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GLOBAL TURNAROUND
The international magazine for company rescue and insolvency specialists
May 2024 | issue 292
ISSN 1743-1751

Creditors hire advisors for Thames Water crisis

Creditors to the UK's Thames Water have hired further advisors in preparation for a fraught and highly political restructuring of the utility's UK£16 billion debt, as the crisis threatens to overshadow the UK's impending General Election.

The latest creditors to announce representation were a group of 18 banks who have hired Perella Weinberg Partners and A&O Shearman to advise them on restructuring options for the Thames Water opco.

Meanwhile Freshfields has confirmed it is representing an Ad Hoc Group of public and private bonds totalling UK£1.5 billion in the group's Kemble holding company.

More announcements are likely given the labyrinthine nature of Thames Water's capital structure. There is UK£1.5 billion in the top holding company, whose obligor is Kemble Water Finance Limited, and another UK£14 billion in the operating companies, led by Thames Water Utilities Finance Plc.

All eyes are now on 12 June, when the UK's regulator Ofwat announces its draft decision on the company's next five-year business plan.

Thames Water had asked for a 56 per cent hike in its charges to consumers, as well as limits to regulatory fines and leniency on dividend rules. Thames Water's owners believe the regulator is unlikely to agree to their demands.

The review process lasts an initial six months, during which the regulator considers the company's proposals for the next five years of capital expenditure, customer charges and so on. Further appeals to Ofwat's decisions can drag the process on even further.

> Add in an imminent British General Election, where Thames Water's role in leaking sewage into the nation's rivers and seasides is likely to draw attention, as well as its finances, and the restructuring talks are bound to be highly sensitive.

Last month, the topco, Kemble, defaulted on its debt. Kemble's bonds are now trading at less than 10 per cent of face value, implying that its lenders are braced for a total wipeout.

Board resignations

Two directors have resigned from Thames Water (Kemble) Finance and several quit from Kemble Water Finance Limited. At the same time Thames Water has hired two independent restructuring experts "to help engage with creditors and assess options for the company."

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Are US assets required for foreign recognition under Chapter 15?

A recent Eleventh Circuit case suggests not, laying the groundwork for a potential challenge to the US Supreme Court.

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On 3 April the United States Court of Appeals for the Eleventh Circuit (comprising Federal Courts in Alabama, Florida and Georgia), affirmed the decision of the District Court for the Middle District of Florida in Al Zawawi v. Diss (In re Al Zawawi) 97 F.4th 1244 (11th Cir. 2024).

This held that eligibility requirements for a "debtor" contained in section 109(a) of the Bankruptcy Code, (which limits the scope of who may be a "debtor" to "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality"), do not apply to foreign recognition proceedings under Chapter 15 of the Bankruptcy Code.

Under the Eleventh Circuit's Al Zawawi ruling, a foreign debtor need not have property in the United States to obtain Chapter 15 recognition, a decision which conflicts with the Second Circuit precedent of In re Barnet (737 F.3d 238 (2d Cir. 2013)).

Background

Talal Al Zawawi, a citizen of Oman, was adjudged bankrupt as a result of his failure, pursuant to a divorce order, to pay a UK£24,075,000 judgment against him levied by the English Courts and bankruptcy trustees were appointed in respect of his insolvent estate.

In March 2021, the bankruptcy trustees in their capacity as foreign representatives filed a Chapter 15 petition in the US Bankruptcy Court for the Middle District of Florida to enforce the freezing order and judgment obtained in the English proceedings.

Mr. Al Zawawi objected to the petition on the grounds that because he did not reside or have a domicile, place of business, or property in the United States, he did not meet the requirements for being a "debtor" under section 109(a), and therefore could not be the subject of a Chapter 15 case.

However, the Bankruptcy Court granted the petition for recognition under Chapter 15, ruling that section 109(a) does not apply to Chapter 15 cases. Mr. Al Zawawi appealed the Bankruptcy Court's order to the District Court, which affirmed the decision of the Court at first instance.

The Eleventh Circuit decision

In affirming the District Court's ruling in In re Al Zawawi, the Eleventh Circuit concluded that the precedent set by its decision of In re Goerg (844 F. 2d 1562 (11th Cir. 1988)) continues to apply and is binding.

In In re Goerg, the Court held that a foreign trustee could commence proceedings ancillary to a foreign insolvency under Section 304, (the predecessor to the modern Chapter 15), even if the foreign debtor did not meet the requirements of section 109(a).

In the In re Al Zawawi case, the Court noted that the plain reading of section 103(a) suggests that the entire Chapter 1 of the Bankruptcy Code, including the definition of "debtor" in section 109(a), applies to Chapter 15 cases.

This however, creates a tension with the use of the term "debtor" in section 1517's expansive definition of "foreign proceeding" which provides that a foreign proceeding need not even be a bankruptcy proceeding either under foreign or US law.

Following the reasoning in In re Goerg, the Eleventh Circuit referred to the "purpose" clause of Chapter 15, and noted that it is to "provide effective mechanisms for dealing with cases of cross-border insolvency."

Consistent with this purpose, the Court interpreted the use of the term "debtor" in the definition of foreign proceeding to refer to a "debtor" properly subject only to applicable foreign law in a foreign proceeding. Accordingly, because Mr. Al Zawawi was properly subject to a foreign proceeding, all the requirements for Chapter 15 recognition were met.

This decision is at odds with the Second Circuit's decision in In re Barnet, where the Second Circuit considered precisely the same question and determined that section 109(a) did apply in Chapter 15 cases.

Conclusion

This ruling reveals a split between the Eleventh Circuit and the Second Circuit and may lay the groundwork for a challenge to the US Supreme Court.

For the time being, the decision in In re Al Zawawi prevails in the Eleventh Circuit and a foreign representative may be well served to consider filing a Chapter 15 case in the Eleventh Circuit to seek to use the US courts for assistance either with the investigation and recovery of concealed assets in a proceeding or with discovery in order to determine whether a potential cause of action is available, regardless of whether the debtor has assets in the US or not.

These considerations may increase the likelihood of forum shopping when a foreign representative is considering where to commence a Chapter 15 case, particularly in circumstances where it is unclear whether the potential debtor has any connection to the US as provided in section 109(a) of the Bankruptcy Code.

On 24 April Mr. Al Zawawi petitioned the Eleventh Circuit to vacate the decision in a motion for en banc review (the hearing of a case by the entire bench, or all of the judges of a court, rather than a panel of a selected few judges).

It remains to be seen whether the approach of the Second Circuit or the Eleventh Circuit with respect to relief in a Chapter 15 case will prevail.