Insolvency
Case Law Update
Rosling King LLP

The High Court has recently considered whether to exercise its jurisdiction to hear winding-up petitions brought against two companies incorporated in Saint Vincent and the Grenadines.

The Facts

The respondents in this case were two companies incorporated in Saint Vincent and the Grenadines ("SVG") known as Buccament Bay Limited ("BBL") and Harlequin Property (SVG) Limited ("Harlequin Property"). The petitioners to this case were investors in a development in SVG called the Buccament Bay Resort. The petitioners claimed a total of £1,191,831.98 from BBL in respect of the non-return of outstanding deposit monies and £599,135.05 from Harlequin Property in respect of money due under various finance agreements and the non-return of deposit monies.

The petitioners sought to rely upon section 221 of the Insolvency Act 1986, pursuant to which a company formed and registered in a foreign jurisdiction can be wound up as an "unregistered company" if it can be shown to have a principal place of business in England and Wales (or Scotland) or at least share its principal place of business with the same jurisdiction. Alternatively, the petitioners sought to argue that the Court had jurisdiction to hear the petitions since the respondents' centre of main interests ("COMI") was situated in England and Wales, by virtue of article 3(1) of the EU Regulation on Insolvency Proceedings.

The petitioners sought to demonstrate that there was a sufficient nexus between the respondents and England and Wales based on the following:

- that both BBL and Harlequin Property acted via their sole director to sign all contracts in the UK;
- that all monies payable under the investor contracts entered into were routed via a further company associated with Harlequin Property in the UK;
- that owing to the need for forensic analysis of the money routed via the UK, it was convenient for the Court to have all matters in the same jurisdiction;
- that SVG operated under the Commonwealth structure of law with the Privy Council as the last resort of appeal and therefore the system and judicial approach would be the same; and
- that the sole director of both respondents lived in Essex and had current proceedings in the High Court relating to the matter.

The Decision

The High Court considered whether it had jurisdiction to hear the petitioners' applications with caution. Before reaching its decision, the following three requirements laid down by Know J in Real Estate Development Co. [1991] BCLC 210 were considered:

- that there must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction;
- that there must be a reasonable possibility if a winding-up order is made, of benefit to those applying for the winding-up order; and
- that one or more persons interested in the distribution of assets of the company must

be persons over whom the court can exercise a jurisdiction.

On the facts, the Court found that there was "no justification at all for a winding up order" being made in England and Wales. Though the court recognised that the respondents' evidence was, in certain respects, unsatisfactory, it was satisfied that the respondents' assets were based in SVG. It further considered SVG to have a "perfectly satisfactory winding up process which [was]... available to the petitioners".

Whilst the Court considered the first and third core requirement laid down in Real Estate Development Co. to have been satisfied, it did not consider the petitioners to have satisfied the second requirement, namely that there was a reasonable possibility that the petitioners would derive a benefit from the winding up of the respondent companies. This was because:

- an English winding up order would not be enforced in the SVG courts;
- SVG had not ratified or incorporated into its law the UNCITRAL Model Law on Cross Border Insolvency 1997 and therefore the procedures to facilitate cross border insolvencies would be unavailable to it; and
- a liquidator appointed by, or under an order of an English court would face "considerable practical difficulties" in relation to the assets in SVG.

For these reasons the Court considered that SVG was "by far the more appropriate forum".

As regards to the petitioner's claim under article 3(1) of the EU Regulation on Insolvency Proceedings, the Court considered itself unable to rebut the presumption that the respondents' COMI was in the jurisdiction where they were incorporated.

The Court therefore refused to exercise its jurisdiction to consider the petitions made against BBL and Harlequin Property.

Conclusion

The decision of the High Court is a useful reminder of the circumstances in which a winding up petition brought against a company incorporated in a foreign jurisdiction will be heard by a Court in England and Wales. It is clear from the Court's decision that a substantial connection with England and Wales will need to be shown before a petition to wind up a company incorporated abroad will be heard.

For further information, please contact Jonathan Hyndman or the Partner with whom you usually deal.