Inside story: The Consumers Trust Case- Rubin and Lan – v – Eurofinance and others

This month's Inside Story is brought to you by David Rubin (david@drpartners.com), David Rubin & Partners LLP, London, UK.

From the Horse's Mouth

There has been a huge volume of commentary from very learned people in the legal profession on the issues and implications of the recent judgement in the UK Supreme Court. I wouldn't dare debate law with lawyers, but I will share with readers my own perspective of this case, where my partner, Henry Lan and I act as the Receivers appointed by the High Court in London and as the Foreign Representatives of the Chapter 11 proceedings in the US Bankruptcy Court.

Background and lead up to the case

The Consumers Trust (TCT) promoted a "Cash Back" voucher program in the USA and Canada. The business was in fact run by a UK based trust, which never traded in the United Kingdom. TCT fell foul of consumer legislation in the USA and as a result, it was under threat from numerous US state authorities who brought proceedings to recover considerable sums of money that TCT did not have.

We were initially instructed by the UK Trustees and the Settlor of the Trust. The first problem was to find a process to protect the remaining assets from hostile action by various US state authorities. As UK law does not recognise the concept of a business trust, none of the formal UK insolvency procedures could be used. My legal advice was to seek appointment from the UK Court as a Receiver specifically so we could approach the US Bankruptcy Court with an application under Chapter 11 of the US Bankruptcy Code. So, this is precisely what we did.

The Chapter 11 process

The first real eye-opener was the number of claimants under the Voucher schemes operated by TCT. There were some 70,000 individual claimants in America, with total claims in the region of $163 million. Many of them had commenced or were threatening legal action against TCT, in addition to either class actions or legislative breach proceedings considered by a number of US State Attorneys. Some of the individual creditors even suggested they would fly over the UK to pay me a visit! The 'stay' provided by the Chapter 11 process was invaluable in halting this avalanche of potential litigation.

We then embarked on an extensive forensic review of TCT's activities, to establish what had happened to the substantial funds flowing into the Trust. Three things very quickly became apparent. Firstly, the voucher schemes were not all they professed to be. The hoops that the claimants had to jump through in order to get their "Cash Back" were so complex and unintelligible, that we could not find many instances of vouchers being honoured in

the normal way. No doubt, this is why the Court of Appeal in London characterised the program as a “Scam”. Secondly, we established that considerable sums had been paid to the Trustees, the Settlor and other connected parties that, whilst in accordance with the terms of the trust deed, were preferences or void dispositions under US Bankruptcy Law. Thirdly, we established that a substantial settlement negotiated with the Attorney General in Missouri had been paid out of trust assets and this was ultra vires the trust.

Now let’s get the money back!

With our legal advisers we set about trying to recover the money paid. We reached compromise settlements with the Trustees and their insurers and this provided a fund with which we paid a dividend to all creditors. We then launched our present action against the settlor of the trust, Eurofinance and its Directors and Shareholders.

The choice of venue of those proceedings was driven largely by the fact that the US Courts recognise the legal entity of a business trust and the UK Courts do not. Proceedings were therefore brought in New York and the defendants received advice not to make an appearance or to defend. Consequently, we were given a default judgment against the defendants for $163 million, of which over $8 million was withdrawn by the Trustees and Settlor of the Trust personally. “Excellent,” we thought, “now all we have to do is enforce this in the UK.” In fact, at one point we thought we might be bringing the very first application under the United Nations Commission on International Trade Law – UNCITRAL - in the UK since the Model Law was agreed. If only we had known!

The aftermath

Eurofinance et al originally sought the appointment of the Receivers engaging the assistance of the UK Courts, to facilitate the filing of a Chapter 11 case in New York in order to protect themselves from activities in the United States which had given rise to consumer protection proceedings by the Attorney General of Missouri and others. Having sought the assistance of the US courts, they then conveniently sought to avoid recourse for their wrongdoing by arguing that they had not submitted to the jurisdiction of the US Bankruptcy Court.

The decision in the Court inthe first instance was unsatisfactory for both parties so the case then went to the Court of Appeal where we won convincingly. The case then went to the Supreme Court and the results of these proceedings are now well known.

I entirely understand the sentiment expressed by the UK Supreme Court that these enforcement proceedings brought under the Common Law go a step too far for the Judiciary and are best be left to the Legislature. However, I am profoundly disappointed at the finding that this type of application does not work under UNCITRAL. To my mind, this is the sort of cross-border scenario that the spirit of UNCITRAL was meant to assist. If we cannot enforce insolvency judgements as between member jurisdictions where the defendants hide behind a refusal to submit to the local jurisdiction, then UNCITRAL has missed one of its major forces for good in the universal application of insolvency. It has done so to the detriment of creditors, whose interests it was meant to serve. The estate has suffered very substantial costs in trying to rectify what was an obvious wrong and the complexities of International Law in this field have not helped creditors regain what they have lost.

In my view, insolvency law in the UK has been set back many years and our reputation in the world of being a sophisticated and progressive force in international insolvency cooperation has been severely harmed by this judgement.

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