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Restructuring and Insolvency
Case Law Update
Rosling King LLP

Establishing a debtor company's Centre of Main Interests ("COMI") is an important step for any creditor who wishes to begin insolvency proceedings within the UK. In the context of real estate finance, it is common for the different borrower-side parties to be incorporated in various jurisdictions and, in particular, for the borrower/propco to be a special purpose vehicle incorporated and registered outside the UK.

The recent High Court case of Thomas & another -v- Frogmore Real Estate Partners & others [2017] EWHC 25 (Ch) has provided some useful guidance when seeking to establish a company's COMI in this situation.

The Legal Position

Determining a company's COMI is currently governed by a combination of EU law, UK law and case law.

Article 3(1) of the relevant EC Regulation (Council Regulation 1346/2000/EC) (the "Regulations") states:

"The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

Therefore, to commence insolvency proceedings in the English courts against a company incorporated and registered outside the UK or EEA, its COMI must be established as being in England or Wales. This position is reinforced under English law through the relevant provisions of the Insolvency Act 1986 (the "Act"). The second sentence of Article 3(1), together with paragraph 111(1B) of Schedule B1 of the Act, creates a rebuttable presumption that a company's COMI will be the jurisdiction within which it has its registered office.

The Judgement

The case concerned with 3 SPV companies (the "Companies"), which formed part of the Frogmore Group and were set up to acquire 3 shopping centres in England. Each of the Companies was incorporated and registered in Jersey, which is not a EEA country for the purposes of the Regulations, and each had the same sole shareholder (the "Shareholder"), which was a company registered in England. Pursuant to an 'Asset Adviser's Agreement', the Shareholder had appointed another English company (the "Asset Manager") to provide a range of property management and investment services to certain 'Adhering Portfolio Vehicles', which included the Companies.

The acquisitions of the shopping centres were financed by facilities from Nationwide Building Society ("Nationwide"), which totalled £106,276,190 and were repayable by 1 October 2016. Nationwide held debentures in respect of the Companies and, when the Companies failed to repay the loans when due, Nationwide appointed UK administrators in November 2016 to enforce its security.

Applications were made to Court to determine the correct COMI of the Companies. The administrators argued that each of the Companies' COMI was England and thus their appointment was valid. The Companies disputed this and sought declarations that the COMI was in fact Jersey.

In its analysis, the High Court applied established case law which states that a company's COMI must be identified by reference to criteria that are both objective and ascertainable by third parties. Adopting this approach it ruled in favour of the administrators and held that the Companies' COMI was to be England for the following reasons:

• day-to-day conduct of the business of the Companies, including day-to-day management of the shopping centres and dealing with their financing, accounting, marketing and formulation of their business strategy, was carried out by the Asset Manager which was located in England (and, the Court noted, pursuant to the Asset Adviser's Agreement which itself was governed by English law and had an English exclusive jurisdiction clause);

• dealings with third parties were also conducted from the offices of the Asset Manager at Wigmore Street in London as evidenced by VAT returns and invoices using this London office address;

• the facility agreement and debentures with Nationwide were governed by English law and made reference to Nationwide's ability to appoint administrators under the Act. As the Companies' largest creditor, the views of Nationwide were important when deciding the issue of the Companies' COMI; and

• arguments put forward by the Companies that their COMI should be Jersey, on the basis that the Companies held their board meeting there, were irrelevant. A third party would have had no way of ascertaining where board meetings were held and, in any event, the day-to-day conduct and dealings with the Companies were through the London based Asset Manager.

Conclusion

The case serves as a useful reminder of how the Courts will analyse the businesses and arrangements of a multi-jurisdictional group of companies to determine the rightful jurisdiction of insolvency proceedings. This will become even more important in the post-Brexit market place where the insolvency regimes of the UK and Europe are likely to diverge and those creditors who are looking to 'forum-shop' may argue a particular jurisdiction applies to an insolvency process.

If you would like to discuss this case, or insolvency matters in general, then please do not hesitate to contact Alex Pelopidas of this firm who would be happy to assist.