Neutral Citation Number: [2021] EWHC 2371 (Ch)

Case No: CR-2020-003129

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 20/08/2021

Before :

ICC JUDGE MULLEN

- -

IN THE MATTER OF INVESTIN QUAY HOUSE LTD
(a company registered in Jersey with company number 114622)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

BUJ ARCHITECTS LLP	**Petitioner**
- and -	
INVESTIN QUAY HOUSE LTD	**Respondent**

- -
- -

Ms Chantelle Staynings (instructed by **IBB Law**) for the **Petitioner**
Mr Stuart Issacs QC (instructed directly) for the **Respondent**
Mr Thomas Cockburn (instructed by **GSC Solicitors)** for Local London Quay House Limited (a supporting creditor)

Hearing date: 8th June 2021

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Approved Judgment

COVID 19 – This judgment has been handed down by circulation to the parties.
The deemed time of hand-down is 10:30 am.

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ICC JUDGE MULLEN

ICC JUDGE MULLEN :

1. This is my judgment following the preliminary hearing of a winding-up petition presented on 27th July 2020 by BUJ Architects LLP ("the Petitioner") against Investin Quay House Ltd ("the Company") seeking the winding up of the Company under the Insolvency Act 1986 ("the 1986 Act").

2. The petition is based on a debt of £354,000, together with interest, payable by the Company to the Petitioner under an order of Waksman J, sitting in the Technology and Construction Court ("the TCC Proceedings"). That order was sealed on 20th November 2019 and bears the date 18th October 2019, but it appears that the latter date is an error and should read 15th November 2019. The debt is not disputed and it has not been paid.

3. There are also two supporting creditors. The first, Local London (Quay House) Limited ("Local London"), claims a sum of £665,300, together with interest, due under an award, dated 18th June 2019, made following a binding expert determination. The second, TC Developments (South East) Limited, claims a sum of at least £180,000, together with interest, which is also payable under Waksman J's order.

4. The Company is registered in Jersey. On 16th October 2020, Deputy ICC Judge Schaffer ordered that the petition be served at the offices of Countrywide Project Management Limited ("Countrywide") in Solihull. The Company appealed that order and it was stayed by Miles J on 2nd November 2020 pending the outcome of the application for permission to appeal. The Petitioner applied to set aside that stay.

5. The application for permission to appeal was withdrawn and, on 18th November 2020, Miles J gave directions by consent for the filing of the Company's evidence for the purposes of the preliminary hearing of the petition provided for by paragraph 8 of the Insolvency Practice Direction relating to the Corporate Insolvency and Governance Act 2020 ("the CIGA PD") and in opposition to the petition. He also reserved the costs of the Company's application for permission to appeal and of the Petitioner's application to set aside his order to the preliminary hearing.

6. The Company opposes the petition on two grounds. First, it contends that coronavirus has had a financial effect on it such that the court may not make a winding-up order by reason of Schedule 10 of the Corporate Insolvency and Governance Act 2020 ("the 2020 Act"). Secondly, it contends that this court has no jurisdiction to make a winding-up order in any event as the Company's centre of main interests ("COMI") for the purposes of the recast EU Regulation on Insolvency Proceedings ("the EU Regulation") is in Jersey.

The hearing

7. Ms Chantelle Staynings appeared for the Petitioner, Mr Stuart Issacs QC appeared for the Company and Mr Thomas Cockburn appeared for Local London as supporting creditor. The hearing was listed for half a day, which was inadequate to hear submissions on the costs reserved by Miles J's order of 18th November 2020 or to give judgment on the principal issues. A proportion of the hearing was taken up with the Company's application for an adjournment. That application is the subject of a separate judgment that I gave at the time, of which a transcript has been prepared. For

present purposes I need only say that the Company was placed into voluntary liquidation in Jersey on 3rd June 2021 and, on 7th June 2021, Mr John Downer, the director of the Company, obtained permission from the Royal Court of Jersey to bring an application on the Company's behalf to injunct the Petitioner from pursuing the petition. The Royal Court declined to grant an injunction on an interim basis. I similarly declined to adjourn the hearing to abide the outcome of the proceedings in Jersey. I understand that the substantive hearing is due to take place on 27th August 2021.

