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Feature

BY EDWARD E. NEIGER AND MARIANNA UDEM

Like a Rolling Stone: SDNY Tackles Its First Individual Chapter 15



Edward E. Neiger
ASK LLP; New York



Marianna Udem
ASK LLP; New York

Edward Neiger is a co-managing partner and Marianna Udem is counsel with ASK LLP in New York.

In *re Kemsley*,¹ the trustee in the U.K. bankruptcy proceeding of Paul Kemsley filed a chapter 15 petition in the U.S. Bankruptcy Court for the Southern District of New York seeking recognition of the U.K. bankruptcy proceeding. Barclays Bank PLC, a major creditor in the U.K. bankruptcy proceeding that also commenced litigation against Kemsley in New York and Florida state courts, opposed recognition, which would have invoked the automatic stay in Barclays' litigation against Kemsley. This was the first contested proceeding involving an individual chapter 15 debtor in the Southern District of New York. The court declined to recognize Kemsley's U.K. bankruptcy proceeding as either a foreign main proceeding or a foreign non-main proceeding.

When a foreign representative (such as the trustee in Kemsley's U.K. bankruptcy proceeding) of a foreign insolvency proceeding seeks recognition of the foreign proceeding under chapter 15 of the Bankruptcy Code, a bankruptcy court may only enter an order recognizing the foreign proceeding if "such foreign proceeding ... is a foreign main proceeding or foreign non-main proceeding within the meaning of section 1502."² A foreign main proceeding is a "foreign proceeding pending in the country where the debtor has the center of its main interests [(COMI)],"³ whereas a foreign non-main proceeding is a "foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment."⁴

COMI, while crucial to determining whether a proceeding qualifies as a foreign main proceeding, is not expressly defined under the Bankruptcy Code. Rather, the Code establishes a presumption: "In the

absence of evidence to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the center of the debtor's main interests."⁵ Similarly, "habitual residence" is not defined under the Bankruptcy Code. For most individuals, habitual residence is easily determined, and thus, the issue of an individual's COMI is rarely litigated in U.S. courts.

COMI for an Individual Debtor on the Move

Kemsley is a well-known public figure in the U.K. He was a renowned businessman with significant interests in real estate and soccer franchises. In a case of first impression in the Southern District of New York, the *Kemsley* court faced the difficult task of determining the COMI of an expatriate and transitory individual. The issue was further complicated by changes in Kemsley's marital status and family life in the period leading up to the chapter 15 recognition proceeding.

The court observed that Kemsley and his family initially moved from the U.K. to a vacation home that they owned in Boca Raton, Fla., in 2009. As the court observed at an evidentiary hearing, Kemsley "left the U.K., in part because his world collapsed there ... took shelter in an existing vacation property in Florida, not necessarily to spend the rest of his days in the United States, but presumably to get away from stress, strain, and embarrassment of having his empire blow up." Subsequently, in 2010, Kemsley and his family moved to a lavish apartment in New York, followed by a rented private home in Beverly Hills in 2011. While residing in Los Angeles, Kemsley and his wife separated, and around December 2011, he moved out of the family home in Beverly

¹ 489 B.R. 346 (Bankr. S.D.N.Y. 2013).
² 11 U.S.C. § 1517(a).
³ 11 U.S.C. § 1502(4).
⁴ 11 U.S.C. § 1502(5).

⁵ 11 U.S.C. § 1516(c).

Hills and into a nearby residence in West Hollywood. On Jan. 13, 2012, while still living in Los Angeles, Kemsley filed a personal bankruptcy case in London. In June 2012, approximately three months after Kemsley commenced his U.K. bankruptcy proceeding, Kemsley's wife and children moved back to London. By this point, Kemsley had relocated to New York. In August 2012, his U.K. bankruptcy trustee commenced the chapter 15 recognition proceeding in the Southern District of New York, at which time Kemsley lived in New York with his girlfriend.

Analyzing the concept of habitual residence, the court emphasized that the phrase "habitual residence" "includes an element of permanence and stability and is comparable to domicile; it connotes a meaningful connection to a jurisdiction, a home base where an individual lives, raises a family, works and has ties to the community. In short, it is the place where an individual is living and has manifested the expectation of remaining for an indefinite period of time."⁶ The court took great pains to determine the COMI for an individual who lived as a "rolling stone." As the court observed at the evidentiary hearing on recognition, Kemsley might be "someone for whom the future may be bright, but whose present is a mess, and it's a mess in part because his personal life is in terrible disarray, his children are in the U.K., but he has a love nest in New York."

The court took note of Kemsley's testimony about the factors that influenced his decision to reside in the various locations and concluded that the residence of his children was the most critical factor to Kemsley's decisions. The court viewed the break-up of the family and Kemsley's children's move to London in June 2012 to signify a conflict between Kemsley's habitual residence in New York and his desire to be close to his children. The court further reasoned that their move to London was an objective event that changed Kemsley's previously manifested intent to remain indefinitely in the U.S. As this event took place after Kemsley commenced his U.K. bankruptcy proceeding and before the foreign representative sought recognition in the U.S., the time frame for determining COMI became key to the court's ultimate decision on Kemsley's COMI.

