



# Corporate Turnaround and Insolvency

## High Court declines to hear foreign winding up petition on COMI and S.221 discretionary grounds

We have become used to a regular stream of decisions in which the courts are prepared to grant administration or winding up orders in respect of overseas companies which have COMI or an establishment in the UK. The decision in *Re Buccament Bay Limited and another* [2014] EWCH 3130 is a rare exception in which the court has refused to exercise its discretion.

### The background

Buccament Bay Ltd and Harlequin Property (SVG) Ltd (the Debtors) were incorporated in Saint Vincent and the Grenadines (SVG), and operated luxury Caribbean holiday resorts. The petitioners were creditors who had paid deposits for units at the resorts (totalling some £1.5 million), and had not received title to their units, nor had their deposits been returned.

The contracts for sale had been executed by the companies' sole director, who was located in the UK. The monies due under the contracts were payable to a third UK entity, which had 30 UK employees. The Debtors' employees and assets were entirely located in the Caribbean.

The petitioners brought winding up proceedings in England, arguing that the Debtors' Centre of Main Interests (COMI) for the purposes of the EC Regulation on Insolvency Proceedings was located there by virtue (amongst other things) of the fact that the sole director was located there, the contracts were signed there and that its activities were administered there. A parallel request was also made for winding up under Section 221(1) of IA 1986. The Debtors contested jurisdiction, arguing that SVG was the appropriate jurisdiction.

### What did the court decide?

The court refused to grant the order on two grounds:

1. The companies' COMI was in SVG, not England. Despite some confusion as to the nature of the companies' activities in England, the evidence was a long way off rebutting the presumption that COMI was located in the jurisdiction of the companies' registered office.
2. Although Section 221(1) of IA 1986 gave the court jurisdiction to wind up overseas companies as an "unregistered company", this involved an exercise of discretion. In particular the court would have to be satisfied both that the Debtors had a "sufficient connection" with England, and that there was a reasonable possibility that a benefit would be derived from winding up the Debtors here. Although a sufficient connection had been established, the benefit had not. SVG's winding up processes were sufficient, and an English liquidator would have considerable difficulties gaining control of the Debtors' assets in SVG.

### What does this mean for practitioners?

As ever, care must be taken when looking to commence insolvency proceedings in England against overseas entities. The English courts have recently shown themselves to be more interrogative when assessing questions of jurisdiction and exercise of discretion (see for example the *Olympic Airlines* decision).

*continued overleaf*

When looking to the EC Regulation on Insolvency Proceedings, the test which must be satisfied is that the company's COMI is in England (for main proceedings – COMI meaning the place where the debtor conducts the administration of its interests *per Interedil SRL (in liquidation) v Fallimento Interedil SRL and another [2011] EUECJ C-396/09*) or that it has an “Establishment” in England (for secondary or territorial proceedings – see *Trustees of the Olympic Airlines SA Pension & Life Assurance Scheme v Olympic Airlines SA [2013] EWCA Civ 643*).

As stated above, Section 221 applications require that: (i) there is a sufficient connection with England and Wales; (ii) there is a reasonable possibility, if a winding-up order is made, of benefit to those applying for the winding-up order; and (iii) one or more persons interested in the distribution of assets of the company is a person over whom the court can exercise a jurisdiction.

This case serves as a helpful illustration of the factors the court will consider when assessing jurisdiction generally, and whether to exercise its discretion under Section 221(1).

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