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Case No: 8703 OF 2011

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2012

IN THE MATTER OF OFFICE METRO LIMITED

Before :

MR JUSTICE MANN

- -

Between :

Trillium (Nelson) Properties Limited	**Petitioner**
- and -	
Office Metro Limited	**Respondent**

- -
- -

Lucy Frazer (instructed by **Reed Smith LLP**) for the **Petitioner**
Blair Leahy (instructed by **Weil Gotshal & Manges LLP**) for the **Respondent**

Hearing dates: 8th February 2012

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MANN

Mr Justice Mann :

Introduction

1. This is a winding-up petition in which the principal issue is whether or not Office Metro Limited ("the Company") can be wound up in this jurisdiction in the light of the fact that, despite its being an English registered company, its centre of main interest ("COMI") is in Luxembourg. The question which has to be determined is whether or not it has an "establishment" in this country for the purposes of the Insolvency Regulation.

The facts

2. The Company was formerly named Regus Limited and was a part of the Regus group, and was incorporated in England and Wales on 17th April 1998. Its principal activity was to hold shares and to provide funding facilities to other companies in the Regus group of companies. It seems to have carried out no trade of its own. Its registered office was at 3000 Illswood Drive, Chertsey, Surrey ("the Chertsey address"). It entered into some 46 guarantees for English properties and a number of others abroad (in 13 different countries). One of the landlords to whom a guarantee was given in respect of a property in this jurisdiction was Trillium (Nelson) Properties Limited ("Trillium"), the current petitioner.

3. In or about March 2010 the tenants under that lease told Trillium that they were in financial difficulties and sought to agree a variation. This was refused. The tenant went into administration on 14th June 2010 and the June 2010 rent was not paid. Since the Company did not pay the rent either, Trillium petitioned to wind it up. Payment of the rent was then made by solicitors acting for the Company on 19th July 2010. The September quarter's rent was paid, as was the December 2010 and March 2011 rent.

4. By May 2011 the tenant had gone into liquidation and on 12th May 2011 Trillium received notice of disclaimer from the liquidators. Under the lease Trillium was entitled to require the Company to accept a lease of the new premises, and a request was made of the Company accordingly. The June 2011 rent was paid by the Company, by which time it had changed its name. However, the September 2011 rent was not paid and that rent ultimately became the present petition debt.

5. The petition as presented and served pleaded in the petition that the EC Regulation on Insolvency Proceedings would apply and that those proceedings would be main proceedings as defined in Article 3 of the Regulation. In response to that the Company took the point that it had already been the subject of insolvency proceedings in Luxembourg and that those proceedings were in fact main proceedings because its COMI had shifted. Mr Yann Barden had been appointed as a Luxembourg trustee in bankruptcy on 21st September 2011. The present petition was presented on 5th October 2011.

6. The change of COMI came about in 2008. With effect from 14th October 2008 the Company, by resolution, transferred its main headquarters and place of administration to Luxembourg. It retained (it had to) a registered office (at the Chertsey address) but had no interest in any part of those premises either as a tenant or as a licensee. It

maintained no employed staff in those premises (it had in fact never had an employee at those offices), or indeed at that time in the UK. It rented premises in Luxembourg, and was granted a Luxembourg company registration number. Mr Barden believes that all board meetings since then have been held in Luxembourg. Since 1st January 2009 the Company has had no employees at all. So far as any activities have to be conducted for the Company in England, they are conducted by a service company in the Regus group, namely Regus Group Services Limited. That provides, when necessary, a number of services, including legal, financial, marketing and other administrative services, as it does to all Regus group companies globally. It has provided accounting and legal services to the Company and some limited administrative services, including forwarding post which arrives at the registered office to Luxembourg. Various contacts took place from time to time between Trillium on the one hand and Mr Stephen Wetherall, who is group legal counsel employed by the service company; he is the person who dealt when rent needed paying. Other accounting services are provided to the Company out of Luxembourg by employees of a Luxembourg Regus company.

7. In the light of those facts, it is accepted in these proceedings that the COMI of the Company is now (and was at the material time in 2011) Luxembourg. In the circumstances the Luxembourg insolvency proceedings are the main proceedings under the Regulation, and any winding-up in this jurisdiction can only be secondary proceedings. On 28th November 2011 the present petition was amended to plead that the proceedings would be secondary proceedings, and the reference to main proceedings was struck out.

