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BANKING AND FINANCE

BRIEFING

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The court recently had to deal with an application concerning Anthony Spicer and Henry Shinnars as administrators of a Guernsey limited partnership. The decision, reported as *Kaupthing Capital Partners II Master LP Inc, Re Pillar Securitisation S.ar.l v Spicer and Shinnars* [2010] EWHC 836 (Ch), is regarded as important for two legal reasons. First, it looks further at the test to be applied when determining a debtor's centre of main interests ("COMI"). Second, it examines the procedural requirements for appointing an out-of-court administrator. However, the case is also interesting for another reason – the law of unforeseen consequences.

Kaupthing Capital Partners II Master LP ("Master") was a Guernsey limited partnership. It was mainly used in connection with an investment fund known as Kaupthing Capital Partners II, set up to allow those involved in the Kaupthing group to invest alongside the group parent, the Icelandic bank, Kaupthing Bank hf. Although it was a limited partnership, Master had made an election under Guernsey Law to have separate legal personality.

Master's general partner was KCP II (GP) Limited ("KCP"), an English registered limited partnership. It was managed by Singer & Friedlander Asset Management Limited which delegated administrative functions to Kaupthing Bank Luxembourg SA ("BankLux") and investment management to Kaupthing Singer & Friedlander Limited ("KSF"), and all of which operated from offices in London. It was also financed by BankLux.

The formal insolvency of Kaupthing Bank hf on 7 October 2008 had an immediate effect on the rest of the group. On the following day, BankLux made demand on Master for repayment which Master was unable to meet. After considering its options therefore, and in particular which form of appointment document was best suited to Master, KCP appointed Anthony and Henry as English law administrators to Master by the out-of-court route using the form prescribed for companies, Form 2.10B. BankLux was also placed into insolvency proceedings, and restructured. Following the restructuring, 99.4 per cent of the unsecured indebtedness of Master was held by Pillar Securitisation S.ar.l and 0.4 per cent by two others.

The administration of Master went well, and was extended with the consent of these creditors after the end of the first year. It was clear that there might well even be sufficient realisations to repay the creditors in full. However, towards the end of the administration, there was a disagreement between the administrators and these creditors as to what considerations the administrators ought to take into account when selling one of Master's two remaining assets, a debt owed to it by KSF.

This disagreement ultimately resulted in the creditors applying to court for the administrators to be removed from office. If this had been their only line of argument it seems unlikely the decision would have aroused any great interest, as the court took the view that the administrators had properly complied with their duties and that as such there was no basis for their removal. However, the creditors also argued in the alternative that the entire administration had in fact been invalid from the outset. There were two limbs to this argument.

First the creditors asserted that Master's COMI had been Guernsey rather than the United Kingdom at the time of the appointment. If so, the English Court would have had no jurisdiction to open administration proceedings. However, the court held that the presumption under the EC Insolvency Regulation that Master's COMI was the place of its registered office was rebutted. It was apparent both objectively and ascertainably to third parties that all of Master's head office functions were carried out on its behalf in England. Importantly, the court concluded that the key third parties to consider here were Master's creditors, not its "insider" investors or shareholders.

Secondly it was argued that KCP had used the wrong prescribed form to make the appointment – it should have used Form 1B, which is applicable to a partnership. The court was prepared to accept that Master was a body corporate, but was not prepared to accept that it was a company. It was not persuaded by the administrators' argument that Master was a hybrid between a company and a partnership as a result of its election under Guernsey Law. It determined that, for the purposes of English insolvency law, Master was a partnership. The court then made it clear that it was bound by previous case law to the effect that use of the correct form was mandatory when appointing an administrator, and held that the original appointment was invalid.

In this respect, the case has been seen by some as a cautionary tale. Most administrators are now appointed out-of-court since this is likely to be quicker, cheaper and more flexible in terms of timing than a court application. However, it has often been said that where the circumstances of the appointment are complicated, for example, because the appointment is over a foreign-registered entity which is hard to categorise for English insolvency law purposes, a court appointment may be the only safe option. Certainly, the decision in this case now supports such a view.

An invalid appointment is nevertheless something very different to the removal and replacement of an administrator, and might have some surprising, and maybe unforeseen, consequences. Here is an interesting example. As noted previously, the administrators believed that there would be sufficient monies to pay creditors' debts in full. In this event, any surplus realisations would next be used to pay interest on those debts from the date of the administrators' appointment onwards at the rate specified in section 17 of the Judgments Act 1838. For the last couple of years, this rate has been very generous compared to most alternatives available. It may well be more generous, for example, than the contractual rate of default interest which the creditors would receive for the same period of time had the entity concerned never validly been in administration, as indeed it was in this case.

Ultimately, however, the case perhaps also serves as a cautionary tale as a result of one of its more practical consequences. Once the court held that administrators' appointment had been invalid, it proved impossible in practice to complete the sale of Master's remaining asset (a shareholder in a ladies fashion chain), as the prospective buyers were uncomfortable with the position. Eventually, therefore, Anthony and Henry were appointed afresh by the same creditors who had sought their removal in order to complete this sale.

The end result was that Anthony and Henry were still able to ensure that all the unsecured creditors were repaid in full plus statutory interest. However, this statutory interest only accrued from the date of their re-appointment, not from the date of the original, invalid appointment.

The original version of this bulletin appeared as an article by Simon Beale in Smith & Williamson's Restructuring and Recovery Bulletin for Autumn/Winter 2010.

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