SQUIRE SANDERS

AN ENGLISHMAN IN NEW YORK
COMI IN THE UK OR THE US?

Summary

Following the US case of *Morning Mist Holdings* when a Court of Appeals decided that COMI had to be analysed on the date of the Chapter 15 case petition, we look again at the case of *Kemsley* where the US bankruptcy court held that COMI had to be analysed on the date of the filing of the UK bankruptcy. We consider whether this could have affected the outcome of the *Kemsley* case and look at the factors used by the English and US Courts to interpret an individual debtor's COMI.

Background

The case of Paul Kemsley, a UK businessman residing in the US, has given both the UK and US Courts the opportunity to interpret an individual's COMI. Briefly, the sequence of events was:-

- Kemsley was made bankrupt in the UK
- The Bankrupt failed to get an injunction in the English Court to restrain an English creditor from continuing US proceedings against his US assets
- The Trustees in Bankruptcy applied to the US Court for recognition of the UK bankruptcy under Chapter 15 of the US Bankruptcy Code
- The US Court decided that COMI had to be analysed on the date of the filing of the UK bankruptcy
- The US Court ruled that, in the case of an individual, COMI was presumed to be the place of his habitual residence, *i.e.*, the place where the individual resides with the intention of remaining for an indefinite period of time
- Chapter 15 recognition was denied on the grounds that the Bankrupt's COMI was in the US at the time of the UK bankruptcy filing.

Mr Kemsley was an English businessman who had considerable assets in the UK and the US. Before his business collapsed in 2009, Barclays made him an unsecured loan for the sum of £5million. In June 2009, he and his family moved to the US. A bankruptcy petition was issued against him by HMRC in the UK in November 2011. He then issued a debtor's petition for his own bankruptcy in January 2012. He claimed he was in the UK on the date the petition was presented, was domiciled in the UK and had a place of residence in the UK within the previous 3 years, as required by s265 Insolvency Act 1986.

On 1 March 2012, shortly before the UK bankruptcy hearing, Barclays issued proceedings in New York and Florida, US, under its loan agreement. Kemsley was made bankrupt in the UK on 26 March 2012 on his own petition.

Kemsley separated from his wife, who returned to the UK with their children in June 2012, while Kemsley remained in the US. Trustees in Bankruptcy were appointed in the UK and applied for recognition of the UK bankruptcy in the US under Chapter 15 in August 2012. The case was not heard until March 2013.

Kemsley was described by the Honourable Judge James M. Peck, a bankruptcy judge sitting in the Southern District of New York, as "a bankrupt who does not live like one. Since leaving his debts behind and coming to the United States, his financial difficulties have not diminished his high standard of living. He earns personal income from certain business activities …and rather conveniently also has ready access to abundant free cash (principally in the form of loans or gifts from generous friends) enabling him to live very well."

The UK Anti-suit Injunction Case

Barclays issued an application for summary judgment in the New York proceeding in June 2012 and issued further proceeding in Florida's state court in November 2012. Kemsley brought an action in the UK bankruptcy seeking to restrain Barclays from continuing the New York and the Florida proceedings in the US on the grounds that:-

1. Barclays would obtain an unfair advantage over the equitable distribution among creditors which was fundamental to the UK bankruptcy regime;
2. The effect of having an order against Kemsley in the US, which was enforceable for 20 years, would avoid the operation of the UK bankruptcy regime which would ordinarily mean he was discharged within 12 months.

Barclays then agreed to remit any US recoveries to the UK Trustees in Bankruptcy thus removing the first ground of the case.

Although anti-suit injunctions are possible under English law, whereby a creditor bound by the bankruptcy proceedings is restrained from taking proceedings abroad to recover a debt due from the bankrupt, the remedy will be applied with caution by the English Courts. The English Court considered that if Kemsley's COMI was in the UK, no injunction was necessary because the US Court would grant the UK Trustees' application under Chapter 15 which would affect an automatic stay. If Kemsley's COMI was in the US, it would be wholly inappropriate for the English Court to grant the injunction. Therefore, the English Court refused to grant the injunction.[1]

1 *Kemsley v Barclays Bank, Fry & Provan* [2013] EWHC 1274 (Ch).

The US Chapter 15 Case

On March 22, 2013, Judge Peck rendered his opinion in the Chapter 15 case filed by the UK Trustees.[2] The UK Trustees brought a petition for the recognition of Kemsley's UK bankruptcy and asked for such proceeding to be recognised as a foreign main proceeding or, in the alternative, a foreign non-main proceeding under Chapter 15.

Chapter 15 of the Bankruptcy Code, enacted in 2005, incorporates the UNCITRAL Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law into the United States Code. Under Chapter 15, a foreign proceeding may qualify as a foreign main proceeding if it is pending in the country where the debtor has its COMI or as a foreign non-main proceeding if it is pending in a country where the debtor has an establishment, defined as "any place of operations where the debtor carries out a non-transitory economic activity." In the event a US bankruptcy court recognises a foreign proceeding as a main proceeding, an automatic stay takes effect.

Such automatic stay covers the entire territory of the United States and prevents creditors from exercising any collection actions in such territory. On the other hand, if a foreign proceeding is denied recognition, subject to limited exceptions, such as suing to collect or recover a claim which is property of the debtor, the debtor is deprived of the Bankruptcy Code's protections and the assistance of the US courts.

