Neutral Citation Number: [2022] EWCA Civ 1419

Case No: CA-2021-000654

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST
Mr. Justice Miles
[2021] EWHC 1523 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Friday 28 October 2022

Before :

LORD JUSTICE LEWISON
LORD JUSTICE SNOWDEN
and
SIR LAUNCELOT HENDERSON

- -

Between :

EAST-WEST LOGISTICS LLP	**Appellant/ Petitioner**
- and –	
MELARS GROUP LIMITED	**Respondent**

- -

Robert Levy KC and Owen Curry (instructed by **Thomas Miller Law**) for the **Appellant**
James Sheehan (instructed by **Hogan Lovells International LLP**) for the **Respondent**

Hearing date : 6 July 2022

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.00am on 28 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Snowden :

1. This is an appeal by East-West Logistics LLP (the "Petitioner") against a decision of Mr. Justice Miles given on 28 May 2021: see [2021] EWHC 1523 (Ch). Miles J allowed an appeal against a decision of Deputy ICC Judge Baister ("Judge Baister") who had made a compulsory winding up order in respect of Melars Group Limited (the "Company"): see [2020] EWHC 2090 (Ch).

2. The appeal concerns Article 3(1) of the Recast EU Regulation on Insolvency Proceedings 2015/848 (the "EU Regulation") which relates to the centre of main interests ("COMI") of a company.

3. Article 3(1) of the EU Regulation provides,

> "The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.
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> 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. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings."

The factual background

4. The Company was incorporated in the British Virgin Islands ("BVI") on 11 January 2005 and traded in oil and petroleum. It entered into a charterparty with the Petitioner in December 2011 for a shipment to Turkmenistan. The address of the Company in the charterparty was stated to be in the BVI. The charterparty contained a clause providing for disputes to be resolved by arbitration in London under English law.

5. The Petitioner claimed that the Company breached the charterparty after its buyer refused to take delivery and the cargo was rerouted to Russia. The Petitioner commenced LCIA arbitration proceedings in London in 2012 claiming demurrage. The Company instructed solicitors in London and disputed the jurisdiction of the LCIA on the basis that the charterparty did not cover the second part of the journey to Russia. It would seem that this challenge was successful and the arbitration did not proceed.

6. Subsequently, in October 2015, the Petitioner brought a claim for the demurrage against the Company in the courts of the BVI and obtained a judgment in default of acknowledgement of service in November 2015.

7. Without notifying the Petitioner, the Company then moved its place of incorporation, and hence its registered office, to Malta. The Company obtained a provisional certificate of continuation from the Registrar of Companies in Malta on 10 December

2015 and a certificate of discontinuance from the BVI Registrar of Companies on 11 January 2016.

8. On 18 February 2016, still not having disclosed to the Petitioner that it had moved its place of incorporation and registered office to Malta, the Company succeeded in an application to set aside the BVI judgment in default. The Company then sought to challenge the jurisdiction of the BVI court on the basis of the arbitration clause in the charterparty. However, the Petitioner then obtained a second judgment in default of defence in the BVI on 16 March 2016, and the Company's jurisdiction challenge was subsequently dismissed. In June 2016 the BVI court assessed damages, together with interest and costs, in a total of US$657,839.18.

9. After obtaining its second default judgment, the Petitioner sent a letter demanding payment to the Company at its previous address in the BVI, threatening winding up proceedings in the BVI if the debt was not paid. When payment was not made, the Petitioner sought to serve a statutory demand upon the Company in the BVI, whereupon it discovered that the Company was no longer incorporated in the BVI and did not have its registered office there.

10. On 19 July 2016 the Petitioner presented a winding up petition in London based upon its BVI judgment debt (the "Petition"). The Petition alleged that the COMI of the Company was in the United Kingdom and that it was not at the place of the Company's new registered office in Malta.

11. In the Petition, the Petitioner relied upon the following factors in support of its contention that the Company's COMI was in the United Kingdom,

    i) the six commercial contracts concluded by the Company of which the Petitioner was aware (including its own charterparty) were in the English language, were governed by English law and had arbitration clauses providing for arbitration in London; and

    ii) the Company participated in the LCIA arbitration in London and was represented by a London firm (or firms) of solicitors.

12. The Petitioner contended that the Company's COMI was not in Malta because,

    i) the Company did not actually have an office there, its registered office address being that of a Cypriot law firm providing company administration services;

    ii) the Company did not have any employees or conduct any business in Malta;

    iii) the Company's sole director was a nominee who was a Swiss national, resident in South Africa; and

    iv) the Company's sole shareholder and principals were Russian.

13. The evidence filed by the Company in opposition to the Petition stated that prior to presentation of the Petition it had moved its registered office to a different address in Malta, and that in addition to a Swiss national, it had, since moving its place of incorporation and registered office to Malta, appointed two other directors who were Estonian nationals. The Company's evidence also stated that at the time of presentation

of the Petition in 2016 it had operated two bank accounts in Geneva, Switzerland, and that after the Petition had been presented, in 2018 it opened an account with a digital payment service (Revolut) based in London. It asserted that the use of English law governed contracts with English arbitration clauses to which the Petitioner had referred had been at the insistence of its counterparties. The Company did not give any further substantive detail of its operations.

The Judgment of Judge Baister

14. The Petition was heard by Judge Baister on 16 July 2020. On 4 August 2020 he handed down a reserved judgment and made a winding up order.

15. In his judgment, Judge Baister quoted the relevant parts of the EU Regulation and extracts from a number of decisions, including the decisions of the CJEU in re Eurofood IFSC [2006] ECR I-3813, [2006] Ch 508 ("Eurofood") and Interedil Srl v Fallimento Interedil Srl [2011] ECR I-9915, [2012] Bus LR 1582 ("Interedil").

