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Crossing Borders—How B.C.I. Finances Broadened Chapter 15 Protections for Foreign Representatives

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July 23, 2018 - In a recent decision, the United States Bankruptcy Court for the Southern District of New York found that a relatively small retainer placed in the trust account of the foreign liquidators' U.S. counsel constituted "property" sufficient to satisfy the requirements of section 109(a) of the Bankruptcy Code in a chapter 15 proceeding.[1] The decision elucidates the parameters of the "property" requirement of section 109, which the Second Circuit has applied even in the chapter 15 context.[2]

In August 2014, B.C.I. Finances Pty Limited, Binqld Finances Pty Limited, E.G.L. Development (Canberra) Pty Limited, and Ligon 268 Pty Limited (the "Debtors"), a group of companies controlled and operated by the Binetter family, were placed into Australian liquidation proceedings after allegations of fraud and tax evasion arose.[3] John Sheahan and Ian Russell Lock were appointed as joint liquidators (the "Liquidators").[4] Following their appointment, the Liquidators brought suit against the Debtors' corporate directors, including Andrew and Michael Binetter, in Australia, alleging that the corporate directors had breached their fiduciary duties, and that their breaches caused "significant losses" to the Debtors.[5] The trial judge in Australia ultimately ruled in the Liquidators' favor, but did not come to a determination on the issue of damages.[6]

In 2017, the Liquidators sought chapter 15 recognition of the Australian liquidation proceedings in order to conduct discovery of Andrew and Michael Binetter, who had moved to New York City during the pendency of the trial in Australia.[7] Andrew Binetter, along with another party (together, the "Objecting Parties"), opposed the Liquidators' chapter 15 petition.

The Objecting Parties claimed that the Debtors were ineligible for chapter 15 relief because they did not have sufficient "property" in the United States to satisfy section 109(a) of the Bankruptcy Code. Section 109(a) states that "only a person that resides or has a domicile, a place of business, or property in the United States . . . may be a

debtor under this title."[8] The Second Circuit has held that this requirement must also be satisfied in the context of chapter 15 proceedings.[9] However, the Second Circuit did not specify a threshold for the amount of "property" sufficient to satisfy this requirement in the chapter 15 context.

In response, the Liquidators argued that (1) a $1,250 retainer placed in the trust account of the Liquidators' counsel (the "Retainer") and (2) the Debtors' fiduciary duty claims against Andrew and Michael Binetter (the "Fiduciary Duty Claims") constituted "property in the United States" sufficient for section 109(a) eligibility.[10]

The Bankruptcy Court held that the Retainer and the Fiduciary Duty Claims each independently satisfied the section 109(a) requirement.[11] Before concluding that even a $1,250 retainer may satisfy section 109(a), the Court noted that "it is well established that '[a] debtor's funds held in a retainer account in the possession of counsel to a foreign representative constitute property of the debtor in the United States and satisfy the eligibility requirements of section 109.'"[12] Furthermore, the court emphasized that the "property" requirement in section 109(a) is satisfied even by a "minimal amount of property" in the United States.[13] The court then rejected the Objecting Parties' argument that the Debtors' deposit was made in order to "manufacture eligibility under Section 109."[14]

The court next addressed whether the Fiduciary Duty Claims were located in the United States, since it was undisputed that the Fiduciary Duty Claims were property of the Debtors. Using a multi-step analysis, the court first applied New York's "greatest interest test," holding that the situs of the Fiduciary Duty Claims should be determined according to Australian law.[15] Then, after considering expert testimony on the issue, the court determined that, under Australian law, claims "are situated where they are properly recoverable and are properly recoverable where the debtor resides."[16] Therefore, the court concluded that, because the Binetters lived in New York, the situs of the Fiduciary Duty Claims was New York and qualified as "property in the United States."

Although the Barnet decision imposed an additional eligibility requirement for foreign representatives seeking chapter 15 protections,[17] the Bankruptcy Courts have consistently lowered the barrier, ensuring that foreign representatives are afforded easy access to the protections offered in chapter 15. With this low barrier, even a de minimis amount of funds deposited in a trust account for the purpose of retaining counsel may satisfy the eligibility requirement. In addition, claims that situated in the United States under applicable laws may also satisfy the requirement.

-Hillary McDonnell assisted with the preparation of this post.

Footnotes

[1] In re B.C.I. Finances Pty Limited, 583 B.R. 288 (Bankr. S.D.N.Y. 2018).

[2] See Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet), 737 F.3d 238 (2d Cir. 2013).

[3] Id. at 290.

[4] Id.

[5] Id. at 291.

[6] Id.

[7] Id.

[8] Id. at 292; 11 U.S.C. § 109(a).

[9] See Barnet, 737 F.3d at 247; see also In re Forge Grp. Power Pty Ltd., No. 17-CV-02045-PJH, 2018 WL 827913, at *9 (N.D. Cal. Feb. 12, 2018) (adopting the Second Circuit's reasoning to hold that Section 109(a) applies to chapter 15 proceedings). But see Transcript of Hearing at 8-9, In re Bemarmara Consulting A.S., No. 13-13037 (KG) (Bankr. D. Del. Dec. 17, 2013) (holding that section 109(a) does not apply to chapter 15 proceedings).

[10] B.C.I. Finances, 583 B.R. at 291.

[11] Id. at 290.

[12] Id. at 293 (quoting In re Poymanov, 571 B.R. 24, 29 (Bankr. S.D.N.Y. 2017)).

[13] Id. at 294.

[14] Id. at 295.

[15] Id. at 297.

[16] Id. at 300.

[17] Barnet, 737 F.3d at 251 (holding that a debtor within a foreign proceeding seeking recognition under chapter 15 must satisfy the section 109(a) requirement of residing or having a domicile, place of business, or property in the United States).

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