8. It was however possible in the time available to hear the submissions of the parties on the question of the effect that coronavirus is alleged to have had on the Company and on the court's jurisdiction to wind up the Company in the light of the evidence filed by the parties. This consisted of the witness statements of:

    i) Mr Andrew Olins, the solicitor for the Petitioner, dated 22nd July 2020 and 28th July 2020;

    ii) Mr Downer on behalf of the Company, dated 3rd December 2020 and 6th June 2021;

    iii) Mr Terrance Alford, a real estate investment and development specialist engaged as a consultant by the Company, dated 5th February 2021;

    iv) Mr Simon Heilpern, the director of Local London, also dated 5th February 2021.

9. Also in evidence were documents from the TCC Proceedings, including:

    i) an affidavit of Mr Stephen Whale, a director of the Company, dated 5th November 2018, made in response to an application made by the Petitioner for a freezing order in the TCC Proceedings; and

    ii) a statement from Mr Freddie Heaf, a member of the Petitioner, dated 31st October 2019, prepared for the trial in those proceedings.

The Company

10. The Company was registered in Jersey on 17th December 2013. As its name implies, its principal purpose was to develop Quay House, 2 Admirals Way, London E14 9XG ("Quay House"), which was purchased on 28th February 2014 at a price of around £11 million. According to Mr Downer, funding for the purchase was provided by Jersey-based financial institutions and by Mr Downer himself.

11. The Company appointed the Petitioner as architects for the development project under a contract dated 5th September 2017, with the object of securing planning permission for development of Quay House as a hotel. The contract was expressed to be subject to English law and to be subject to the exclusive jurisdiction of the courts of England and Wales. It was the dispute arising from this contract that led to the TCC Proceedings and Waksman J's order.

12. The property was sold on 27th July 2018 at a price of about £26 million. Only £109,477.20, plus interest, remains in bank accounts in the Company's name in

Jersey. As appears from the evidence of Mr Whale, Mr Downer received approximately £17 million in loan repayments and £5.6 million in interest payments. The bulk of these payments were made within the two years prior to presentation of the petition. There is thus the potential, on the Petitioner's case, for a preference claim to be brought pursuant to section 239 of the 1986 Act.

13. The Company's registered addresses have at all times been in St Helier, Jersey. For much of its trading life it had seven directors. Six of the directors, Mr Whale, Ms Donna McCrorie, Mr Roberto Monticelli, Mr Paul Weir, Ms Linda Garnier and Mr Darren English, are said by Mr Downer to have been directors of the JTC Group. Mr Downer says that JTC Group was paid a fee for providing:

> "substantial experience and expertise in running property companies and making business decisions to ensure the Company was properly run in accordance with the requirements of Jersey laws."

He exhibits the terms of engagement with JTC (Jersey) Ltd, dated 7th December 2015, which provides that "services will be limited to the administration of the Entities", excludes "the provision of legal, financial, tax or other such professional advice" and describes Mr Downer as "our principal client." The "Entities" to which JTC was to provide its services are set out in the schedule to the terms of engagement. This has been redacted in the form in which it appears in bundle in that it is headed with the words "Schedule 1", under which appears the words "('the Entities')", and the name of the Company appears halfway down an otherwise blank page.

14. One of the JTC directors, Mr English, resigned in October 2018 and another five resigned on 16th July 2019, leaving Mr Downer as the Company's sole director. Mr Downer has not been resident in England and Wales since 2014 and now lives in Portugal. He does not dispute that the Company no longer carries on any business and that it is unable to pay its debts. Indeed, as I have said, steps were taken in Jersey to place it into liquidation.

The Coronavirus Test

15. Part 2 of Schedule 10 to the 2020 Act prevents a creditor from presenting a petition for the winding up of a company unless he has reasonable grounds for believing that:

> "(a) coronavirus has not had a financial effect on the company, or
>
> (b) the facts by reference to which the relevant ground applies would have arisen even if coronavirus had not had a financial effect on the company."