16. Article 3(1) of the EU Regulation is set out above. The relevant parts of the Preamble to the EU Regulation that were referred to by Judge Baister are Recitals (27) - (32),

> "(27) Before opening insolvency proceedings, the competent court should examine of its own motion whether the centre of the debtor's main interests or the debtor's establishment is actually located within its jurisdiction.
>
> (28) When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to a change of address in commercial correspondence, or by making the new location public through other appropriate means.
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> (29) This regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping.
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> (30) Accordingly, the presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests should be rebuttable, and the relevant court of the Member State should carefully assess whether the centre of main interests is genuinely located in that Member State. In the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all relevant factors establishes in a manner that is ascertainable to third parties, that the company's actual centre of management and supervision and

> the management of its interests is located in that other Member State. […]
>
> (31) With the same objective of preventing fraudulent or abusive forum shopping, the presumption that the centre of main interests is at the place of the registered office, at the individual's principal place of business or at the individual's habitual residence should not apply where, respectively, in the case of a company, legal person or individual exercising an independent business or professional activity, the debtor has relocated its registered office or principal place of business to another Member State within the 3-month period prior to the request for opening insolvency proceedings, or, in the case of an individual not exercising an independent business or professional activity, the debtor has relocated his habitual residence to another Member State within the 6-month period prior to the request for opening insolvency proceedings.
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> (32) In all cases, where the circumstances of the matter give rise to doubts about the court's jurisdiction, the court should require the debtor to submit additional evidence to support its assertions and, where the law applicable to the insolvency proceedings so allows, give the debtor's creditors the opportunity to present their views on the question of jurisdiction."

17. The key paragraphs from Eurofood (a case decided under the first EC Insolvency Regulation 1346/2000) are paragraphs [31]-[36],

> "31. The concept of the centre of main interests is peculiar to the Regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation.
>
> 32. The scope of that concept is highlighted by the thirteenth recital in the Preamble to the Regulation, which states: "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."
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> 33. That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.

> 34. It follows that, in determining the centre of main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of the company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at the registered office is deemed to reflect.
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> 35. That could be so in particular in the case of a 'letterbox' company not carrying out any business in the territory of the Member State where its registered office is situated.
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> 36. By contrast, where a company carries on business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by the parent company in another member state is not enough to rebut the presumption laid down by the Regulation."

18. The key paragraphs from Interedil (also decided under the first EC Insolvency Regulation) are paragraphs [47] - [53],

> "47. While the Regulation does not provide a definition of the term "centre of a debtor's main interests", guidance as to the scope of that term is, nevertheless, as the court stated in Eurofood, para 32, to be found in recital 13 in the Preamble to the Regulation, which states that "the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and [which] is therefore ascertainable by third parties".
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> 48. As the Advocate General observed at point 69 of her opinion, the presumption in the second sentence of article 3(1) of the Regulation that the place of the company's registered office is the centre of its main interests and the reference in recital 13 in the Preamble to the Regulation to the place where the debtor conducts the administration of his interests reflect the European Union legislature's intention to attach greater importance to the place in which the company has its central administration as the criterion for jurisdiction.
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> 49. With reference to that recital, the court also stated in Eurofood, para 33, that the centre of a debtor's main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings. That requirement for objectivity and that possibility of ascertainment by third parties may be considered to be met where the material factors taken into account for the purpose of establishing the place in which the debtor company conducts the administration of its interests on a regular basis have been made

public or, at the very least, made sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them.

50. It follows that, where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in the second sentence of article 3(1) of the Regulation that the centre of the company's main interests is located in that place is wholly applicable. In such a case, as the Advocate General observed at point 69 of her opinion, it is not possible that the centre of the debtor company's main interests is located elsewhere.

51. The presumption in the second sentence of Article 3(1) of the Regulation may be rebutted, however, where, from the viewpoint of third parties, the place in which a company's central administration is located is not the same as that of its registered office. As the court held at [34] of Eurofood, the simple presumption laid down by the EU legislature in favour of the registered office of that company can be rebutted if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.

52. The factors to be taken into account include, in particular, all the places in which the debtor company pursues economic activities and all those in which it holds assets, in so far as those places are ascertainable by third parties. As the Advocate General observed at [70] of her opinion, those factors must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case.

53. In that context, the location, in a Member State other than that in which the registered office is situated, of immovable property owned by the debtor company, in respect of which the company has concluded lease agreements, and the existence in that Member State of a contract concluded with a financial institution - circumstances referred to by the referring court - may be regarded as objective factors and, in the light of the fact that they are likely to be matters in the public domain, as factors that are ascertainable by third parties. The fact nevertheless remains that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption laid down by the EU legislature unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third

> parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State."

19. Judge Baister also referred to the decision of the Court of Appeal in Shierson v Vlieland-Boddy [2005] EWCA Civ 974, [2005] 1 WLR 3966. That was a case in which a bankrupt had moved from the UK to Spain before presentation of a bankruptcy petition in England. Judge Baister summarised the judgment of Chadwick LJ as follows,

> "17. Although decided early in the life of the EC Regulation and in the context of individual rather than corporate insolvency, Shierson v Vlieland-Boddy [2005] EWCA Civ 974 still contains valuable guidance on matters relevant to the search for a debtor's centre of main interests. The following propositions from the judgment of Chadwick LJ (largely to be found in paragraphs 47 and 55) seem to me to be relevant here:
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> (a) An individual (and presumably a company too) is free to change his or its centre of main interests, even for a self-serving purpose.
>
> (b) If a debtor shifts his centre of main interests in the face of possible insolvency, the court must scrutinise the facts and determine whether the change is one of substance or illusory.
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> (c) Regard must be had to the need for the centre of main interests to be ascertainable by third parties, in particular creditors and potential creditors.
>
> (d) Whilst the date on which a debtor's centre of main interests is to be established is the date of presentation of the petition, evidence as to a debtor's activities and actions at other times may be significant to the extent that they cast light on the truth or otherwise of any claim to have had a centre of main interests in a particular location at the relevant time.
>
> (e) A change of centre of main interests must have an element of permanence."

20. Having referred to these cases, Judge Baister then indicated that he regarded much of the case law as being of little assistance because it dealt largely with companies that had a physical presence such as headquarters, offices, tangible assets or staff, whereas the Company "traded virtually rather than physically". He then outlined his approach to the facts of the case, indicating that he regarded the case as one of forum shopping,

> "22. This is a case about forum shopping. The petitioner seeks a winding up order here because it is easier, quicker and less costly to do here than it would be in Malta. That is understandable but is not a factor I can take into account. The company has plainly moved its registered office to Malta for

> precisely that reason: it wishes to avoid or put off being wound up, even though it cannot pay the petitioner's undisputed judgment debt or, it seems, debts due to other creditors. I draw that conclusion from the timing of the move of the company's registered office … The company's explanation that the reason for the move to a country with which it had no prior connection was to save overheads makes no sense without amplification; there appears to have been no attempt to notify any third party of the move: no evidence is given of the company's having done so; on the contrary, … the company continued to use a BVI address after the move ... As we know from Shierson v Vlieland-Boddy, a debtor is entitled to move his centre of main interests and to do so for self-serving reasons. The question is whether the move is real or illusory.
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> 23. As the Court of Appeal said in Shierson v Vlieland-Boddy, the court must scrutinise an apparently suspicious shift of a debtor's centre of main interests to establish which is the case. That it is obliged to do so is plain from recitals 27, 30 and 32 of the EU Regulation."

