Modified universalism meets désastre

July 2017

Recently, the Royal Court has, for the first time, considered the interrelationship between foreign insolvency proceedings and désastre in Guernsey affecting trustees in bankruptcy looking to gather in a bankrupt's Guernsey assets. The case also gives useful guidance as to when the assets of a debtor no longer form part of the debtor's estate during a désastre.

Background

Concurrent insolvency proceedings were on foot in Guernsey and England in respect of the same individual.

English trustees in bankruptcy applied to the court for recognition of their appointment by the English Court and ancillary orders relating to the right to gather in the assets of the bankrupt located in Guernsey and to collect the books and other records of the bankrupt that related to his estate and affairs.

However, the bankrupt also had several judgments entered against him in Guernsey totalling approximately £1.8 million, some of which had been passed to HM Sheriff for enforcement. HM Sheriff had sold these assets and was holding the proceeds of c. £40,000 (and one painting, which couldn't be sold!).

When the arresting creditor applied to the court to see HM Sheriff release the proceeds of sale, the application was adjourned to enable the trustees to apply to the court for an order that the arresting creditor be recognised in Guernsey and fairly standard ancillary orders in relation to the delivery up of books and records and delivery up of the bankrupt's property in Guernsey.

Whilst recognition was unopposed, there was a dispute in relation to the extent of the delivery up orders sought.

Discussion

The first issue before the court was in relation to the extent of modified universalism in Guernsey, post the Privy Council decision in *Singularis*, and the earlier Royal Court decision in *Brittain v JTC (aka Re X)*. For reasons which are not apparent from the judgment, no letter of request under section 426 of the Insolvency Act was sought by the Trustees.

Having noted the earlier authority, the court considered that basic ancillary orders for the getting in of assets and the delivery up of papers were an "ordinary" consequence of recognition and so there was sufficient common or customary power to grant such assistance, even absent a letter of request.

The second, and more heavily contested issue, was in relation to whose property the proceeds of sale were. This boiled down to the question of at what point did the debtor's assets stop belonging to the debtor. The court found that once HM Sheriff had sold the debtor's assets, he lost title because HM Sheriff was holding the funds as part of a court-directed enforcement process. Effectively, the assets were held for the benefit of the debtor's creditors (either the arresting creditor, of if more than one creditor was known, all of the creditors). The consequence of this for the trustees was that at the time of recognition, the proceeds of sale no longer formed part of the debtor's estate.

Finally, the trustees' bid for recognition in Guernsey was not entirely pyrrhic. Whilst they missed out on the cash, they did get the unsold watercolour.

Conclusion

In circumstances where a letter of request is unavailable or impractical, common law recognition of a foreign officeholder will carry with it basic powers to get in the assets. In many cases, this may be sufficient for the officeholder to achieve their objectives in Guernsey.

When enforcing in Guernsey, it would be prudent for the foreign officeholder to liaise closely with HM Sheriff to understand what, if any, Guernsey enforcement proceedings are on foot and what assets may otherwise be available. Before the costs of recognition are incurred, they (and their creditors) will want to make sure it is worth it.

For Guernsey lawyers, the Deputy Bailiff's thorough and careful analysis of the désastre process will be of significant interest and benefit outside the circumstances in this case.

For more information please contact:

Michael Adkins

Partner // Guernsey

t:+44 1481 734 231 // *e:*michael.adkins@collascrill.com

James Tee

Partner † // Guernsey

t:+44 (0) 1481 734284 // *e:*james.tee@collascrill.com