Briefing

BURGES SALMON

Disputes and Litigation

Olympic Airlines: Failed secondary insolvency proceedings in the UK to seek pension protection for the *"worthless detritus of a defunct operation"* of a Greek airline

The Court of Appeal[1] has rejected an attempt by the trustees of a UK pension scheme to commence secondary insolvency proceedings in the UK to obtain statutory protection for the UK members of Olympic Airline's pension scheme after the Greek company's insolvency.

The insolvency regulation

The EU Insolvency Regulation[2] governs cross- border insolvency proceedings across the EU.

Under the Insolvency Regulation, it is possible to have "main" insolvency proceedings in the member state where the insolvent company has its centre of main interests (or "COMI") and "secondary" proceedings in another member state where the entity has an "establishment".

Secondary proceedings run in parallel with the main proceedings and are only concerned with the assets of the insolvent company in the secondary member state. The purpose of secondary proceedings is ostensibly to protect creditors who have been dealing with an establishment up to the point it ceased operations in the secondary member state.

Meaning of "Establishment"

The Insolvency Regulation defines an establishment as, *"any place of operations where the debtor carries out a non-transitory economic activity with human means and goods".*

Facts of case

Olympic Airlines was a Greek airline company which went into liquidation in Greece in 2009.

On 14 July 2010, notice was provided to the 27 staff employed by Olympic in the UK that their employment contracts would be terminated.

As at 14 July 2010, Olympic's business in the UK had effectively ceased and tickets were no longer being sold to customers. However, a London office had been retained, with a few staff on short term contracts who dealt primarily with administrative tasks concerning the winding up of the business.

According to English law, the airline's liquidation in Greece was not a "qualifying insolvency event" and consequently the pension scheme deficit (over £15million) did not automatically fall within the protection of the UK Pension Protection Fund. This left the UK employees exposed. Consequently on 20 July 2010, the trustees of the UK pension scheme commenced secondary insolvency proceedings in the UK by presenting a winding up petition to try to bring the insolvency within the UK fund.

The Greek liquidator opposed the secondary proceedings on the basis that Olympic did not have an establishment in England on or after 20 July 2010 and consequently the English Court lacked jurisdiction to grant a winding-up order.

Both parties agreed that 20 July 2010 (the date of the presentation of the UK winding up petition) was the relevant date at which the Court should consider whether Olympic had an "establishment" in the UK.

The High Court decided in favour of the trustees and decided that the London office amounted to an establishment as at 20 July so the English Courts had jurisdiction to make a Winding-up Order. The Greek Liquidator appealed this decision.

Court of Appeal decision

The Court of Appeal allowed the Greek Liquidator's appeal. It considered that the High Court had failed to take account of an authoritative commentary on the Insolvency Regulation known as the Virgos-Schmit report in reaching its decision. The Virgos-Schmit report had been taken into consideration in a number of important

[1] Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA [2013] EWCA Civ 643 (6 June 2013)

[2] Council Regulation (EC) 1346/2000 on insolvency proceedings

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cases concerning the interpretation of the Insolvency Regulation.

According to the Virgos-Schmit report, the critical issue in determining whether an entity had an establishment at the relevant date was whether there was still a **place of operations performing economic activity**. A mere physical presence was not enough for there to be an establishment, there must be **active economic activity** within the entity's operational market.

Taking this guidance into account, the Court of Appeal decided that Olympic was not carrying out any active economic activity in the UK as at 20 July and the work being carried out to further the orderly winding up of the company did not count. Consequently the airline did not have an "establishment" in the UK at the relevant date. The Court described the residual UK operations of the airline as "the worthless detritus of a defunct operation".

Impact of the decision

The Court of Appeal has provided an important gloss on previous decisions concerning the meaning of "establishment" and the decision reinforces the importance of the Virgos-Schmit Report in the interpretation of the Insolvency Regulation.

Burges Salmon encountered precisely this issue when it advised the trustees of the Alitalia pension scheme in secondary proceedings in the UK following the insolvency of the Alitalia airline in Italy. In that case, the trustees were successful in establishing on the facts that there was a UK establishment at the relevant date and the scheme was brought within the Pension Protection Fund.

The European Commission is currently in the process of amending the Insolvency Regulation. Judging from the current draft, the Commission appears to accept the general view expressed by European insolvency practitioners that secondary proceedings are mainly being used (or abused) for reasons other than the protection of local creditors. The current proposed amended Insolvency Regulation envisages secondary proceedings only being opened if it is *necessary* to protect the interests of local creditors, a significant departure from the current wording.

Set in this context, the decision in Olympic can be seen as a stepping stone towards a narrower regime for secondary proceedings in cross border insolvency.

This is particularly important (and unwelcome) for UK final salary pension schemes of overseas companies. Currently, the pensions legislation governing eligibility for entry into the PPF's protection on insolvency (Section 121 of the Pensions Act 2004 and Regulation 5 of the Pension Protection Fund (Entry Rules) Regulations 2005) is restricted to specified UK insolvency events. There is no recognition of equivalent insolvency events for overseas entities.

This means that pension schemes which ought properly to benefit from PPF protection (especially in light of the fact that The Pensions Regulator regards its "moral hazard" powers to levy FSDs and CNs as applying outside the UK) may lose this support unless they can commence secondary winding up proceedings against the foreign company. Reform of the pensions legislation is needed to address this apparent injustice.

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