21. Judge Baister also commented that this was a case in which it was difficult to undertake a comprehensive assessment of the factors going to the location of the Company's COMI (as referred to in Interedil) because the evidence on both sides was unsatisfactory, with the content being "sparse", and much evidence being second-hand hearsay given by solicitors. At [28], Judge Baister then remarked,

> "28. I reject [counsel for the Company]'s suggestion that where ascertaining the company's centre of main interests is difficult, as it is in this case, the court can avoid the inquiry it is mandated to undertake by using the registered office presumption to make a default finding. There is a difference between applying a presumption and making a finding by default. It may be that in reality, in many situations, the registered office in fact operates as a default basis on which jurisdiction is established, for example where the petitioner asserts a jurisdictional position and the company does nothing to challenge it and no other creditor raises a doubt about it; but that is not the position here … In my judgment, when faced with competing claims, the court must inquire into the basis on which its jurisdiction is being invoked (or contested) and reach a principled decision on the evidence as opposed to using the registered office presumption as a fall back to avoid having to do so. The EU Regulation is not framed as [counsel for the Company] would have it. It could have been if the legislators had intended the registered office presumption to work in the way he suggests."

22. Having determined to adopt this approach, Judge Baister considered the various jurisdictions having some potential relevance to the case. He immediately eliminated the BVI and Estonia on the basis that neither party contended that the Company's

COMI was located in either jurisdiction. Judge Baister then also eliminated Malta on the following basis,

> "35. Locating the company's centre of main interests in Malta rests on its registered office being there and no more than that. There is unchallenged evidence from the petitioner that there is no operational office and no one conducting the business of the company there. The registered office is a "letter box" and no more. It follows that if the company "conducts the administration of its interests on a regular basis elsewhere" such that that "is ascertainable by third parties", that "elsewhere" can only be either the UK or Switzerland."

23. Judge Baister then analysed the evidence connecting the Company with the UK (England) or Switzerland, and concluded, at [54],

> "54. I conclude on the basis of the documentary material, the location of the company's banking facilities from time to time, the location of its legal advisers, the location of at least one judgment creditor to which a debt was to be paid and the place where the company was involved in litigation that at the relevant time the company was administering its interests in both the UK and Switzerland so that both were centres of the company's interests. I conclude, by a narrow margin and with misgivings, that on balance the greater use of English law for contracts, the greater use of London as a seat of arbitration, the actual recourse to or forced involvement in legal proceedings here and the consequential use of English lawyers makes the UK, on the balance of probabilities, the main centre of those interests. The company's affairs seem to have been conducted in this country more than in Switzerland, certainly as far as contractual and litigation interests were concerned, although it is, I accept, hard to be precise."

24. Judge Baister also then considered the question of the extent to which the factors to which he had referred were ascertainable by third parties. He stated, at [55],

> "55. As to ascertainability, I agree with [counsel for the Petitioner] that what is required by the Regulation is just that, not actual ascertainment at the relevant date. I make the obvious observation that the petitioning creditor, a third party, has in fact ascertained the company's centre of main interests and done so in the face of a cloud of obscurity. I also note, as Lewison J did [in Lennox Holdings plc [2009] BCC 155 at [7]], that ascertainability by third parties of the centre of main interests is not central to the concept of the centre of main interests but seems to flow from the fact of where the interests lie; and that in Irish Bank Resolution Corporation Limited v Quinn [2012] NI Ch 1, Deeny J said,

> "[A] debtor does not appear to be obliged to advertise his centre of main interest but nor may he hide it. It should be reasonably or sufficiently ascertainable or ascertainable by a reasonably diligent creditor" (paragraph 28).
>
> Whilst the fact of the company's registered office being in Malta was and remains, as [counsel for the Company] rightly says, ascertainable from public records, the fact that its centre of main interests was and remains in the UK was and still is similarly ascertainable, albeit less readily, by one reasonably diligent creditor and could be by others."

25. Having thus determined that the Company's COMI was in England, Judge Baister made a winding up order.

The Judgment of Mr. Justice Miles

26. Judge Baister gave permission to appeal. As indicated above, the Company's appeal was allowed by Miles J.

27. In his judgment, Miles J first set out the relevant legal framework from the EU Regulation and the relevant EU and English case law. In doing so, in addition to quoting the relevant parts of the EU Regulation and the decisions in Eurofood and Interedil set out above, he referred to the decisions of Lewison J (as he then was) and the Court of Appeal in Re Stanford International Bank [2009] EWHC 1441 (Ch), [2010] EWCA Civ 137, [2011] Ch 33 ("Stanford"), to which Judge Baister had not been referred. Miles J pointed out that in Stanford, Lewison J had accepted that his earlier views (expressed without the benefit of adversarial argument) in Lennox Holdings plc, upon which Judge Baister had relied, had been wrong, and this revised view had been confirmed by the Court of Appeal.

28. Miles J then summarised the principles of law which could be derived from the cases as follows,

> "56. …. First, the principles of legal certainty and foreseeability require that the centre of main interests should be capable of ascertainment by reference to publicly available objective features. The applicable insolvency law will generally follow the rules on jurisdiction, and creditors generally should be able to predict which insolvency law will apply from ascertainable features without having to make more detailed enquiries. For this reason the right perspective is that of typical third parties.
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> 57. Second, in the case of corporate debtors there is, of course, the statutory presumption that the centre of main interests is in the place of the registered office. The place of a registered office is a fact in the public domain. Creditors can, therefore, assume, absent other factors which are ascertainable, and which point the other way, that the centre of main interests will be in that place.