The issues in this petition

8. As observed above, since the Company's COMI is in Luxembourg, the petitioner is only entitled to a winding-up order if it can be demonstrated that the Company had an "establishment" in this jurisdiction at a relevant time. The issues that arise are therefore as follows:

    i) What is the relevant time for judging whether an establishment exists. Is it

        a) At some time before the petition is presented, and in this case when the transaction underlying the petition debt was entered into?

        b) At the date of the petition?

        c) At the date of the amendment of the petition?

    ii) At the relevant date did the Company have an establishment here within the meaning of the Regulation?

    iii) If so, is there a good reason for winding up the Company in this jurisdiction?

Did the Company have an establishment after 2008? – the facts

9. Before the move to Luxembourg the Company had its registered office here. The evidence does not really state what actual activities were carried on here, but it does state that board meetings and other central functions were moved to Luxembourg.

However, the important thing is what activities were carried on here since that date. The relevant state of affairs, on the evidence, is as follows:

i) 4 bank accounts were maintained here – 2 sterling accounts (one a blocked account which could only be operated with the consent of Royal Bank of Scotland), one US dollar account and one foreign account.

ii) The Chertsey office remained its registered office under English company law.

iii) Demands under the guarantees were sent there, and they produced a response so they were apparently referred to the right person.

iv) There was no physical presence of the Company at the Chertsey office, and the Company had no lease or licence of it which permitted occupation.

v) The guarantee payments were made from a UK sterling account.

vi) Dealings in relation to such matters, apart from any formal demands sent to the registered office, were handled by the Regus service company pursuant to the arrangement referred to above. Mr Wetherall, Group Legal Counsel, was the individual personally involved. There is a certain amount of email traffic with him. It is not clear what else he did for the Company, but it seems likely that he did analogous work for the company in relation to other landlords whose leases were guaranteed. His work also involved dealing for other companies in the group. He seems to have been based at the Chertsey office.

vii) Accounting services are "predominantly" (Mr Baden's word) provided to the Company out of Luxembourg. However, since there are filing requirements in the UK, there are various things which have to be done in this jurisdiction, and accountants employed by the services company (in Chertsey) and another group company (Regus Global Management Centre SA – based in Switzerland) provide services related to that. Deloitte Luxembourg have also provided accountancy services to the Company.

viii) The Company's main assets were shares in its subsidiaries, and indemnities (presumably) from group companies whose rent was paid by the Company under relevant guarantees. Its interest in intellectual property rights had been transferred to another group company for consideration which was discharged by that other company assuming a liability under a lending facility.

ix) While payments to the petitioner were effected by Mr Wetherall in England, the decision to make the payments was taken in Luxembourg. Mr Baden's evidence is that payment was made from an English account because to do so was more straightforward and cheaper than transferring money from Luxembourg. There were apparently 5 such payments, one of which actually came from the Company's English solicitors in order to procure the dismissal of the previous winding up petition in 2010; it is not apparent where the money came from to pay those solicitors, but it is more likely to have come from a UK sterling account.

The meaning and significance of "establishment"

10. This concept appears in the Regulation as being a pre-requisite for secondary insolvency proceedings:

> "Article 3
>
> … 2 Where the centre of a debtor's main interests is situated within the territory of a Member State, the court 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 other proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State."

11. The concept is defined in Article 2(h):

> "(h) 'establishment' shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."

12. That is the definition which has to be applied to the facts of this case to see if Office Metro had an establishment in this jurisdiction once its COMI had moved to Luxembourg, which it is common ground it had by the date of any of the candidates for the relevant date.

13. The parties each relied on various authorities and other pronouncements as providing guidance on how to apply that test. Miss Frazer pointed to the following facts and matters.

14. The Virgos-Schmit report provides some guidance at paragraph 70:

> "For the sake of an overall consensus on the Convention, those States agreed to abandon the presence of assets as a basis for international competence provided that the concept of establishment is interpreted in a broad manner but consistently with the text of the Convention. This explains the very open definition given in Article 2(H).
>
> In the Convention, the mere presence of assets (e.g. the existence of a bank account) does not enable local territorial proceedings to be opened. The presence of an establishment of the debtor within the jurisdiction concerned is necessary. "

Miss Frazer pointed to the reference to the need to interpret broadly. I agree that that is right, but in the sense that it needs to be interpreted realistically, bearing in mind that it is a concept operating in a commercial context. It is not a purely technical matter. It is the test by reference to which it is held proper that insolvency proceedings be commenced, not some sort of box-ticking exercise.

