CASE REVIEW SECTION

Re Aim Underwriting Agencies (Ireland) Limited [2004] EWHC 2114 (Ch). Lancelot Handerson QC (sitting as a Deputy Judge of the High Court)

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Introduction

This case contributes to the relatively few existing but increasing number of cases decided under the EC Regulation on Insolvency Proceedings which came into operation on 31 May 2002. It concerned an application by the Company for an administration order pursuant to paragraph 10 of Schedule B1 to the Insolvency Act 1986. The main issue in the case was as to the location of the centre of main interests ('COMI') of the Irish incorporated Company.

The facts

The Company was relatively recently incorporated on 31 October 2002 under the Irish Companies Act 1982 and carried on business as a manager for the underwriting of insurance and reinsurance portfolios. It was a wholly owned subsidiary of a company incorporated in the UK, which itself had been placed into administration under paragraph 22 of Schedule B1 on 3 June 2004. The proposed administrators were the same as those appointed to the UK parent.

The Company had been incorporated in Ireland on the basis of a perception that the regulatory regime in Ireland was less stringent than in the UK. The purpose of incorporation was to continue the business previously carried on by the UK company. The Company underwrote reinsurance business in relation to commercial property and heavy haulage contracts, mainly emanating from South Africa, the Far East and India. It never underwrote any business emanating from the UK or Ireland.

The parent had operated from offices in London and Toronto with joint venture partners in Australia. The managing director of both the parent and the Company operated the businesses from London. He was solely responsible for authorizing and underwriting business on behalf of the Company. The Company had no employees itself but relied, for administrative support purposes, on one of the employees of the parent, who was based in Dublin and reported directly to the managing director. The business of the Company was effectively dependent on the UK parent which controlled the Company's bank accounts via the financial manager and managing director of the parent.

The UK parent performed management functions for the Irish subsidiary on a relatively informal basis. There were no formal contracts but it appeared that substantial sums might be owed by the Company to its parent. The financial affairs of the Company were in a state of some disarray but it appeared that the parent was the only known creditor of the Company in respect of unpaid management charges and reimbursements. The Company's only asset represented commission charged on sums paid into the insurance broker accounts ('IBAs') which were held in Dublin. On the basis of the information available it appeared that the Company was or was likely to become unable to pay its debts and that the insolvency requirement was therefore satisfied.

The issue

The Court was satisfied that the administration was likely to provide the most effective method to protect creditors and carry matters forward. The main issue before the court was therefore the question of jurisdiction and whether the presumption under Article 3.1 that the registered office of the company was the centre of its main interests was rebutted by the evidence.

The court considered *Re Daisytek ISA Ltd* [2004] BPIR 30 and the test which was applied in that decision which required the court to consider the scale of interests administered in the competing relevant places. The court noted the importance in that case of the principle that the COMI should be ascertainable by third parties, the most important of whom were creditors. The court also considered *Re BRAC Rent-a-Car International* [2003] 2 All ER 201 and the recent decision of the Irish High Court in

Eurofoods IFSC Ltd. which cited the two English cases with approval.

In considering the issue of where the COMI lay, the court referred to six factors relied upon by Counsel for the Company, placing particular importance on the sixth: (1) the Company was set up solely for the purpose of carrying on the UK parent's business; (2) the business was controlled and managed entirely from London; (3) all underwriting business was carried out by the London-based managing director or under his authorization and the documentation relating to that business was stored in London; (4) the Company relied upon the financial support of its parent, which effectively acted as a banker for its subsidiary; (5) the only activity of any substance which took place Ireland was the operation of the IBAs carried out by an employee of the parent based there; (6) the main and only known creditor was the parent, which evidently knew that the UK was the base of the relevant commercial operations.

In considering the evidence as a whole, the Court was left with no doubt that the COMI was the UK rather than Ireland and that the Court therefore had jurisdiction to make an administration order in the terms sought with the proceedings being main proceedings within the meaning of the EC Regulation.

Conclusion

On the facts of the particular case and in the absence of any challenge, the Court had little difficulty, it seems, in reaching its conclusion. However, one obiter comment may be of interest for future cases. The Court noted that had there been evidence of other creditors elsewhere in the world, it might have been necessary to consider the issue a little more closely, although the Court had little doubt on the facts that the same result would have been reached. The other interesting point which arises in this case is that the Court was not concerned with the fact that the motivation for incorporation in Ireland was to take advantage of a perceived less stringent regulatory regime. The more important factor was as to the position of creditors and where on an objective basis they understood the COMI to be.