> 58. Third, a corporate debtor may move its registered office, including for self-serving reasons. There is protection within the regulation itself against changes within three months of the request to open insolvency proceedings. Equally, the presumption based on the place of the registered office may be rebutted by other evidence. It is likely to be easier to rebut the presumption, where the registered office may be seen as a letterbox, rather than the place of actual administrative conduct. However, it does not follow, even in such cases, that there is no presumption. Part of the reason for the presumption is to enable creditors to be able to predict, with reasonable certainty, which insolvency law is likely to be applicable, in the event of the insolvency of their counterparty. Creditors are therefore able to base their expectations on the place of the registered office unless there are objective pointers going the other way. It is clear from the Eurofood case that although, in the case of a letterbox office, the presumption may be more readily rebutted, it nonetheless remains a real presumption.
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> 59. Fourth, the burden is on a party seeking to rebut the presumption to show that there is another place where the debtor conducts the administration of its interests on a regular basis. That again seems to me to flow from the principles of certainty and foreseeability.
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> 60. Fifth, the focus is on the place where the interests of the debtor are being administered, not where it happens to operate commercially (though these may be relevant to determining the former).
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> 61. Sixth, the matter has to be examined at the date of the petition. Earlier or later events may be relevant, but only in so far as they may throw helpful light on the position as at that date.
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> 62. Seventh, the centre of main interests of a debtor may change, but the concept of COMI connotes a degree of permanence. It would be inimical for the purposes of the concept and the rules in which it is embodied if the centre of main interests could fluctuate too easily depending on the place where things happened to be occurring from time to time."

29. Miles J then concluded that Judge Baister had erred in principle in three ways in his approach to the determination of the Company's COMI. The first was in relation to the importance of the presumption in Article 3(1), the second was in relation to the concept of ascertainability, and the third was in failing to distinguish between matters of administration of the company's interests and matters going to the operation of its business.

30. As to the presumption, Miles J held, at [65]-[67],

> "65. … The company had its registered office in Malta. Its creditors could have ascertained that by inspecting the register. By virtue of Article 3(1), Malta was presumed to be the centre of main interests, in the absence of proof to the contrary on the basis of ascertainable factors.
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> 66. The judge appears to have considered that because there was no evidence of any actual administration in Malta, it should be disregarded, so that the court had to search (doing the best it could) for the best possible alternative candidate. That, it seems to me, is wrong in principle. The registration of the office in Malta was a real fact. Indeed, counsel for the petitioner accepted that the presumption did arise, and the fact that, as he put it, the company's office was no more than a letterbox, went to the strength of the presumption, rather than its existence.
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> 67. As already explained, the judge treated the registration of the office in Malta as "illusory". Again that is wrong: the company was undoubtedly registered there. In my view the judge failed to appreciate the importance given by the Recast Regulation to the place of a registered office, and the reason for the statutory presumption. The registered office is stated on a public register, which is open to public inspection, and a company's creditors are, therefore, *prima facie*, able to rely on it, in order to predict the applicable insolvency law in the event of the company's insolvency."

31. As to ascertainability, Miles J held, at [68]-[69],

> "68. The second related flaw in the judge's reasoning is his approach to ascertainability. A leitmotif of the European jurisprudence is that only those features of a debtor's administration of its interests which are readily identifiable by third parties will be relevant for determination of its centre of main interests. That, again, is because of a need for legal certainty and foreseeability. Unfortunately, the judge was not referred to the Stanford case, which emphasised this point (and held that Re Lennox was wrong to suggest otherwise). When the judge ascertained the various connecting factors, such as the governing law or the contracts for the company's banking arrangements, he did not go on to examine the further question whether such aspects of the company's business were ascertainable, in the sense of being available to typical third parties of the company, without further enquiry.
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> 69. To my mind, the judge's error is well illustrated by his comment in paragraph 55, that the petitioner had ascertained the company's centre of main interests in the face of a cloud of obscurity. He said that it had been discovered by a reasonably diligent creditor (the petitioner). The judge was referring there

> to the petitioner reaching that conclusion in the light of all of the evidence that was before the court, including evidence, for example, about the banking contracts and the various contracts that had been disclosed in the course of the proceedings. There is no reason to suppose that those matters would have been ascertainable to typical creditors of the company, and the judge did not address that question separately."

32. As to distinguishing between administration and operation, Miles J held, at [71]-[72],

> "71. The third flaw in the judge's reasoning is that he failed properly to distinguish between the matters of the administration of the company, on the one hand, and matters of the operations of its business on the other hand. It seems to me that a number of the factors he relied upon, such as the proper law of the contracts and the seat of any potential arbitration, and the employment of lawyers in relation to litigation in various countries, are matters going to the operations of its business, rather than the place of the administration of its interests.
>
> 72. This seems to me to have arisen because of his conclusion, reached at an early stage in the analysis, that the administration of the company's interests was not happening in Malta (see above). He therefore concluded that the company's business must in fact have been administered somewhere else, and then, basing himself on such evidence as there was about the affairs of the company, concluded that the company's business must have been administered in the same place as its business was operating."

33. Having determined that Judge Baister had taken the wrong approach, Miles J redetermined the COMI of the Company *de novo*. He held that none of the factors relied upon by the Petitioner, whether considered individually or cumulatively, were sufficient to rebut the presumption that the COMI of the Company was in Malta as the place to which its registered office had been moved.

34. Miles J first reiterated, at [78]-[79], that the fact that the Company might have moved its registered office to delay winding up might have been relevant to the strength of the presumption and the weight of evidence needed to rebut it, but neither the fact of the move of the registered office, nor the absence of evidence of any actual activities of the Company in Malta were, without more, sufficient to rebut the presumption. At [80], he also agreed with Judge Baister that the domicile of the directors was of no weight.

35. Miles J then turned to the other factors relied upon by the Petitioner. At [84]-[86], Miles J observed that there was no suggestion that the Company's contracts were actually to be performed in England. He also placed no weight on the fact that the Company's contracts were in English, that they were governed by English law and that most of them contained provision for arbitration with its seat in England. He pointed out that the use of the English language and English law are commonplace in international trade contracts, and that London is a major international arbitration centre. He observed that many companies administered abroad use contracts containing such

terms and that it would be surprising to them, and to their creditors, to be told that their COMI was in England.

36. Miles J then added, at [87],

> "87. It is also significant that the contracts were with particular creditors. There is no reason to think that the choice of law clauses or dispute resolution clauses contained in them were publicly and readily ascertainable by typical third-party creditors of the company."

37. Miles J reiterated this point when deciding that no great weight could be given to the fact that the charterparty between the Company and the Petitioner had referred, under the heading "place", to London. Miles J pointed out that there had been no finding by Judge Baister that the charterparty had in fact been concluded in London, and stated, at [89],

> "… I also do not see how it could be said that typical third-party creditors of the company could ever have been aware of the reference to London in the contract. It seems to me that this factor is therefore exiguous."