The petition here sets out a statement to that effect, as required by Insolvency Rule 7.5(1), as amended by paragraph 19(3) of Schedule 10 to the 2020 Act, and the summary of the grounds for that belief, as required by paragraph 3 of the CIGA PD. Where it appears to the Court that coronavirus has had a financial effect on the company prior to presentation of the petition, it may not make a winding up order unless it is satisfied that the facts by reference to which the relevant ground for

winding up applies would have arisen even if coronavirus had not had a financial effect on the company. This is referred to in the CIGA PD as "the coronavirus test". The Company contends the Petitioner did not have reasonable grounds for the belief stated in the petition and, further, that the coronavirus test is not met.

16. As explained by ICC Judge Barber in *Re A Company (Application to Restrain Advertisement of a Winding Up Petition)* [2020] EWHC 1551 (Ch), in particular at paragraphs 40 and 44 to 45, the evidential burden of showing that coronavirus had a "financial effect" on the company before the presentation of the petition is on the company. The company need only establish a prima facie case. If it does so, the evidential burden shifts to the petitioner to show that the relevant ground would still apply if coronavirus had had no financial effect upon it.

17. Paragraph 21(3) of the 2020 Act provides that coronavirus has a "financial effect" on a company:

> "if (and only if) the company's financial position worsens in consequence of, or for reasons relating to, coronavirus."

It is apparent from the words "for reasons relating to" that a "financial effect" for the purposes of the coronavirus test is sufficiently wide to include an indirect effect on the company.

18. I bear in mind that paragraph 8.1 of the CIGA PD provides that, at the preliminary hearing, the court has two options as follows:

> "(1) if the court is not satisfied that it is likely that it will be able to make an order under section 122(1)(f) or 221(5)(b) of the 1986 Act having regard to the coronavirus test, it shall dismiss the petition; or
>
> (2) if the court is satisfied on the evidence before it that it is likely that it will be able to make an order under section 122(1)(f) or 221(5)(b) of the 1986 Act having regard to the coronavirus test it shall list the petition for a hearing in the winding-up list."

19. The Petitioner's grounds for its statement in the petition as to the effect of coronavirus are straightforward. The Company ceased trading in 2018 following the sale of Quay House and the distribution of the sale proceeds. The order of Waksman J was made on 15th November 2019 and fell due for payment within 14 days. This was long before coronavirus had any significant effect in the UK, certainly within the sector in which the Company operated. The Company had only around £91,000 in its accounts as at the date of Mr Whale's affidavit in connection with the freezing order application. The inference is thus that the debt could not have been paid in any event.

20. The Company's case is that coronavirus had an effect on Mr Downer's other business interests, with the result that he could not inject funds into the Company to allow it to meet its debts. The evidence in support of this is set out in Mr Downer's witness statement at paragraphs 11 to 15. He contends that COVID-19 had a "knock-on effect on how much money I can personally use to financially assist the Company". He says

that he had previously settled debts of the Company and gives examples, in very broad terms, of ways in which other development projects were affected by coronavirus. He concludes:

> "For the avoidance of doubt, just prior to Covid-19, I was keen to seek to resolve matters with the Claimants and had a number of conversations with an intermediary linked to Phil Chadda of TC Development to try and come to an agreement. Had Covid-19 not had a such an impact on my own business and income, I believe we could have negotiated an amicable resolution. Unfortunately, Covid-19 means I am not able to pay the Company's debts as I simply don't have the funds to do so."

21. Ms Staynings says this is inadequate and is no more than assertion, unsupported by any evidence. There is no evidence of Mr Downer having discharged any debts of the Company in the past. She also relies on a letter from the Company to the Petitioner's solicitors, dated 13th May 2021, which she says calls into question Mr Downer's willingness to discharge the Company's debts. This letter states that:

> "We believe that your expression of surprise at Mr Downer being 'keen to seek to resolve matters' is unfounded and disingenuous. As you will be aware, Mr Downer, through his solicitors at Hamlins LLP, has made numerous offers to bring this matter to a close since November 2019, for both of your client, all of which were under the banner of without prejudice save as to costs and without prejudice, and so we will not say anything further about the details.
>
> No doubt your clients will have told you about the funder that was seeking to resolve matters amicably on behalf of John Downer, to no avail due to your clients wish not to engage. We will provide evidence, as requested by you, in relation to the approach made by the third party, in due court for inclusion within the trial bundle.
>
> We are not sure why you seem to have a belief that, notwithstanding the losses suffered by our client already, and notwithstanding being the majority creditor of Investin, John Downer should pay any further monies."

