

Ci4net.com: Looking Beyond the Brass Plate in Establishing the Centre of Main Interests

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For a creditor to prove that the Centre of Main Interests ('CoMI') of a company is in a different jurisdiction from its registered office might seem an uphill task, particularly when in opposition to the company's directors. However, this is precisely what a UK bank ('the Bank') achieved as a petitioning creditor in a recent case where I was appointed liquidator of a Delaware (USA)-registered company and administrator of its Jersey-registered subsidiary by the High Court in Leeds, in what is believed to be the first case where the CoMI of a company has been disputed in court in the UK. Reassuringly for creditors, it confirms that the English courts will look behind the brass plate of the registered office and will look at the real centre of activity as ascertainable by the potential creditors of the company.

Ci4net.com Inc ('Ci4net') was a US-quoted, Delaware-registered dot.com incubator set up by Jersey businessman Kevin Leech. Its subsidiary, DBP Holdings Limited ('DBP'), was registered in Jersey. Both companies held investments in mainly technology start-ups, and had suffered huge losses as many of their investments failed following the dot.com crash. A third company in the group, Criterion Management Services Limited ('Criterion'), was registered and based at Haymarket in London and provided management services to the group; it had entered into a Company Voluntary Arrangement with its creditors in May 2002. The Bank, through its branch in Jersey, had loaned significant sums to Mr Leech, which he invested in supporting these companies, amongst other ventures. In addition, the Bank had directly loaned some GBP 5 million to DBP, which had been guaranteed by Ci4net.

In its SEC filings for 2000, filed in May 2001, Ci4net described its 'address of principal executive offices' as being at Haymarket, London. Subsequent draft filings provided to the Bank repeated this statement and the draft 2002 filing contained an internal heading in capital letters stating baldly 'WE ARE PREDOMINATELY BASED OUTSIDE OF THE UNITED STATES'.

During 2001, having failed to raise further funds with which to support its investments, Ci4net.com withdrew its active funding and management input into the investee companies and changed its activity

into that of a 'passive holding' company. Its US-based director resigned. Its remaining directors were Mr Leech (based in Jersey) and a UK citizen resident in Spain. In October 2002, Mr Leech was declared bankrupt or 'en desastre' in Jersey, with debts of some GBP 90 million, and was therefore forced to resign.

At this time the Bank reviewed its exposure to DBP/Ci4net, but concluded that the value of the companies' investments (their only assets) was negligible. It made formal demand for repayment, but the companies having no free assets were unable to make any payments. However, by early 2004, it became clear that at least one of the companies' investments had significant value – potentially enough to repay the Bank and other creditors in full. The Bank renewed its demand. The Bank was also unhappy with the level and accuracy of information that it was receiving on the financial position of the companies, leading to a breakdown of trust between the Bank and the companies' management and to a conclusion that control should be taken out of the hands of the current management. An application was therefore made for administration orders in respect of the two companies on the basis that their CoMIs were in London.

Although it was admitted that both companies were insolvent in that they were unable to pay their creditors as they fell due, the companies' director opposed the applications on the grounds that the CoMIs were not in England and the court therefore did not have jurisdiction to open proceedings and that the statutory purpose of administration could not be met. The statutory purpose is defined as:

- (a) rescuing the company as a going concern, or
- (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
- (c) realizing property to make a distribution to one or more secured or preferential creditors.

HHJ Langan concluded that the CoMIs for both companies were in England. In respect of the Jersey company, he concluded that the existence of an English debenture held by the Bank containing charges under which certain of the assets could be

caught meant that objective (c) above could be achieved and he therefore made an administration order. In respect of Ci4net there was no such security and the Judge concluded that the nature of the assets was such that they would not realize more in administration than in liquidation; he therefore made an order for the winding up of the company under English law.

