Court of Appeal provides guidance on compan y's centre of main interests test under the Reca st EU Regulation on Insolvency Proceedings (Melars Group Ltd v East-West Logistics LLP)

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Restructuring & Insolvency analysis: The Court of Appeal dismissed the appeal against the High Court's decision to set aside an earlier winding-up order on the basis that the debtor's centre of main interests (COMI) was not in the UK. The court emphasised the importance of the statutory presumption that a company's COMI is in the place of its registered office. While the High Court was not correct to invoke a hypothetical third party creditor who might have ascertained objective facts to displace the presumption, in the circumstances none of the facts presented were sufficient to rebut the presumption and establish that the debtor company's COMI was in the UK. Written by Tamer Bahgat, partner, Phil Taylor, partner, Anna Nolan, counsel and Luke Hiller-Addis, associate at Alston & Bird.

East-West Logistics LLP v Melars Group Ltd [2022] EWCA Civ 1419

What are the practical implications of this case?

The judgment provides a helpful outline of key principles relating to the determination of a company's COMI for the purposes of the Recast EU Regulation on Insolvency Proceedings 2015/848 (the 'EU Regulation'). In particular, the judgment clarifies the meaning of 'ascertainable' evidence for the purposes of rebuttal of the statutory presumption under the EU Regulation that a company's COMI is in the place of its registered office.

The judgment will be of interest to parties considering challenges to insolvency proceedings commenced under the EU Regulation on the basis of a debtor's COMI, with it being clear that factors relating to COMI need not be in the public domain to displace the statutory presumption. While the EU Regulation only has effect in the UK where main proceedings were opened before the end of the Brexit transition period, the guidance on COMI may be helpful in interpreting the equivalent provisions of the EU Regulation as imported into English law by the European Union Withdrawal Act 2018 and amended by the Insolvency (Amendment) (EU Exit) Regulations 2019, SI 2019/146.

What was the background?

In July 2016, East-West Logistics LLP (the 'Petitioner') presented a winding-up petition in London in relation to Melars Group Ltd (the 'Company'), based on a July 2016 BVI default judgment of US$657,839.18. At the time the petition was presented, the Company's registered office was in Malta. The petition was heard in July 2020 by Deputy Insolvency and Companies Court Judge Baister, who made a compulsory winding-up order in respect of the Company, having found that its COMI was in the UK (*East-West Logistics LLP v Melars Group Ltd* [2020] EWHC 2090 (Ch)).

On appeal, Mr Justice Miles set aside the winding-up order, finding that the court had applied the wrong test in ascertaining the Company's COMI. Miles J's decision to allow the appeal (see News Analysis: High Court clarifies the right approach to determining a company's centre of main interests in the context of pre-Brexit corporate insolvency (Melars Group Ltd v East-West Logisitics LLP)) set out guidance on the approach to ascertaining a company's COMI for the purposes of Article 3(1) of Regulation (EU) 2015/848, EU Regulation.

The Petitioner subsequently appealed Miles J's decision, arguing (i) that Judge Baister's original decision was correct in regarding the Maltese registered office of the Company as a mere 'letter box' and therefore that the presumption under Article 3(1) of the EU Regulation (that, in the absence of proof to the contrary, a company's COMI is located in the place of its registered office) should have been given little or no weight, and (ii) that Miles J was incorrect in limiting the determination of the Company's COMI to facts which would have been apparent to a hypothetical typical third party dealing with the Company.

What did the court decide?

The judgment affirmed the importance of the presumption under Article 3(1) of the EU Regulation. Provided a company has not moved its registered office to another EU Member State within three months of the request to open insolvency proceedings, the presumption is the point from which the court must start its inquiry. The question for the court (as indicated by Article 3(1) and *Interedil Srl v Fallimento Interedil Srl* [2011] ECR I-9915, [2012] BUS LR 1582 (not reported by LexisNexis®UK)) is then whether the presumption is rebutted by 'proof to the contrary', being objective and ascertainable evidence which shows that the company in fact conducts the administration of its interests on a regular basis in a different location from that of its registered office. Lord Justice Snowden agreed with Miles J's view that a lack of evidence of a company carrying out activities at the place of its registered office does not allow the court to ignore or disregard the presumption; instead, the court is entitled to treat the presumption as more easily rebutted in such circumstances.

Lord Justice Snowden provided guidance on the 'ascertainability' of evidence relating to a company's COMI, citing the decisions of the Court of Justice in the Court of Justice in *Leonmobili Srl v Homag Holzbearbeitungssysteme GmbH*, Case C-353/15 EU:C:2016:374 (24 May 2016) and *MH v OJ*, Case C-253/19, [2021] 1 WLR 2498. Contrary to Miles J, Snowden LJ considered that the court should not invent a hypothetical typical third-party creditor and form a view on what would or would not have been apparent to that creditor. The court should not discount factors relevant to a company's COMI on the basis that those factors were not in the public domain. Snowden LJ cautioned against adopting too restrictive a test in terms of the evidence that may be considered by the court, giving the hypothetical example of a company having entered into ten separate commercial contracts with ten separate counterparties, each negotiated and signed by the same representative of the company in the same office and together representing a material proportion of the company's commercial interests. The exclusion of the evidence of those contracts on the basis that the terms of the contracts were not public or ascertainable by a typical creditor would not be a result intended by the framers of the EU Regulation and is not mandated by the decisions of the Court of Justice referred to in the judgment.

Snowden LJ also emphasised the need to treat with care the distinction drawn by Miles J between 'operations of a commercial business' and the 'administration of interests' (the location of the latter being, per Miles J's judgment, a key determinant of a company's COMI). While the distinction is a 'useful analytical tool', it should not be regarded as a new test to be overlaid on the definition of COMI in Article 3(1) EU Regulation.

In other key respects, Snowden LJ enthusiastically agreed with Miles J's judgment. It was 'obviously right' to hold that the Company's entry into English language contracts governed by English law said nothing about where the Company conducted the administration of its business; it was 'entirely right' to place little or no weight on the fact that proceedings had previously been brought against the Company under English law in London; it was 'obviously correct' that the Company's use of a bank account in England in 2018 could not illuminate where its interests were being administered in 2016; and Snowden LJ would 'entirely agree' that the domicile of the Petitioner cannot logically be connected with where the Company administered its interests. The appeal was therefore dismissed.

Case details:

- Court: Court of Appeal, Civil Division
- Judges: Lord Justice Lewison, Lord Justice Snowden and Sir Launcelot Henderson
- Date of judgment: 28 October 2022

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