

***Malcolm Brian Shierson (trustee in bankruptcy of Martin Vlieland-Boddy) v Clive Vlieland-Boddy* – EC Regulation on Insolvency Proceedings – Shifting the COMI after Debts are Incurred – Bankruptcy Proceedings: Court of Appeal Decision**

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Introduction

This case review is further to my previous case review of the judgment of Mr Justice Mann in the High Court.¹

Since Council Regulation (EC) No 1346/2000 on Insolvency Proceedings ('the Regulation') came into force in the UK on 31 May 2002, the meaning of 'centre of main interests' ('COMI') has been frequently considered by the courts, as there is no definition of the term within the Regulation itself. The situation of the COMI is crucial in determining which EC country has jurisdiction to open main insolvency proceedings in cross-border disputes. In the Court of Appeal in *Malcolm Brian Shierson (trustee in bankruptcy of Martin Vlieland-Boddy) v Clive Vlieland-Boddy*² ('*Vlieland-Boddy*'), the issue of change of COMI in bankruptcy proceedings arose on appeal from the decision of Mr Justice Mann. He had reversed the decision of the Registrar to accept jurisdiction under the Regulation and make a bankruptcy order against Mr Vlieland-Boddy ('the Debtor').

Mr Justice Mann considered whether or not the COMI (or alternatively an establishment) of the Debtor could, or indeed should (as a matter of policy), remain situated in England or Wales or was now situated in Spain. He allowed the appeal of the Debtor and made the following findings:

- (i) the relevant time for assessing the COMI of the debtor in accordance with the Regulation is the time of the opening of proceedings, which is the date on which the relevant order is made;
- (ii) there had been a change of COMI from England to Spain prior to the opening of proceedings;
- (iii) the debtor did not have an establishment in England or Wales.

The Court of Appeal was concerned with reviewing the above findings in order to determine whether the centre of the Debtor's main interests was in fact within the territory of the United Kingdom at the relevant date and if not, whether the debtor possessed an establishment here.

The Regulation

There is no definition of COMI in the Regulation. References to the COMI are made primarily in Article 3:

3.1 the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

3.2 where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

There is further reference to the COMI and the need to prevent debtors from seeking the most favourable forum in the Recitals to the Regulation, see especially Recitals 4, 12 and 13.

An establishment is defined in Article 2(h) of the Regulation: 'establishment shall mean any place of

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1 [2004] EWHC 2752 (Ch) and see (2005) 2(1) *International Corporate Rescue*.

2 [2005] EWCA Civ 974.

operations where the debtor carries out a non-transitory economic activity with human means and goods’.

Issues in the Court of Appeal

The Court of Appeal essentially considered two questions: (i) whether, on the facts found by the bankruptcy court in this case, the centre of the Debtor’s main interests was within the territory of the United Kingdom at the relevant date and (ii) if not, whether the Debtor possessed an establishment here, so as to found jurisdiction in respect of territorial insolvency proceedings. Each question turned on how much weight should be given to the perception of creditors as to the Debtor’s COMI at the time that credit was extended and whether or not the court was prepared to accept that a Debtor is free to change his COMI between the time at which credit is extended and the opening of insolvency proceedings.

(i) COMI in the UK?

Forum shopping

One of the predominant policy reasons for bringing into force a Regulation to govern the taking of jurisdiction in cross-border disputes must be to avoid forum shopping. This is the purpose of the COMI concept. The situation of the COMI necessitates an analysis of many aspects of a debtor’s life and is harder to shift than mere assets or a place of business.

The main reasons why the courts will not usually interfere with a deliberate change of COMI are: (i) the use of COMI as a concept is enough to prevent forum shopping, because a change of COMI is difficult to achieve, (ii) change of COMI is not forbidden in the Regulation, (iii) the Regulation is premised on the basis that the insolvency regimes of other Member States are satisfactory and adequate and (iv) the courts will be astute to detect attempted changes of COMI which are not genuine.

The Court of Appeal did not consider that recital 4 of the Regulation and the concept of the prevention of forum shopping could be read so as to impose any restrictions on the ability of a debtor to choose where he administers his interests. Instead, the court must take on the responsibility of looking critically at the facts which are said to give rise to a change in the COMI in circumstances where there is suspicion that the debtor has deliberately sought to change his COMI at a time when he is insolvent, in order to alter the insolvency rules that will apply to him in respect of his existing debts.

Relevant time

Lord Justice Longmore and Sir Martin Nourse held that the relevant time for determining the COMI is the date on which a judgment given which opens the proceedings becomes effective pursuant to the Regulation. In bankruptcy proceedings this will be the date on which the bankruptcy petition is served on a debtor after an order is made to serve that party out of jurisdiction. The date of service is the date on which the judgment opening proceedings becomes effective. Lord Justice Chadwick’s view was that the relevant time for determining the position of a debtor’s COMI is the date of the hearing of the petition, the hearing of an application to serve a party out of jurisdiction or at a hearing for interim relief prior to the petition hearing. Advocate General Jacobs went further than the Court of Appeal in his recent opinion in *Eurofood IFSC Ltd*³ to state that the relevant time for the determination of the COMI may be the date of the presentation of a petition where the domestic law of a country includes a relation-back principle.