22. Mr Isaacs reminds me that the threshold is a low one. The Company merely has to make out a prima facie case. Mr Downer's statement is more than mere assertion – it is his evidence as to what the position is and it sets out a prima facie case, which has not been rebutted by the Petitioner.

23. In my judgment no prima face case has been made out. While Mr Downer's case is set out in a witness statement it is indeed no more than assertion that he might have funded the Company, had he been able to negotiate a satisfactory deal, and is remarkably lacking in particularity. He does not give any indication of the level of the debts that he says he has previously discharged. He does not say what he anticipated his financial position to be had coronavirus not intervened and how his financial

position has changed prior to presentation of the petition. He exhibits no documentary evidence at all. While the threshold is indeed a low one, it appears to me that these improbable assertions cannot simply be accepted at face value in circumstances where the judgment debt went unpaid for some time prior to the advent of lockdown. I was not referred to any expression of a willingness to pay it or any indication that Mr Downer was awaiting a project to conclude which would enable any sums to be paid to the Company to pay any portion of its debts, even if those payments could only have been made some time after the debt had fallen due.

24. I should say that I place no great weight on the letter from the Company dated 13th May 2021. It is written well after the pandemic began and also long after presentation of the petition. It could be consistent with a change of heart about meeting the Company's debts as a result of a worsening of Mr Downer's personal circumstances. It does not, however, say that in terms and offers no more detail of any change in Mr Downer's finances. It does emphasise the inherent improbability that he should have wished, at any time, to pay any further monies towards the Company's liabilities in circumstances where he considers himself to be its principal creditor and it had ceased trading and distributed the vast majority of its assets before the date of Waksman J's order.

25. It is against that background that one would have anticipated there to be some proper evidence, beyond mere assertion, that, but for the effect of coronavirus, there was a genuine prospect of Mr Downer making funds available to the Company. There is simply no reason here to believe that the Company's financial position has worsened as a result of being deprived, by reason of coronavirus, of a source of funds that would otherwise have been available to it. That is purely speculative. It would be necessary for the Company to show prima facie evidence of a prospect that monies would have been provided to it by a third party if coronavirus had not intervened. In this case, that would require at least some evidence of genuine proposals to make such funds available.

26. For the purposes of paragraph 8.1 of the CIGA PD, I am satisfied that the court is likely to be able to make a winding up order, under section 122(1)(f) or 221(5)(b), assuming it otherwise has jurisdiction to do so. I will now turn to that question.

Jurisdiction to wind up the Company

27. The Petitioner's principal position is that the Company's COMI always has been in England. The secondary position, advanced in Ms Staynings' skeleton argument, is that, if that is not right, the court may nonetheless wind the Company up as un unregistered company. I will deal with those points in turn.

COMI

28. As a preliminary point, it is useful to set out the post-Brexit application of the EU Regulation. It appeared that there was some dispute as to its applicability but in the event counsel were agreed. It is the EU Regulation as incorporated into UK law and amended that applies to this petition, notwithstanding that the petition was presented prior to the end of the transition period following the United Kingdom's withdrawal from the European Union. This was explained in *Mederco (Cardiff) Ltd* [2021] EWHC 386 (Ch) by His Honour Judge Davis-White QC at paragraphs 50 to 69.

29. The EU Regulation is preserved in UK law by the European Union (Withdrawal) Act 2020. It continued to apply during the transition period, which came to an end at 11pm on 31st December 2020. The Insolvency (Amendment) (EU Exit) Regulations 2019, as amended by the Insolvency (Amendment) (EU Exit) Regulations 2020, provide for a number of changes to the retained EU Regulation, which came into effect from the end of the transition period.

30. Regulation 4(2) of the 2019 Regulations, as amended, provides:

> 'The amendments made by these Regulations do not apply in respect of any insolvency proceedings and actions falling within Article 67(3)(c) of the withdrawal agreement.'

