank, and there were provisions whereby receivables could, at the Bank's election, be transferred by the Bank back to the Company – for example, in the event of a default by the party responsible for paying the receivable. The Company became insolvent and the Company's liquidator contended that the agreement was not a sale transaction at all – but rather was a charge created by the Company over its receivables which was void because it was not registered with the Companies Registration Office.

The High Court had rejected all of these arguments by the liquidator. In a recent decision, the Court of Appeal rejected the liquidator's appeal and affirmed the decision of the High Court.

Decision

The court rejected all grounds of appeal put forward by the liquidator of the Company and fully endorsed the High Court decision. The court decision is a helpful analysis of the law on true sale in Ireland and, just as the High Court had done, recognises and accepts the English jurisprudence in this area and states that Irish law is substantially the same as English law on this topic.

The court in its decision focused very much on the express provisions of the agreement which supported the conclusion that there was a transfer of title in the debts. For example, the court held that the inclusion of a 'fail safe clause' in the form of a Company declaration of trust (for example, over income received by the Company in error) actually strengthened the argument that there had been a transfer of title, as opposed to a charge being created. The declaration of a trust had the effect that the Bank was the beneficial owner of the debts and that the Company only held bare legal title to them.

The court further held that the ability of the Bank to require the Company to buy back any debt did not lead to the conclusion that the agreement was a charge. The liquidator had argued that a mitigation or security against risk showed that title in the debts had not passed to the Bank. The court disagreed and stated that the Bank's right to transfer back debts to the Company in such instances showed that title in such debts had passed and there was no charge in existence.

The liquidator had claimed that the provisions of the agreement were so 'conditional' and 'random' that the correct construction of the agreement was that it was a charge. The court found that an Irish court will seek to construe an agreement 'with the intent of ascertaining its substance and intent, and that the court will not be bound by the characterisation that the parties, or one of them, identifies, even if such identification of the agreement is express.'

It is worth noting two further statements made by the court in its judgment:

1) The court held that the right to collect the debts and to enforce payments of the debts, or to compromise any claim in regards to any of the debts, was incompatible with the existence of a charge; and,
2) The court noted that the agreement in question had a mechanic in it whereby a separate account was maintained in the name of the Company into which payments of the debts were to be made. The court helpfully found that funds segregation such as this is consistent with the ownership by the Bank of the debts.

Outlook

The *Eteams* decision provides helpful confirmation that in a receivables financing transaction an Irish court will not readily be inclined to accede to arguments that a transaction expressly structured as a sale should be re-characterised as a form of secured lending. This approach – which underscores party autonomy – is also helpful in a number of areas of financial law, including securitisations. Furthermore, it means that in appropriate cases Irish lawyers can confidently provide 'true sale' opinions on the basis that Irish law will (save in exceptional cases) give effect to the legal structuring of the transaction agreed by the parties.

Maples Group
75 St. Stephen's Green Dublin 2, Ireland
T: +353 (0)1 619 2000
F: +353 (0)1 619 2001
E: callaghan.kennedy@maples.com and john.breslin@maples.com
W: www.maples.com