38. Miles J then held, at [90], that the fact that the Company engaged lawyers in England to deal with an arbitral dispute in London was not evidence capable of rebutting the presumption. He described these factors as a necessary response to the proceedings brought by the Petitioner in London, and simply a feature of the operation of the Company's commercial business. He then added,

> "In any event there is no reason to think the typical third-party creditors of the company would be aware of disputes of that kind or place any weight on it."

39. At [91], Miles J held that no weight could be placed on the fact that the Company had opened a digital payment service with Revolut in London in December 2018. He pointed out that this was two years after the relevant date when the Petition was presented, and that the evidence was that the account had been set up to pay lawyers engaged in defending the Petition in London and in Malta. Apart from the question of timing, Miles J held that this was simply part of the operations of the business of the Company, rather than an indication of the place where its interests were being managed. He pointed out that if the location of bank accounts was relevant, it would be far more telling that the Company had two bank accounts in Geneva at the relevant time in 2016. Miles J also stated that there was no reason to think that typical third party creditors of the Company would have been aware of the location of the Revolut facility, or that its location would have indicated to them that its interests were being administered from the UK.

40. Finally, at [92], Miles J held that the location of the Petitioner as a creditor of the Company was a matter of happenstance not arising from non-performance of any contractual obligations to be performed in England, and just related to the particular debt owed to the Petitioner. He also observed, at [93],

> "93. Moreover, there is again the question of ascertainability and the position that would have been known to typical third parties dealing with the company. There may be cases where the great bulk of the creditors of the company are to be found in a particular state, and that may throw light on where the company is being administered from. However, the point being relied on here was merely the particular debt owed to the petitioner itself. That does not assist in rebutting the statutory presumption."

41. In the result, Miles J held that the presumption created by the place of the registered office had not been rebutted by any matters that would have been ascertainable by typical third party creditors, and hence that the COMI of the Company was in Malta. He therefore allowed the appeal and set aside the winding up order.

The arguments on the appeal

42. On appeal, Mr. Levy KC, for the Petitioner, raised two arguments,

    i) That Judge Baister had been right to regard the registered office of the Company in Malta as a mere "letter box", and to conclude that the change in registered office from the BVI to Malta had been made by the Company to avoid, or put off, being wound up. Judge Baister was right in these circumstances to regard the presumption to which the location of the registered office gave rise under Article 3(1) as "illusory", or at least as having little or no weight in the determination of the Company's COMI. Miles J had not considered how much specific weight to give to the presumption in these circumstances, and/or had wrongly given it too much weight.

    ii) That Miles J was wrong to limit his assessment of the factors relevant to the determination of COMI to those facts which he considered would have been apparent to a (hypothetical) typical third party dealing with the Company. This meant that he placed insufficient weight upon the factors which were actually apparent to, or had been discovered by, the Petitioner, which was a real creditor which had dealt with the Company.

43. For the Company, Mr. Sheehan essentially submitted that Judge Baister was wrong, and Miles J was correct in his approach to the presumption under Article 3(1) for the reasons that he gave. He also submitted that Miles J's approach and evaluative judgment of the various factors at the second stage was both correct in principle as regards the ascertainability point, and not properly open to challenge on appeal on the facts.

Analysis

The presumption under Article 3(1)

44. Judge Baister was right to state that under the EU Regulation, the court which is requested to open main insolvency proceedings must always seek to verify for itself that the debtor's COMI is located in its jurisdiction. However, the process of determination of a corporate debtor's COMI does not start from a blank sheet of paper. Except where the presumption in Article 3(1) is expressly disapplied because the debtor

company has moved its registered office to another Member State of the EU within three months of the request to open insolvency proceedings, the effect of the presumption is that in every case the court must start its inquiry from the premise that the COMI of a corporate debtor is in the same place as the debtor's registered office.

45. As indicated by Article 3(1) and by the CJEU in Interedil at [51], the question for the court is then whether that legal presumption is rebutted by "proof to the contrary" – i.e. evidence of factors which are both objective and ascertainable by third parties and which show that the debtor actually conducts the administration of its interests on a regular basis in a different location from the location of its registered office.

46. I agree with Miles J that, contrary to Judge Baister's view, a lack of evidence that the debtor actually carries out any activities at the place of its registered office does not allow the court to ignore or disregard the legal presumption under Article 3(1). In contrast to cases where there has been a move of the registered office to another Member State within three months of the request to open proceedings, there is no exception in Article 3(1) for cases in which the evidence of actual administration of interests is sparse. Rather, what the court is entitled to do, as Miles J correctly stated in [58] of his judgment, is to treat the presumption that the COMI is the same place as the place of the debtor company's registered office, as more easily rebutted if the evidence shows that no relevant acts of administration of the company's interests are actually carried out at the place of the registered office, i.e. that the registered office is, in reality, no more than a "letter box". But even in such a case, the presumption will still apply, and will not be displaced, unless there is sufficient contrary evidence of objective factors ascertainable by third parties to establish (prove) that the debtor actually conducts the administration of its interests on a regular basis in a different place from that of its registered office.

47. Judge Baister was of course right to say that the court must be alert to detect fraudulent or abusive forum shopping by purported changes of COMI by a debtor. In such cases, as the decision in Shierson indicated, "The question is whether the move is real or illusory." Critically, however, the question in such cases is whether the move of COMI is real or illusory. It is not whether the move of the debtor's registered office is real or illusory.

48. A company is an artificial legal person existing under the legal system of its place of incorporation, and its registered office is a legal concept, the place of which is necessarily determined by that same legal system. As such, and as Miles J pointed out in [57] – [58] and [66] of his judgment, the place in which a company is incorporated and has its registered office is a "real" fact which will inevitably give rise to the legal presumption under Article 3(1), unless that presumption is disapplied because the place of the registered office has been moved to another Member State within three months of the request to open insolvency proceedings.

49. In my judgment, therefore, Miles J was right to find that Judge Baister erred when he decided to conduct a comparison of the factors pointing to the various countries which he identified, but without starting from the presumption that the Company's COMI was in Malta and asking whether the evidence of actual administration of interests in any other place was sufficient to displace that presumption.