The *Kemsley* case is noteworthy because, as the US bankruptcy court noted, it was "the first contested matter involving recognition of an individual's foreign insolvency case to be decided in the Southern District of New York." While under the *Bear Stearns* case, US bankruptcy courts generally identify five critical factors to guide their COMI analysis for an insolvent business,[3] the court in the *Kemsley* case determined how COMI should be analysed for an individual debtor. Specifically, the US bankruptcy court ruled that "in the case of an individual, COMI is presumed to be his or her place of habitual residence." While the court noted that the term "habitual residence" was not a term defined in the Bankruptcy Code, the court explained that it was akin to the concept of "domicile" and had been "construed as the place where an individual resides with the intention of remaining for an indefinite period of time." Such intention to remain for an indefinite period of time must be analysed with respect to the debtor himself but also with respect to the "members of his immediate family."

Barclays contested the recognition in the Chapter 15 case to avoid its state court actions from being halted by the automatic stay. Specifically, Barclays argued that Kemsley's COMI was in the US and not the UK because he had been living and working in the US for more than three and a half years and became a full time resident of New York City with the intention of remaining indefinitely in the US. The UK Trustees, on the other hand, argued that Kemsley never intended to live indefinitely in the US and that his COMI never changed and remained in the UK, where "his bankruptcy is being administered, his children are residing and he has a meaningful concentration of ongoing personal and business interests."

The US bankruptcy court rejected the UK Trustees' argument, ruled that Kemsley's COMI was in the US and thus denied their petition for recognition. First, the US bankruptcy court determined that the COMI had to be analysed as of 13 January 2012, the date of the filing of the UK proceeding and not 21 August 2012, the date of the filing of the Chapter 15 petition.

Second, the US bankruptcy court ruled that Kemsley's COMI was in the US as of such date because "the Debtor's close relationship with his children serves as a useful proxy for the Debtor's subjective intent regarding his habitual place of residence." At the time of the filing of the UK proceeding, he was living in the US with his family, therefore his COMI was then in the US.

In the case *Morning Mist Holdings*,[4] the Court of Appeals for the Second Circuit ruled that a Chapter 15 debtor's COMI must be determined as of the Chapter 15 petition date, not as of the foreign proceeding filing date. The Court of Appeals for the Second Circuit thereby resolved a split of authority in the Southern District of New York between lower courts that had ruled that COMI had to be determined as of the Chapter 15 petition date and courts that had ruled that COMI had to be determined as of the foreign proceeding filing date.[5] The conclusion reached by the US bankruptcy court in *In re Kemsley* is contrary to the ruling of the Court of Appeals for the Second Circuit, which takes precedence. While the ruling of the US Bankruptcy court relating to the timing for the determination of the COMI is no longer good law, the test established to determine COMI for an individual debtor is still the test to be applied.

2 *In re Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013).

3 *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008) (the five critical factors are the location of the debtor's headquarters, the location of those who actually manage the debtor, the location of the debtor's primary assets, the location of the majority of the debtor's creditors, or of a majority of the creditors who would be affected by the case, and the jurisdiction whose law would apply to most disputes.)

4 *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127 (2d Cir. 2013).

5 *See In re Fairfield Sentry Ltd.*, 440 B.R. 60 (Bankr. S.D.N.Y. 2010) and *In re Millennium Global Emerging Credit Master Fund Ltd.*, 458 B.R. 63 (Bankr. S.D.N.Y. 2011), *aff'd*, 474 B.R. 88 (S.D.N.Y. 2012).

Comparison between the UK and US interpretation of COMI

In the UK, the date on which the COMI is to be established is the date of presentation of the bankruptcy petition but evidence as to the debtor's activities and actions at other times may be significant in that they cast light on the truth or otherwise of his claim to have had his COMI in England at the relevant time.[6]

The factors to be taken into account when assessing an individual's COMI have been summarised by the English Court in the case of *Sparkesse*.[7] In the case of businessmen and professionals, it is the place where they conduct their business. For anyone not in business, it will normally be his habitual place of residence where he lives with his wife and family.

The COMI must have an element of permanence and must be ascertainable by third parties, in particular his creditors. This contrasts with the US decision in *Kemsley* where the Court ruled that in the case of an individual, irrespective of whether he is in businessman or not, COMI is presumed to be his place of habitual residence.

During the hearing for the anti-suit injunction, the English Court declined to make any finding on where Kemsley's COMI was located. In the Chapter 15 proceeding, the US Court considered that his COMI was in the US, both on the date of the filing of the bankruptcy petition – in January 2012 - and the date of the bankruptcy order – March 2012. Had the English Court been asked to decide the point and reached the same conclusion, it would cast doubt on the validity of the English bankruptcy proceedings since, for the proceeding to be valid, a debtor's COMI must be in the UK.

Following the decision in *Morning Mist Holdings,* the US Court would likely have assessed Kemsley's COMI at the time of filing of the Chapter 15 petition in August 2012. By this time, Kemsley was estranged from his wife and his children were living in the UK with her. While he remained in the US, it appears that his intention was to return to the UK and restart to conduct his business there. It is thus likely that the US court would have reached a different conclusion if the case had been decided after the *Morning Mist Holdings* decision. Had the Chapter 15 petition succeeded, Barclays' US actions would have been automatically stayed and the outcome for one of Kemsley's major creditors could have been very different.

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6 *Shierson v Vlieland-Boddy.*, [2005] EWCA Civ 974.

7 *Sparkasse Hilden Ratingen Velbert v Benk and another*, [2012] EWHC 2432 (Ch) (29 August 2012).