Briefing

Corporate Turnaround and Insolvency

BURGES SALMON

Retrospective extension of court appointed receiverships and COMI in bankruptcy – two recent decisions

This update focusses upon two recent High Court decisions dealing with (respectively) the ability of the court to retrospectively extend court-appointed receiverships, and the issue of whether COMI had shifted to England for a German national seeking bankruptcy here.

Extension of court-appointed receiverships

The case of *Bank of Ireland v (1) Edeneast (2) Cosgrove and (3) Maguire (17/09/2013)* concerned an application by the bank to retrospectively continue and extend the appointment of a court-appointed receiver.

Edeneast owned licensed premises and was indebted to the bank for circa £385,000. The company got into difficulties and went into liquidation, after which the bank obtained a court order appointing a receiver in May 2010, with authority to act up to (but not beyond) 1 March 2011. That deadline was overlooked by the receiver, who realised late in the day that he needed court authority both to extend the receivership and to grant a lease of property.

The court ruled that it had authority under the Rules of Court Judicature Order 3 Rule 5 to retrospectively extend the appointment. There were good reasons to extend which outweighed the factors against such an extension, especially in view of the fact that the lapse of the receivership was due to simple error. On the grant of the lease, the bank's loss would be exacerbated if it was not granted in a timely fashion, it was a proper arrangement and it was appropriate to grant the order.

This case highlights the problems of the use of court appointed receivership. Generally speaking, they are different from fixed charge receiverships on a number of fronts: (i) the receiver's appointment will be of a fixed duration only; (ii) his powers are strictly determined by the court and if stepping outside those powers a court order will be necessary, (iii) cost is subject to judicial control, (iv) he is personally liable for contracts entered into by him (although he is entitled to an indemnity out of any assets), (v) he is not the agent of the borrower and his appointment may well terminate any existing contracts of employment, and (vi) he is receiver for the benefit of all creditors and not a specific named creditor. Given these severe constraints, thought should be given before they are used.

COMI shifts and bankruptcy tourism

The decision in *Schrade v Sparkasse Ludencheid (06/02/2014)* is a demonstration of the High Court's increased willingness to challenge an assertion that foreign nationals' COMI has shifted to England for the purposes of the EC Insolvency Regulation.

Mr Schrade petitioned for his own bankruptcy, having lived and worked in Germany with his wife and children for all his working life. In 2012, after experiencing financial difficulties and the breakdown of his marriage, he moved to London in the May, where he obtained accommodation and incorporated a company in June 2012. Come January 2013 he presented a petition for his own bankruptcy. At the hearing, the Registrar considered whether this was bankruptcy tourism as it was becoming increasingly prevalent for foreign nationals (particularly from Germany) to try and establish COMI in England in order to take advantage of its more benign regimes.

Amongst the factors considered were that (i) his family ties were in Germany (ii) he continued to use at least one German bank account (which had a higher turnover than his English accounts), (iii) he held stocks and shares in Germany, (iv) he was involved in litigation in Germany, and (v) his creditors including Sparkasse Ludencheid) were almost entirely located in Germany.

On balance the Registrar ruled that Mr Schrade's COMI had remained in Germany and refused to make a bankruptcy order.

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On appeal, the High Court decided that Mr Schrade had not come close to showing that the judge had been wrong on his factual conclusions. This case had all the hallmarks of forum shopping – whilst there may have been good reasons for the move to England, the evidence did not reflect that. The Court also said that the refusal of the Registrar to grant an adjournment of the application was entirely within his discretion and could not be interfered with.

This case stands as a timely example of the more interrogative approach the English courts are taking to COMMI forum shopping, and serves as a good benchmark of the types of issues practitioners should be looking into in cases of personal insolvency involving foreign nationals.

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