15. The report goes on:

"71. For the Convention on insolvency proceedings, 'establishment' is understood to mean a place of operations through which the debtor carries out an economic activity on a non-transitory basis, and where he uses human resources and goods.

Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional.

The emphasis on economic activity having to be carried out using human resources shows the need for a minimum level of organisation. A purely occasional place of operations cannot be classified as an 'establishment'. A certain stability is required. The negative formula ('non-transitory') aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor.

The rationale behind the rule is that foreign economic operators conducting their economic activities through a local establishment should be subject to the same rules as national economic operators as long as they are operating in the same market. In this way, potential creditors concluding a contract with a local establishment will not have to worry about whether the company is a national or foreign one. The information costs and legal risks in the event of insolvency the debtor will be the same whether they conclude a contract with a national undertaking or a foreign undertaking with a local presence on that market.

Naturally, the possibility of opening local territorial insolvency proceedings makes sense only if the debtor possesses sufficient assets within the jurisdiction. Whether or not these assets are linked to the economic activities of the establishment is of no relevance."

16. The following significant points can be extracted from that passage:

i) There has to be some activity external to the company itself, and which is apparent to the outside world. Internal activities which do not operate on "the market" are not sufficient.

ii) There has to be something which amounts to a <u>place</u> of operations. Operations by themselves, not linked to some sort of location, are not sufficient. Presumably it is intended that liability to secondary proceedings should depend on the possibility of identifying such a physical location. Thus a collection of roving salesmen, without some sort of additional location from which the activities could be said to be conducted, would not be sufficient.

17. Next, Miss Frazer turned to a European decision.

> " … the existence of an establishment must be determined, in the same way as the location of the centre of main interests, on the basis of objective factors which are ascertainable by third parties." – *Interedil Srl v Fallimento Interedil Srl* Case C 396/09 at para 63. She placed significant stress on this and said that what matters is how things would appear to a third party and what sort of impression that third-party would get – would such a person think there was an establishment

here? I do not think that this is thrust of what is being said in this statement. It is referring to the facts underpinning the absence or presence of establishment, and how they are to be viewed. It is not saying that the question of whether there is an establishment must be decided by reference to what third parties would think. The question of whether or not there is an establishment is a matter of law, not a question of what third parties would think.

18. Miss Frazer submitted that so far as the "human means" is concerned, it was not necessary for the humans in question to be employees of the company. In Germany the case of *BenQ* held that it was sufficient if the humans were employed by another group company (see the commentary on the Regulation by Moss, Fletcher and Isaacs, second edition at para 8.44). Accordingly, in the present case it does not matter that services were supplied by a lawyer employed elsewhere in the group or by third-party professionals. I agree with her. If “human means” are used, it matters not whether they are employees of the company, employees of another group company, or independent contractors. All those categories of people are human instruments through which economic activity can be conducted.

19. I also agree that the word "goods" can and should be interpreted more widely than "chattels". Moss et al at para 8.45 point out that the word is a mistranslation of French and German words and would be better rendered as "assets". In those circumstances money and land would also qualify.

When the establishment has to be established

20. At the hearing Miss Frazer took a point about the point in time at which one had to establish the existence (or otherwise) of an establishment. She submitted that the date at which the existence of an establishment had to be tested was the date of the transaction in question, and not the later dates of the opening of proceedings or the making of an order. If there was an establishment here at that date then it did not matter that there was not one at the date of the presentation of the petition (or other the opening of insolvency proceedings). Miss Leahy for the liquidator said the relevant date was the date of the opening of the insolvency proceedings – here, the presentation of the petition, or alternatively the date of the amendment to plead secondary proceedings rather than main proceedings. Since there is no material difference on the facts between those latter two dates, it will be useful to take just the former (the date of the presentation of the petition) as the counter-date to Miss Frazer’s.

21. Miss Frazer’s bold submission seems to fly in the face of the wording of Article 3. Article 3(1) provides that:

> “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.”

That seems to refer to a single moment in time, namely the time when the proceedings are opened. This analysis is supported by *Interedil* at para 55:

> “It must be inferred from [material cited] that, in principle, it is the location of the debtor's main centre of interests at the date

> on which the request to open insolvency proceedings was lodged that is relevant for the purpose of determining the court having jurisdiction."