50. It follows that Miles J was entitled to address the COMI question for himself *de novo*.

Ascertainability

51. In paragraphs [68] –[70] of his judgment, Miles J rightly emphasised (and Mr. Levy did not dispute) the requirement which is evident in the EU Regulation and the case law, that the factors which can be relied upon to displace the Article 3(1) presumption must be both objective and ascertainable by third parties. The CJEU has emphasised that the requirements of objectivity and the possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings: see Eurofood at [33]-[34] and Interedil at [49].

52. The same points were reiterated in the more recent decisions of the CJEU in Leonmobili Srl v Homag Holzbearbeitungssysteme GmbH (Case C-353/15) EU:C:2016:374 (24 May 2016) ("Leonmobili") at [33] and MH v OJ (Case C-253/19), [2021] 1 WLR 2498. Those cases were not cited to Miles J.

53. In MH v OJ, the CJEU stated, at [19]-[21],

> "19. …as regards the term "centre of main interests" in article 3(1) of [the First EU Insolvency Regulation], the court has held that the scope of that term is clarified in recital (13) of that Regulation, which states that "the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties". The court has concluded that that definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings (order in Leonmobili, para 33 and the case law cited).
>
> 20. The same interpretation must be used to determine the meaning and the scope of the term "centre of main interests" for the purposes of [the EU Regulation]. As Advocate General Szpunar stated in point 29 of his opinion … the use of objective criteria remains essential in order to ensure legal certainty and predictability as regards the determination of the court having jurisdiction. In addition, the rules on international jurisdiction laid down in [the EU Regulation], as is stated in recital (5), aim to avoid incentives for parties to transfer assets or judicial proceedings from one member state to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors.
>
> 21. Recital (28) of [the EU Regulation] also provides useful clarification in that respect by stating that, when determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the

> creditors and to their perception as to where a debtor conducts the administration of his or her interests. The use of objective criteria which can be ascertained by third parties in order to determine the centre of the debtor's main interests must make it possible to determine the jurisdiction with which the debtor has a genuine connection and thus meet the legitimate expectations of the creditors."

54. Mr. Levy criticised Miles J for not giving full effect to the emphasis that the CJEU put on the interests and legitimate expectations of creditors. He contended that Miles J was wrong to disregard or place no weight upon factors that were actually known to individual creditors, because he had wrongly relied upon dicta in Stanford to the effect that factors were not relevant unless they were in the public domain and would have been apparent to a typical third party creditor doing business with the company without further enquiry.

55. So, for example, in addition to finding that the use of English law and dispute resolution clauses in most of the Company's commercial contracts that were in evidence were not indicative of where the Company administered its interests, Miles J discounted these factors (at [87]) because,

> "… the contracts were with particular creditors [and] there is no reason to think that the choice of law clauses or dispute resolution clauses contained in them were publicly and readily ascertainable by typical third-party creditors of the Company."

Miles J gave similar reasons when dealing with other factors at [89], [90], [91] and (to a lesser extent) [93].

56. Mr. Levy pointed out that the factual context and issue addressed in Stanford were very different from the instant case. Stanford concerned an application for recognition under the Cross-Border Insolvency Regulations 2006 (the "CBIR") by the Antiguan liquidators of the Stanford International Bank ("SIB"). SIB was incorporated in Antigua where it had its registered office, a significant physical presence and operations, and where it presented its "public face" to investors and regulators. However, SIB was allegedly the vehicle for a fraudulent Ponzi scheme, orchestrated and directed "behind the scenes" by its eponymous founder and another individual based in the US. SIB had been ordered to be wound up by the court in Antigua, and the liquidators sought recognition in the UK under the CBIR on the basis that the COMI of SIB was in Antigua.

57. Recognition in the UK of the Antiguan liquidation was opposed by a receiver who had been appointed over SIB's assets worldwide by a court in the US in the interests of the victims of the alleged fraud, most of whom were US citizens. The US receiver contended both that ascertainability was not a precondition to a factor being taken into account in the determination of COMI, and that in addition to factors that might be apparent to those doing business with the debtor company, the court could also take into account factors that would only be ascertained on investigation. So, said the receiver, in determining the COMI of SIB, the court could take into account that the real "interest" of SIB had been conducting the Ponzi scheme, and this had been directed and controlled from the US.

58. These contentions were rejected by Lewison J, whose decision was upheld by the Court of Appeal. In the course of his judgment, Lewison J concluded, at [70(vi)], that,

> "What is ascertainable by third parties is what is in the public domain, and what they would learn in the ordinary course of business with the company."

59. In the Court of Appeal, Sir Andrew Morritt C stated, at [56],

> "… In my view [the decision of the ECJ in Eurofood] clearly established the following propositions:
>
> …..
>
> (2) It is clear from paragraph 34 of the judgment of the ECJ that the presumption 'can be rebutted only [by] factors which are both objective and ascertainable'. That this test is not the same as the head office functions test adopted by Lewison J in Re Lennox Holdings and Lawrence Collins J in Re Collins & Aikman Corp Group [2006] BCC 606 para 16 is plain….
>
> (3) Thus it is conclusively established that the factors relevant to a rebuttal of the presumption must be both objective and ascertainable by third parties. Lewison J [at first instance] confined factors ascertainable by third parties to matters already in the public domain and what a typical third party would learn as a result of dealing with the company and excluded those which might be ascertained on enquiry. The good sense of this conclusion is demonstrated by the cases in English domestic law relating to constructive notice and its various degrees, see, for example, Baden v Societe Generale SA [1993] 1 WLR 509, 575 paras 250-274. To extend ascertainability to factors, not already in the public domain or apparent to a typical third party doing business with the company, which might be discovered on enquiry would introduce into this area of the law a most undesirable element of uncertainty.
>
> (4) Whether or not factors, not already in the public domain or so apparent, ascertainable on reasonable enquiry are relevant to a rebuttal of the presumption, that cannot extend the range of ascertainable factors to the fraudulent Ponzi scheme. That, inevitably, is neither a matter of general knowledge nor ascertainable on reasonable enquiry. It was suggested that after the fraudulent scheme had been uncovered the facts as to its previous existence had become public knowledge and should be relevant to the rebuttal of the presumption. No doubt the COMI of a company may change as the situation of its registered office may change, but it can only do so by reference to main interests which it still has and facts within the public domain or so apparent at the time of their occurrence. The allegations of fraud have not yet been proved before a court of competent jurisdiction

> …, SIB's interests main or otherwise ceased on discovery of the alleged fraudulent scheme and the activities now said to rebut the presumption were not in the public domain or so apparent when they occurred.
>
> …"

60. I entirely accept, for the reasons given by Morritt C in sub-paragraph [56(4)] of his judgment, that factors relating to a fraud which was deliberately concealed from third parties and which only became apparent as a result of subsequent investigation by the relevant authorities or insolvency officeholders, cannot possibly be relevant to a determination of the company's COMI. In my view, in the context in which they were made, the references in the judgments in Stanford to matters being "in the public domain" were primarily intended as a contrast to such internal matters that were concealed from the view of any third parties dealing with the company.