Article 67(3)(c) of the withdrawal agreement itself provides that:

> "Regulation (EU) 2015/848 of the European Parliament and of the Council (78) shall apply to insolvency proceedings, and actions referred to in Article 6(1) of that Regulation, provided that the main proceedings were opened before the end of the transition period"

"Opened" has a technical meaning in this context and is not synonymous with the commencement of proceedings under the 1986 Act. As Judge Davis-White QC explained:

> "it is generally considered that under the EU Regulation 2015, English winding up proceedings were opened by the making of the winding up order (assuming e.g. no earlier order appointing a provisional liquidator) rather than being opened at the date to which the winding up may be said to date back under s127 IA 1986".

31. Here no insolvency proceedings have been "opened" for the purposes of the 2019 Regulations and thus it is the EU Regulation, as amended from 11pm on 31st December 2020, that applies. Article 1 of the EU Regulation, as retained and amended, provides:

> "1. The grounds for jurisdiction to open insolvency proceedings set out in paragraph 1B are in addition to any grounds for jurisdiction to open such proceedings which apply in the laws of any part of the United Kingdom.
>
> 1A. There is jurisdiction to open insolvency proceedings listed in paragraph 1B where the proceedings are opened for the purposes of rescue, adjustment of debt, reorganisation or liquidation and—
>
> (a) the centre of the debtor's main interests is in the United Kingdom; or

> (b) the centre of the debtor's main interests is in a Member State and there is an establishment in the United Kingdom.
>
> 1B. The proceedings referred to in paragraph 1 are—
>
> (a) winding up by or subject to the supervision of the court;
>
> (b) creditors' voluntary winding up with confirmation by the court;
>
> (c) administration, including appointments made by filing prescribed documents with the court;
>
> (d) voluntary arrangements under insolvency legislation; and
>
> (e) bankruptcy or sequestration."

Jersey of course is not a member of the EU and is not a Member State for these purposes.

32. Article 3 of the EU Regulation provides, insofar as it is relevant, that:

> "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.
>
> 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 from the United Kingdom to a Member State or to the United Kingdom from a Member State within the 3-month period prior to the request for the opening of insolvency proceedings."

33. In *Re Eurofood IFSC Ltd* [2006] Ch 508, the Court of Justice of the European Communities considered the predecessor regulation, which, for present purposes, is materially identical to the EU Regulation:

> "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 13th recital of 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 is therefore ascertainable by third parties.
>
> 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 Art.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 the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that 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 that registered office is deemed to reflect.
>
> 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 in which its registered office is situated."

34. The Court of Justice of the European Union considered the predecessor regulations further in *Interedil Srl (in liquidation) v Fallimento Interedil Srl* [2012] Bus LR 1582:

> "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 *In re Eurofood IFSC Ltd* 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'.
>
> 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.
>
> 49 With reference to that recital, the court also stated in *In re Eurofood IFSC Ltd* case, 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 in *In re Eurofood IFSC* (Case C-341/04) [2006] Ch 508, para 34, the simple presumption laid down by the European Union 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 point 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 European Union 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."

35. I remind myself that COMI is to be judged when the petition is heard and there is a presumption that the COMI of a company corresponds to the place in which it is registered. Ms Staynings took me to factors that have been held to be relevant in rebutting the presumption, which include –

    i) Where the majority of the company's administration is undertaken in the UK, particularly if the company's creditors would consider the UK to be the place where the important functions are carried out (*Re Daisytek-ISA Ltd* [2003] BCC 562, *per* His Honour Judge McGonigal, sitting as a judge of the High Court, at paragraphs 13 to 17);

    ii) Where day to day conduct of the business and activities of the company was handled by an agent appointed in England and dealings with third parties were arranged from offices in London, particularly since a third party would not have known that board meetings took place in Jersey (see *Thomas v Frogmore Real Estate Partners GP1 Ltd* [2017] EWHC 25 (Ch), *per* Mr Philip Marshall QC, sitting as a Deputy High Court Judge at paragraphs 36 to 40, citing *Re Northsea Base Investments Ltd* [2015] EWHC 121 (Ch));

    iii) Where a company is a "letterbox" company that does not carry out any business in the country where its office is situated (*Re Eurofood IFSC Ltd* at paragraph 35); and

    iv) Generally, factors going to the "head office functions test", including the law governing the main contracts, the location of business relations with clients, the location of creditors, and the management of the company (see the discussion in *McPherson's Law of Company Liquidation* at 18-042 to 18-043).