Evidence of COMI

Mr Justice Mann had given some guidance on the extent of the evidence necessary to show that there has been a change of the COMI of an individual. He accepted that a change of COMI would inevitably occur due to the subjective choices of the debtor in question, but that the ultimate analysis as to whether, in fact, the COMI has changed is an objective test. The Court of Appeal approved this objective test.

It is important to have regard to not only what the debtor is doing, but also to what he would be perceived to be doing by an objective observer, because the court must take into account the need for the COMI to be ascertainable by third parties. Having said that, it is certainly not possible to fix the COMI at the place where debts were incurred. A debtor must be free to relocate his home and business. It is a necessary consequence of this freedom, that a debtor may relocate for a self-serving purpose at a time when he is insolvent. In suspicious circumstances, the court will need to be satisfied that the change is based on substance and not illusion and that the change has a necessary element of permanence: *Re Ci4net.com Inc and another*.⁴ The court will also consider historical facts that have led to the position as it is at the time for determination.

On the basis of the above principles it was held that Mr Justice Mann was entitled to reach the conclusion that the Debtor’s COMI had moved to Spain. He had

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3 Case C-341/04, 27 September 2005, See § 47–95.

4 [2004] EWHC 1491.

considered the grounds for suspicion and the fact that without testing the evidence by cross-examination, it would be unfair to disbelieve the Debtor's credible evidence. Mr Justice Longmore raised the further point that if the correct standard of proof to apply is that of a good arguable case that the jurisdictional requirements apply (this argument was not before the court), cross examination would rarely be necessary in coming to such decisions. However, Sir Martin Nourse questioned whether an English court could apply the lower standard of proof without obtaining a ruling from the European Court to that effect.

The Court of Appeal did not consider the decisions of *Skjevesland v Geveran Trading Company Limited*⁵, *Re Daisytek* and others⁶ or *In the Matter of Eurofoods IFSC Limited*⁷ to be of assistance, as the factual questions arising in *Vlieland Boddy* had not arisen in these cases and had not previously been before the Court of Appeal.

(ii) Establishment in the UK?

The Registrar had concluded, in the alternative, that the Debtor had an 'establishment' in England and Wales on the basis of:

- (a) the Debtor's interest in a company within the jurisdiction and;
- (b) the Debtor's interest in a property within the jurisdiction.

In reliance upon the definition of establishment in Article 2(h) of the Regulation, Mr Justice Mann had disagreed with the Registrar on both (a) and (b) above. With regard to (a) above, he held that simply holding a directorship and a shareholding in a company is not enough to amount to a 'non-transitory economic activity with human means and goods', because any 'activity' would be on behalf of the company and an interest in a company did not amount to a personal 'place of operations'. As regards (b) above, a beneficial interest in a company that holds property in a jurisdiction is not evidence of a personal establishment within that jurisdiction.

The Court of Appeal agreed that simply holding a directorship would not be enough to found jurisdiction under article 3.2 of the Regulation. However, the Debtor's beneficial interest in a company (the 'Company') was considered in further detail. Mr Justice Mann had not ruled out the fact that the

Company might be a sham or a front for the Debtor. The Court of Appeal was suspicious of the fact that a property registered in the joint names of the Debtor and his wife had been transferred for no consideration to the Company. The Company had also featured several times in the Debtor's affairs. The assertion by the Debtor that he had no connection with the Company was not credible. With reference to the Virgós-Schmit Report, it was held that the owner of a property carries out a non-transitory economic activity with human means and goods for the purposes of the Regulation and that, on the evidence the Company that owned the property was a front or nominee for the Debtor. Therefore, the Debtor had an establishment within the jurisdiction at the time that the Registrar had opened insolvency proceedings.

Conclusion

I previously noted⁸ that assessment of the COMI at the date of the judgment or order leaves a period of time between the date on which debts are incurred or indeed, between the presentation of a bankruptcy petition or winding up petition and the date on which an individual is made bankrupt or a company is put into liquidation. This period of time might be used in bad faith by a debtor, in order to attempt to move its COMI to the most lenient jurisdiction. The decision that the date for assessment should be the date of service of the petition, which gives effect to an order to serve out of jurisdiction, goes some way to resolving this issue. However, it does not go as far as the recent opinion of the Advocate General,⁹ in which he accepts that where there is a rule of national law deeming the winding up to commence from the date of presentation of the petition, as we have in England and Wales, it follows that the COMI should be ascertained as at the date of presentation of the petition. Therefore, the date of presentation must be the appropriate date in respect of the English jurisdiction. The decision of the European Court on this matter is eagerly awaited.

The decision in the Court of Appeal in *Vlieland-Boddy* demonstrates that the evidence of a debtor will be closely scrutinised by the court where a COMI appears to have changed in suspicious circumstances. Companies that remain in the jurisdiction which are shams or nominees for a debtor will still amount to an establishment.

Notes

5 [2002] EWHC 2898.

6 [2004] BPIR 30.

7 [2005] IL Pr 2.

8 See (2005) 2(1) *International Corporate Rescue*.

9 In *Eurofood IFSC Ltd* Case C-341/04.