61. The issue of whether it is essential that matters are in the public domain was also touched upon by the CJEU in Interedil - which post-dated Stanford – at [49],

> "49. … [the] requirement for objectivity and that possibility of ascertainment by third parties may be considered to be met where the material factors taken into account for the purpose of establishing the place in which the debtor company conducts the administration of its interests on a regular basis have been made public or, at the very least, made sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them."

The alternative formulation at the end of this paragraph does not suggest that the CJEU regarded it as essential that a material factor should have been made public, provided that it was at least accessible to third parties.

62. Accordingly, I do not consider that Stanford should be taken to be authority for the proposition that matters that were known to or ascertainable at the relevant time by creditors should be excluded from consideration on the COMI question simply because they were not generally known or advertised to the public at large.

63. I also consider that, contrary to Miles J's summary at [56], which was plainly based upon paragraph [56(3)] of Morritt C's judgment in Stanford, when assessing COMI, the court should not invent a hypothetical "typical" third party creditor with "average" or "normal" characteristics, and form a view on what might (or might not) have been apparent to that creditor in the course of a notional dealing by him with the company. Neither the EU Regulation nor the jurisprudence of the CJEU refer to the concept of a "typical" creditor, but refer instead, and more generically, to "creditors" or "third parties". Morritt C's reference to a "typical" third party can be traced back to counsel's submissions at first instance in Stanford, with which Lewison J had expressed general agreement (in paragraph [62])). However, and contrary to Morritt C's summary in [56(3)], Lewison J's own formulation of the test in [70(vi)] of his judgment did not employ the term.

64. Further, and differing in this respect from the view of Miles J in [87], I consider that the fact that the contractual terms upon which any one creditor dealt with the company would not be known or disclosed to other creditors in the ordinary course of their dealings with the company, should not mean that (if otherwise relevant) evidence of those terms should necessarily be excluded from consideration by the court on the basis that they would not be ascertainable on reasonable enquiry by other creditors (or a "typical" creditor).

65. The problem of adopting too restrictive a test in this regard can be illustrated by an example. Suppose that in the course of its business a debtor company entered into ten separate and bespoke commercial contracts with ten separate counterparties; that each contract was negotiated and signed by the same representative of the company in the same office; and that in each contract, the company identified the same person in the same office as being responsible for dealing with the counterparty in respect of all matters arising out of the contract.

66. From their individual viewpoints, each of the counterparties would have the same perception of where the company was administering its interests relevant to the dealing with them. Taken together, the facts in relation to the ten contracts would also indicate that the company was administering its interests in relation to the ten creditors concerned from the same place, and hence might be thought to be doing so on a regular basis. Assuming that the ten contracts represented a material proportion of the company's commercial interests, it seems to me that on a straightforward reading of Article 3(1), those facts would plainly be relevant to the determination of its COMI.

67. In such a situation, however, it might well be that the individual creditors would not even know of the existence of the other counterparties and contracts, especially if the other contracts were entered into after theirs. Even if an individual creditor did know of the existence of (some) of the other contracts, they might not think it commercially relevant to enquire into the terms of those other contracts. And even if they did enquire, they might well be told by the company, entirely properly and for legitimate commercial reasons, that the terms on which the company was dealing with those other counterparties were confidential. All of the same points could be made in respect of a "typical" creditor – whether that be one of the actual creditors or some hypothetical construct.

68. On a narrow reading of Morritt C's judgment in Stanford, the considerations set out in the last paragraph would lead to the evidence of the terms of the ten contracts being excluded from consideration on the question of the company's COMI because none of the terms were either "public" at the relevant time, nor were they "ascertainable by a typical creditor" in the ordinary course of dealing with the company. In my view, that would not be a result intended by the framers of the EU Regulation, and it is not mandated by any of the decisions of the CJEU to which I have referred.

69. In its decisions, the CJEU has stressed that the limitation of relevant factors to those that are both objective and ascertainable by third parties is designed to ensure legal certainty and foreseeability, from the perspective of third parties, of the court which will have jurisdiction to open main insolvency proceedings in respect of their debtor. This is entirely understandable because insolvency is a foreseeable risk which persons proposing to deal with a company will wish to take into account when deciding whether, and at what price, to enter into a transaction. In that regard, the place in which main

insolvency proceedings can be opened is important, because it will determine the applicable law governing a significant number of issues concerning the rights of creditors in the proceedings: see Article 7 of the EU Regulation. The CJEU has also made clear that focussing on the COMI question from the perspective of prospective creditors is designed to give effect to their legitimate expectations and to minimise the possibility of abusive moves of COMI by debtor companies to the detriment of creditors.

70. The common theme running through these statements of principle is that when determining the COMI, the court should look at the operations of a debtor company from the external (objective) perspective of third parties, rather than from the internal (subjective) perspective of the debtor company itself. But I see no warrant in any of the materials for an approach under which the court should be forced to disregard a factor that a third party actually ascertains from the course of his dealing with the company, which indicates to him where the debtor company is administering its interests, simply because other third parties who dealt with the company in the past or who might deal with it in the future, may not also know of it.

71. In my judgment, the issue of whether the facts ascertained by a particular creditor from its dealings with the debtor were indicative of dealings by creditors more generally should not go to admissibility, but to the weight to be attached by a court to the evidence. Depending on the facts, such evidence might, for example, throw some light on whether the company conducted the administration of its interests "on a regular basis" in the place indicated. I appreciate that it could be said that this approach might mean that a prospective creditor could not be certain in advance what weight will be attached to his perspective by a court: but the same problem arises in a more acute form if the creditor can have no assurance that what he actually knows will be taken into account at all in the determination of COMI unless he is ultimately found to be "typical" of others dealing with the company.