Were it otherwise, and were it capable of referring to a number of different points of time, the Article would be unworkable because there could be a number of main proceedings, which is contrary to the purpose of the Regulation. That refers to the time for determining COMI, but it would be odd if it were different for determining whether a debtor has an establishment or not. Article 3(2) seems to follow the same theme – another States' courts can open proceedings only if the debtor "possesses an establishment". That suggests a single point of time too, and there is nothing in the wording which suggests that one can look back to the date of a previous transaction. So the wording of the Regulation seems to be against her.

22. Nonetheless, Miss Frazer relies on principle and authority. So far as principle is concerned, she submits that the purpose of Article 3(2) can only be satisfied if a broad interpretation is applied to the date when the test has to be applied. That enables a third-party dealing with the debtor to know where he/she stands in terms of insolvency proceedings in relation to his or her transaction and also prevents undesirable forum manipulation by a debtor who closes down all activity and moves COMI or establishment between the date of the transaction giving rise to the claim and attempts to use that claim in insolvency proceedings. In this context she points to the undesirable effects of forum shopping which are referred to in recital 5 to the Regulation.

23. Then she relies on the account of an Estonian case (it cannot be treated as a report) called *Re AB* appearing in Insolvency Intelligence for April 2007 at page 43 which reports the case as proceeding on the basis that:

> "If the debtor had an establishment in the past which met the requirements, and there were assets left from that activity, that should be considered sufficient for the opening of secondary proceedings."

24. She also pointed to an English case called *Re Energea Umwelttechnologie GmbH,* apparently heard in Leeds District Probate Registry on 10th March 2009, of which no transcript is available and the only account of which appears in Marshall on Cross Border Insolvency, Ed Jennifer Marshall at para 2.083/3/2. The editor observes that it seems to be inherent in that decision that a historical establishment, rather than a current establishment, was sufficient for the purposes of opening secondary proceedings, though she is critical of that reasoning.

25. Last, she points to the views of one of the editors (but only one, namely Professor Fletcher) of Moss et al, recorded at para 8.144, to the effect that a creditor should not be allowed to avoid an insolvency jurisdiction by deciding to remove an establishment. He suggests that some form of estoppel should prevent that. It is plain from the preceding paragraph that this point was the subject of some editorial disagreement within the publication itself.

26. I do not think that Miss Frazer can be right about this. One could probably construct some policy reasons for allowing insolvency proceedings to be entertained if there

was an establishment at the date of a transaction giving rise to a debt, on the footing that a creditor may have relied on that connection with the jurisdiction at the time and should not be deprived of the advantages of that jurisdiction by virtue of acts which are wholly those of the debtor (the removal of the trappings of establishment) by the time insolvency comes about. However, I doubt if they would be very strong, and it is not possible to identify them in the Regulation. The Regulation seems to say something else. The authorities she relies on are neither clear nor strong. The Estonian case may be a case on the facts – there was still enough of a whiff of an establishment. But if it is stating a proposition which is to be taken at face value it is, with respect, wrong. If all that is left is assets then that is not enough to found establishment. The *Energea* case is not reported with enough clarity to allow reliance on it, but if it really was held that a historic establishment was sufficient then in my view it was plainly wrong, and I agree with the editor who expressed that view. Other than Prof Fletcher, no other editor or commentator supports Miss Frazer's view. Prof Fletcher articulates policy reasons, and urges the intervention of an "estoppel-like doctrine" without identifying that doctrine. I am afraid I cannot identify that doctrine, and Miss Frazer did not attempt to do so either.

27. In the circumstances I find that the relevant date for determining the existence of establishment is the date of the presentation of the petition. I do not need to consider whether, on the facts of this case it should be the date of the amendment to plead establishment, because the facts were the same at both dates.

Was there an establishment at the date of the presentation of the petition?

28. The first relevant inquiry is where the "place of operations" might be. There is only one candidate – the Chertsey office. It is therefore necessary to consider whether, at the date of the presentation of the petition, Office Metro carried out

    i) economic activity there;

    ii) with human means and assets;

    iii) in a manner which was non-transitory.

29. The activities which were done appear above. The Company itself did not occupy the Chersey premises – it had neither a lease nor a licence of the premises, and apparently did not have any means which would be the physical manifestation of occupation either. That is not fatal, but it does not make Miss Frazer's task easy.