Basis for reaching conclusions on the CoMIs

It was agreed by Counsel for the companies that Ci4net's CoMI had been in London until early 2001 – this was explicit in the filing made to the SEC in May 2001. However, it was then claimed that the decision of the directors to convert it from an active company to a passive holding company, personally managed by the company's remaining director, meant that the CoMI had moved to New York by the end of that year, with the Haymarket address being no more than a post box. The basis for this argument was that the director was by that time resident in Spain and carried out the majority of his business activity either in Spain or in New York.

Throughout this period the Bank had corresponded with the companies at the address of Criterion in Haymarket, London, had held meetings at those offices and believed them to be the office at which the companies' director worked. They had received letters from that office and the director had provided them with business cards with that address. The Bank also believed that the director was a UK resident at this time. The Judge concluded from evidence presented that there had been restructuring activity since 2001 and it was therefore incorrect to argue that the companies were passive. He also rejected arguments that the draft SEC filings for 2001 and 2002 handed to the Bank by the company were merely works in progress full of errors – these were in the nature of representations made by the company to the Bank and the Bank was entitled to place reliance on them.

The Judge placed weight on the affidavit of the trainee lawyer who had served the administration applications on the companies at the London address. She reported how on arriving at the building she was told by security guards that she would find the offices of the company on the second floor. She left the documents with the receptionist there, who confirmed that the offices were those of Ci4net and DBP and who identified the correct person to open them (one of the directors of DBP). This demonstrated that the address was more than a mere post box.

Following the judgment in *Re Brac Rent-A-Car International Inc*¹, the Judge concluded that the companies could have their CoMIs in England although they were registered in other jurisdictions. In his judgment, HHJ Langan then referred to the following recitals to the EC Regulation:

- (4) It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)
- (13) The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

The judgment in *Re Daisytek ISA Limited*² considered that in assessing where the CoMI was situated, it was necessary to weigh the scale and importance of the interests administered at the different locations, and that the most important 'third parties' to consider were the potential creditors. HHJ Langan added to this 'There seems to be no reason to suppose that the presumption that a company has its CoMI at the place of its registered office is a particularly strong one'. Applying this to the current case it was clear that the Bank, as principal creditor of the companies, regarded their CoMIs as being in London and, furthermore, the scale and importance of the activities carried on in London by comparison with the scale and importance carried on in Spain, New York or Jersey did not lead to the identification of anywhere that could beat London into second place.

With regard to the possibility of the CoMI changing, the Judge was of the view that the bar on forum shopping does not prevent a company from being able to change its CoMI in the situation of 'a restructuring of the business which takes place for sound commercial reasons long before the question of insolvency proceedings becomes live'. There does, however, need to be some degree of permanence to the CoMI and the idea of the CoMI changing with the movements of the companies' director is contrary to the policy underlying the EC Regulation.

The case of the US-registered Ci4net, where the Judge concluded that the CoMI of the company had not reverted to its registered office after becoming passive, needs to be contrasted with the case of Jersey-registered DBP. For the latter, the company asserted that it had been almost wholly administered

Notes

1 [2003] 1 WLR 1421.

2 [2003] BCC 562, paras 14–16; see also (2004) 1 *International Corporate Rescue* 27–29, 146–147.

by Mr Leech, a Jersey resident, up to his *desastre* and the borrowings were made by the Bank from its Jersey branch. However, the Judge concluded that the only activity of the company in the last three to four years had been with regard to its bank borrowings and all correspondence from the Bank (including bank statements), telephone calls and meetings had been with London. Of the remaining directors none were based in Jersey and two out of three were based at the London office. Accordingly, certainly since Mr Leech's bankruptcy and probably for some two years prior to that, the CoMI had been in London.

This judgment is important in demonstrating that creditors can assert their rights in insolvency to ensure that proceedings are opened in the jurisdiction they had understood to be the CoMI of the company even in cases where the company's management assert that the CoMI has changed. It also adds further weight to the conclusion that, in judging between competing centres of activity, it is the understanding of the potential creditors that should be critical in determining which is the true CoMI.