The court noted that there was a split of authority as to the relevant date for determining COMI. Some courts have found that the date of commencement of the foreign proceeding controls, while others have concluded that the date for filing the petition for recognition of the related chapter 15 case is the appropriate date. Relying on recent decisions in *In re Gerova Fin. Grp. Ltd.*⁷ and *In re Millennium Global Credit Master Fund Ltd.*,⁸ the court decided that Kemsley's COMI should be determined as of the date of commencement of his U.K. proceeding. The court viewed the foreign proceeding date as appropriate because it was a fixed, verifiable date and less subject to potential manipulation. Thus, the court concluded that Kemsley's COMI was the U.S. because his children were living in the U.S. when he filed the U.K. bankruptcy petition and denied recognition of the U.K. bankruptcy proceeding as a foreign main proceeding. The court noted that its finding might have been different had Kemsley's estranged wife and children

moved back to London prior to the commencement of the U.K. bankruptcy proceeding.

The court next examined whether Kemsley's U.K. proceeding could qualify as a foreign non-main proceeding. To establish the existence of a foreign non-main proceeding, the foreign representative must show that the debtor has an "establishment" in a foreign country. Section 1502(2) of the Bankruptcy Code defines an establishment as "any place of operations where the debtor carries out a nontransitory economic activity." Relying on the Fifth Circuit's opinion in *Lavie v. Ran (In re Ran)*,⁹ the court noted that in order to qualify as an establishment, a location should rise to the level of a debtor's secondary residence or possibly a place of employment. The court considered Kemsley's testimony that he had an informal employment arrangement and an office at a London-based company, but determined that the nature of his employment with the company was not sufficiently formalized to meet the requirements of an establishment. The court noted that Kemsley did not have an employment agreement, performed services only sporadically and received no salary. Based on the foregoing, the court concluded that Kemsley's employment arrangement in the U.K. did not meet the requirements of an establishment. Therefore, the court concluded that the U.K. bankruptcy proceeding was not entitled to recognition as a foreign non-main proceeding.

Second Circuit Weighs In on Why Timing Matters

Following the *Kemsley* decision, in an unrelated appeal, the Second Circuit issued its decision in *Morning Mist Holdings Ltd. v. Kryz (In re Fairfield Sentry Ltd.)*¹⁰ and held that the relevant time for analyzing a debtor's COMI for purposes of recognizing a foreign main proceeding is at or around the time that a petition for recognition under chapter 15 is filed. Fairfield Sentry, organized in the British Virgin Islands, was one of the largest "feeder funds" that invested with Bernard L. Madoff Securities from 1990 to late 2008. Following Bernie Madoff's arrest, Fairfield Sentry directors began the winddown of the company, and in July 2009, it commenced a liquidation proceeding under British Virgin Islands law.

The foreign representative for Fairfield Sentry's British Virgin Islands proceeding filed a petition for recognition of the proceeding as a foreign main proceeding in the U.S. Bankruptcy Court for the Southern District of New York. Shareholders of Fairfield Sentry that had previously commenced a derivative action in New York state court opposed recognition. The bankruptcy court granted recognition to the British Virgin Islands proceeding as a foreign main proceeding following an examination of the period from Fairfield Sentry's cessation of operations through the chapter 15 petition date. The shareholders appealed, first to the district court, which affirmed the bankruptcy court's decision, and subsequently to the Second Circuit. The shareholders argued that the bankruptcy court should have considered Fairfield Sentry's entire operational history to determine COMI.

⁶ *In re Kemsley*, 489 B.R. at 353.

⁷ 482 B.R. 86, 92-93 (Bankr. S.D.N.Y. 2012).

⁸ 458 B.R. 63, 72 (Bankr. S.D.N.Y. 2011).

⁹ 607 F.3d 1017, 1027 (5th Cir. 2010).

¹⁰ 714 F.3d 127 (2d Cir. 2013).

To establish the relevant time period for purposes of determining COMI, the Second Circuit examined the statutory text, other court decisions and international sources. The court noted the present tense used in § 1517 of the Bankruptcy Code, which provides that a “foreign proceeding shall be recognized ... as a foreign main proceeding if it is pending in the country where the debtor has the [COMI].”¹¹ It concluded that this present-tense language requires use of the petition date to “anchor the COMI analysis.”¹² The court further noted that the majority of courts to examine the issue concluded that the chapter 15 petition date is determinative for purposes of the COMI analysis. In addition, the court reasoned that a “regular and ascertainable” date, such as the chapter 15 petition date, would ensure a consistent treatment with similar international provisions.¹³

In light of the Second Circuit’s ruling in *Fairfield Sentry*, the *Kemsley* analysis might have resulted in the opposite outcome because Kemsley’s children moved back to London between the filing of the U.K. bankruptcy petition and the chapter 15 filing. Thus, under the court’s rationale that Kemsley always intended to follow his children, his COMI would have been London, when the foreign representative filed the chapter 15 petition for recognition. Nevertheless, the factors that the *Kemsley* court examined to determine an individual’s COMI remain relevant today, and the analysis remains a hybrid of subjective intent as seen through largely objective actions. **abi**

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¹¹ 11 U.S.C. § 1517(b).

¹² *In re Fairfield Sentry Ltd.*, 714 F.3d at 132.

¹³ *Id.* at 136.