30. Nonetheless, in my view the Company did do some things from that place. When Mr Wetherall was dealing with the affairs of the Company with which he dealt, he, or the service company, must have been acting as agent for Office Metro. For those passages of time the Company was doing something there. It was also doing it with human means.

31. However, I do not think that it amounts to economic activity within the meaning of the Regulation. By the time of the petition it seems that the only "activity" (and I deliberately put it in inverted commas) was to sit there being liable on guarantees, sometimes paying out on them, and perhaps doing whatever else was necessary to keep itself alive in terms of compliance with formalities such as company filings. Mr

Wetherall (or perhaps his staff) occasionally sought legal or accounting advice, but there is no evidence it was doing anything else. Being in a state of liability, with the need sometimes to pay out on that liability and take a bit of advice, is not an economic activity for the purposes of the Regulation. Neither is seeking accounting or legal assistance on other matters. Forwarding post (which is said to have happened from Chertsey) is not an economic activity carried on there. It is something which goes on so that someone can carry it on somewhere else. Utilising the guidance given in the Virgos-Schmit report, it is not conducting activities on the market.

32. The activities necessary for compliance (filing and so on) are not, apparently, carried out at the Chertsey office. They are therefore not carried out at the only candidate for a place of operations.

33. Even if I am wrong as to whether Office Metro's residual activities are economic activity for the purposes of the Regulation, I do not consider that they are non-transitory. They are not a consistent activity. The activities involved in paying up on guarantees do not have the character of a consistent business or business-type activity. They arise as and when needed, and were all going well in the underlying group they would not arise at all. The concept of "establishment" is the one chosen as the touchstone of sufficient presence to justify the opening of insolvency proceedings. There are 3 ingredients for these purposes – (i) a place where things happen, and (ii) sufficient things (iii) of sufficient quality happening there. The concept of non-transitoriness goes to the third of them. In my view the converse of something being transitory is not confined merely to things which are "fleeting" (to use one English synonym) but is also intended to encapsulate such things as the frequency of the activity; whether it is planned or accidental or uncertain in its occurrence; the nature of the activity; and the length of time of the activity itself. When measured against all these elements I consider that the activities of procuring payment on the guarantees is transitory (or not non-transitory) for the purposes of the Regulation. This is to a large extent a value judgment in respect of which one cannot be prescriptive of the elements to be fulfilled (or not fulfilled), but in my view it is plain that if the activities were otherwise economic activities they would, for these purposes, be "transitory" for the purposes of the Regulation.

Discretion

34. The last thing of which I would need to be satisfied before allowing winding-up relief here is that it would be proper to do so. It is common ground that it is necessary for secondary proceedings to have some useful purpose. There is little point in starting secondary proceedings if they add nothing to the primary purpose. In the light of my decision on the non-existence of an establishment it is not necessary for me to come to a conclusion on this, but I heard argument and will express my views, but only briefly.

35. Miss Frazer relied on three points:

    i) There was a case for saying that some prior transactions should be investigated to see if they could be set aside, and time limits for that were more favourable in this jurisdiction than in Luxembourg.

ii) Wrongful trading (which needed investigating) required aggravated negligence in Luxembourg, but not in this jurisdiction.

iii) There are concerns as to whether the Luxembourg liquidator is prepared to act promptly enough because it is said he has not been sufficiently responsive to requests for activitiy.

iv) It is less easy to engage with a liquidator in Luxembourg.

36. As to the first two, the evidential position is not entirely satisfactory because of the haste with which the evidence on the point has come in. The opportunity for challenging preferences where connected persons are involved, and transactions at an undervalue, may be greater in this jurisdiction in that the time periods are more favourable (2 years in this jurisdiction; 6 months in Luxembourg). The petitioner has suggested that some prior payments out of a blocked account may need investigating as preferences, but the evidence suggests no more than that there are some questions which need to be asked and do not indicate any particularly realistic claim. It is not apparent what undervalue points might be open. It is not clear that any wrongful trading type claims are more advantageous to a liquidator here. The suggestions that the Luxembourg liquidator is not prepared to act promptly enough are not borne out; nor is the suggestion that he is somehow not easy enough to get hold of. All in all, I doubt if I would have come to the conclusion that there is any real benefit to a secondary winding up here had it been necessary for me to reach a conclusion on the point. That is all I need say.

Conclusion

37. In the circumstances I shall dismiss the petition.