Focus on Cross-Border Bankruptcies

A Tale of Two COMIs: *Kemsley v Barclays Bank Plc* and *In re Kemsley*

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The world is getting smaller. The number of people who hop from country to country throughout their lives is increasing. Inevitably, when a jet-setting life becomes financially troubled, bankruptcy and other court proceedings are likely to be similarly international. Two cases involving the same parties were heard in both the High Court in London and the US Bankruptcy Court for the Southern District of New York. *See Kemsley v Barclays Bank Plc & Ors* [2013] EWHC 1274 (Ch) (15 May 2013), 2013 WL 1904308, and *In re Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013). The judges were aware of the parallel cases, but each decided the questions before him on their own merits without reference to the judgment of the other court.

These cases (and the complementary judgments) have application beyond the narrow confines of one individual's bankruptcy because they revolve around the US/UK trading axis. The UK ruling reflects the English High Court's unwillingness to interfere in the affairs of another jurisdiction without exceptional cause (with some discussion of what such cause might be). The US decision represents yet another ruling by a US bankruptcy court examining the relevant time frame for establishing "center of main interests" ("COMI") and "establishment" for purposes of granting recognition of a foreign bankruptcy proceeding under chapter 15 of the US Bankruptcy Code.

It Was the Best of Times . . .

Paul Kemsley ("K") was a British high-net-worth individual whose businesses in England had collapsed in 2009. One of his creditors was Barclays Bank PLC ("Barclays"), which had given K

an unsecured loan. After the businesses failed, K and his family moved first to Florida and then to New York City. In 2012, the couple became estranged, and in June of that year, K's wife and family returned to the UK while K remained in the US. K was declared bankrupt in the UK in March 2012. The UK court determined that K's COMI (under the EC Insolvency Regulation, Council regulation (EC) No 1346/2000 of 29 May 2000) was in the UK because K was physically present in England at the time of the bankruptcy filing and because he resided there within three years of the presentation of the petition. K was discharged from his bankruptcy one year after the filing, in March 2013, and all debts, including the loan from Barclays, were also discharged.

It Was the Worst of Times . . .

Just before K was declared bankrupt in the UK, Barclays commenced proceedings under the loan agreement in the Supreme Court of the State of New York. Barclays also commenced proceedings in Florida over a property that K owned there. In August 2012, K's English trustee in bankruptcy ("TiB") filed a petition in the US Bankruptcy Court for the Southern District of New York, seeking recognition of K's English bankruptcy as a foreign main proceeding under chapter 15 of the US Bankruptcy Code. The New York state-court litigation was stayed pending the bankruptcy court's ruling on the chapter 15 petition.

During this chapter 15 "gap" period, K and his TiB sought an anti-suit injunction from the High Court in London preventing Barclays from pursuing collection proceedings in the US. The injunction application was based on two grounds:

(i) Barclays would obtain an unfair advantage for itself over other creditors by recovering K's assets in the US; and

(ii) K would not be released from his English bankruptcy debts on his discharge from bankruptcy (due to occur in late March 2013), as the judgment of the New York court would be enforceable for 20 years in the US and any other jurisdiction that recognised the judgment.

The English High Court's Ruling

The court refused to grant the anti-suit injunction. In an unpublished decision, the court explained that K's COMI was either in England or in the US. The court noted that if the US bankruptcy court determined that K's COMI was in England, the English bankruptcy would be recognised as a foreign main proceeding under chapter 15, and any other litigation would be stayed. If COMI was found to be in the US, the court concluded, it would not be appropriate for an English court to intervene in a foreign proceeding. Barclays could proceed in the US as it saw fit, and K would be entitled to challenge any such actions in the relevant US courts. The High Court further explained that if the US bankruptcy court recognised K's UK bankruptcy as a nonmain proceeding because K had merely an "establishment" in the US (as distinguished from COMI), the TiB, as K's foreign representative, could also seek an injunction of all pending US litigation against K or his assets.

Added to this, the High Court explained, such an injunction should be granted only if it would be oppressive or unfair not to do so. The court felt that this was not the case here. Barclays had been very open with the TiB about its plans and had, notably, undertaken to pass over to the TiB any recoveries it realised in the US, so that its actions would benefit all of the creditors.

The US Bankruptcy Court's COMI Finding

Shortly after the anti-suit injunction decision was issued, the US bankruptcy court refused to recognise K's UK bankruptcy as a foreign main or nonmain proceeding under chapter 15. The

court held that K's COMI needed to be adjudged as at the time of his English bankruptcy filing, not the time of the chapter 15 filing. Rejecting K's statement at the time of his UK bankruptcy filing, the court found that his COMI was in the US at that time, focusing on K's habitual place of residence and that of his family.

The court then considered whether K had an establishment in the UK. It found that there was insufficient connection; for example, there was no contract of employment, no regular schedule of visits or work and no evidence that an office in London was used for "non-transitory economic activity". That being the case, the US bankruptcy court concluded that K's English bankruptcy case did not qualify as a foreign proceeding (either main or nonmain) under chapter 15. Thus, taking into account the High Court's denial of the English anti-suit injunction, Barclays would be free to proceed with the state-court litigation in New York and Florida, with any realisations to be turned over to K's TiB for the benefit of all creditors.

As a side note, just as Barclays' conduct (i.e., agreeing to turn over recoveries for the benefit of all creditors) seems to have been considered by the UK court, K's behaviour was examined by the US bankruptcy court. The bankruptcy court noted that K's bankruptcy had not "diminished his high standard of living", primarily because of the support of "generous friends". The court was also concerned that there might be a "coordinated trans-Atlantic litigation strategy . . . to shield [K's] assets from enforcement action by Barclays", thus achieving "a result that [was] adverse to the interests of one of [K's] major creditors". Foreign representatives seeking recognition under chapter 15 as a means of protecting US assets should be aware that the US bankruptcy court may look at more than just the immediate petition for chapter 15 relief. As is

frequently the case, honesty and transparency of motive are likely to increase the receptiveness of the court to one's arguments.