72. I also consider that evidence of a factor actually known to a creditor at the time of his dealings with the debtor company should be admissible on the COMI question irrespective of whether the evidence is adduced by the creditor concerned, or is adduced by a different creditor who only obtained the evidence of what the first knew at a later stage. That approach would, in my view, be consistent with Recital (32) to the EU Regulation.

73. Although Recital (32) does not seem to be reflected in any operative article of the EU Regulation, it clearly envisages that in a case of doubt, the court should require the debtor to submit additional evidence to support its assertions and, where the law applicable to the insolvency proceedings so allows, give the creditors the opportunity to present their views on the question of jurisdiction.

74. If the court were to require the debtor company to provide additional information, I see no reason why this could not include requiring the debtor to submit evidence of all its relevant contracts and dealings with creditors so as to permit the court to carry out the "comprehensive assessment of all relevant factors" referred to in the cases from the CJEU. By the same token, I see no reason why one creditor could not, if he were able to assemble relevant information as to how other creditors had dealt with the company prior to the request to open insolvency proceedings, be permitted for convenience to present the evidence of all their contracts and dealings together to the court. I stress,

however, that as held in Stanford, this would not permit evidence to be adduced of factors that were unknown to any creditors dealing with the company at the relevant time, and were only discovered on a subsequent investigation.

Miles J's decision on the evidence

75. Although, for the reasons that I have indicated, I do not agree with Miles J's application of the dicta in Stanford as regards matters being in the public domain and ascertainable by a typical third party dealing with the company, his observations in that respect were not central to his decision on COMI. Instead, as I have indicated above, he went through each of the factors relied upon by the Petitioner, assessed their relevance and weight, and rejected the suggestion that, individually or collectively, they were sufficient to displace the presumption under Article 3(1) in favour of Malta. In these respects I do not think that Miles J's analysis can be faulted.

76. Miles J was, for example, obviously right to hold at [85]-[86] that the fact that the Company entered into international commercial contracts with a variety of counterparties that were in the English language, were governed by English law, and had dispute resolution provisions for arbitration under English law in London says nothing about where the Company conducted the administration of its interests on a regular basis. English has been a preferred language of international commerce for generations and countless counterparties with their COMI in different jurisdictions choose English law and arbitration in London for a variety of reasons that have nothing to do with where they are based or have their COMI.

77. Miles J was also entirely right at [90] to place little or no weight upon the fact that arbitral proceedings were brought against the Company under English law in London, and that it instructed English lawyers to deal with such proceedings. Most international companies who were subjected to such litigation would do the same for obvious reasons of obtaining expert local legal advice and representation. The COMI of a company that trades in international commerce cannot sensibly depend on where in the world it might be subjected to legal proceedings from time to time.

78. Likewise, Miles J's assessment in [91] that the Company's use of a Revolut account opened in London in 2018 could not sensibly illuminate where the Company's interests were being administered in July 2016 was obviously correct: and as he also pointed out, if the use of bank accounts could be relevant to the location of COMI, at the relevant time in 2016 the Company had accounts in Switzerland, not London.

79. I would also entirely agree with Miles J's comments in [92] that the domicile of the Petitioner cannot logically be connected with where the Company administered its interests. As he pointed out at [93], it would only be if a very large proportion of the general body of creditors were domiciled in the same place that some inference might conceivably be drawn as to where a debtor company had been conducting the administration of its interests on a regular basis.

80. In my judgment, therefore, Miles J was correct to hold that none of the factors relied upon by the Petitioner were, individually or collectively, sufficient to establish that the Company actually conducted the administration of its interests on a regular basis in England (or any other particular location) so as to displace the presumption in favour of Malta under Article 3(1).

81. Although not part of Mr. Levy's criticism of Miles J's approach, I would finally, and only briefly, mention the distinction which Miles J drew, in [71] of his judgment, between matters that he regarded as "operations of a commercial business" and matters that were "administration of interests". That categorisation may be a useful analytical tool in ensuring that undue weight is not given to business activities which a company may routinely, and of necessity, be required to carry out in various different jurisdictions. However, it should be treated with care. I do not think that it can be regarded as a bright-line distinction, it introduces concepts that are not to be found in the EU Regulation or in the decided cases, and I do not think that it should be regarded as a new test to be overlaid on the definition of COMI in Article 3(1).

Disposal

82. For the reasons that I have given, I would dismiss this appeal.

Sir Launcelot Henderson:

83. I agree that the appeal should be dismissed for the reasons given by Snowden LJ.

Lord Justice Lewison:

84. I agree that the appeal should be dismissed for the reasons given by Snowden LJ.

85. It was unfortunate that Judge Baister was referred to my decision in *Lennox Holdings* and not to the decisions in *Stanford International Bank*. That may have led him down the wrong path.

86. I wish to add a few observations on what was decided in *Stanford International Bank*. In my judgment at first instance I set out the rival contentions at [62]:

> "This leads on to the next question: what is meant by "ascertainable"? Mr. Isaacs submitted that information would count as being ascertainable even if it was not in the public domain if it would have been disclosed as an honest answer to a question asked by a third party. Provided that a third party asked the right questions, and was given honest answers, the result of the inquiry would be ascertainable. Mr. Zacaroli submitted that this formulation was far too wide and blurred the distinction between what was ascertainable and what was not. On the basis of Mr. Isaacs' submission the requirement of ascertainability was diminished almost to vanishing point. Rather, what was ascertainable by a third party was what was in the public domain, and what a typical third party would learn as a result of dealing with the company. I agree with Mr. Zacaroli. As Chadwick LJ says, one of the important features is the perception of the objective observer. One important purpose of COMI is that it provides certainty and foreseeability for creditors of the company at the time they enter into a transaction. It would impose a quite unrealistic burden on them if every transaction had to be preceded by a set of inquiries before contract to

> establish where the underlying reality differed from the apparent facts."

87. It was the choice between those two alternatives that led me to the decision that I made (and, as I understand it, for this court to have approved that decision). I was certainly not intending to add to the large cast of hypothetical characters who people EU law (e.g. the average consumer, the diligent and reasonably well-informed tenderer etc). The essence of Mr. Levy's argument was that the Company's COMI should be decided in the light of everything that the Petitioner had discovered after the event. Since one of the reasons for requiring ascertainability by third parties is to promote legal certainty and predictability at the time when creditors do business with the company, I consider that his argument is wrong. The importance of predictability was emphasised by the court in both *Leonmobili* at [33] and *MH* v *OJ* at [20].

88. I do not consider that it is necessary to go any further in order to dispose of this appeal.