    I bear in mind of course that the question is fact specific and the cases cited are simply examples of factors that the court has considered relevant in the particular circumstances of those cases.

36. Here, the Petitioner contends that the presumption as to COMI has been rebutted and it in fact lies in England. No business has ever been carried out in Jersey, the company having been incorporated for the sole purpose of carrying on the development of Quay House, as its name implies. It was purely a "letterbox" company which did not carry out any business in Jersey. The central administrative functions of the Company have been carried on by Countrywide, of which Mr Downer was shareholder until 2015, which is based in Solihull.

37. Mr Downer's own evidence is that Countrywide was retained by the Company in 2014 simply to provide "advisory services", including legal assistance, accountancy and project management. Mr Jon Burgwin of Countrywide was, however, identified in the contract with the Petitioner as the "Employer's Representative", that is to say the representative of the Company, having "full authority to act on the Employer's behalf in connection with this agreement", save for terminating the agreement or procuring additional services that increased the fee. I note that his address is given as "Countrywide Project Management Limited" at the Solihull address. That contract provides for English law to apply and for the Courts of England and Wales to have exclusive jurisdiction. It contains numerous references to UK legislation, as one might expect in a contract related to the development of property in England, but also defines the "insolvency" of either party by reference to the 1986 Act. It provides for notices to be sent, not only to the Company's registered office, but to solicitors in England.

38. Ms Staynings further relies on the evidence of Mr Heaf, Mr Alford and Mr Heilpern. Mr Heaf states that, in 2016, the Petitioner was approached by "Mr Alford of [the Company]" in connection with the development of Quay House. He refers to a meeting on 9th April 2018 with representatives of the London Borough of Tower Hamlets, "Jon Burgwin and Terence Alford of [the Company]" and others. It is not stated where this meeting took place but, given that it involved officers of the local authority, it is a reasonable inference that it took place in London.

39. Although Mr Heaf refers to Mr Alford as being a representative of the Company, Mr Downer states that he was an independent consultant. Mr Alford's evidence confirms this. He says, however, that:

> "To give the appearance, and add credibility that I was part of Investin's 'in-house' team, which Mr Downer was keen to promote, I used an email address with the Investin domain name."

He says that he took instructions from Mr Downer, predominately by telephone. His face-to-face meetings with Mr Downer took place at a hotel near Quay House or at a hotel near the airport if Mr Downer was flying in from abroad. He said that Mr Downer never deferred to anyone else and, while he was aware that there was a board of directors in the background, "if I had been asked at the time what its role was, I would have said to rubberstamp Mr Downer's decisions". He does not give any illustrations of this.

40. He says that no one other than Mr Downer gave instructions on the project but he had an "in-house team", which had an administrative and legal function. Although he does not give Countrywide's name he gives its address as the offices from which this team operated. He says:

> "from my regular contacts with the in-house team, I knew that it provided this administrative and legal function for all his SPVs including the Company."

41. He lists the members of the in-house team, including:

i) Mr Burgwin "who was Mr Downer's 'eyes and ears' on all his projects";

ii) Ms Lisa McGinn, who had previously been a property solicitor at Browne Jacobson and "handled Investin's property and lending transactions either alone or with additional support from external solicitors";

iii) Mr Roger Lal, who had "a senior role providing, amongst other things, input on financial matters for all of Mr Downer's projects, including Quay House";.

iv) Ms Caron Bennett, who is Mr Downer's sister-in-law and "acted like a personal assistant";

v) Mrs Debra Clamp, who had responsibility for marketing and business development; and

vi) Mr Downer's brother, who also worked at the Solihull office, although Mr Alford was not aware of his specific role.

Mr Alford says that he submitted his invoices to Ms Bennett each month. He says that he expected to receive a fee on the sale of Quay House pursuant to his agreement with Mr Downer, which he did not receive.

42. Mr Heilpern explains that he was interested in running Quay House as serviced offices and understood that "Mr Downer owned Quay House through his special purpose vehicle [the Company]". He states that he met Mr Lal, Mr Burgwin and others at a service station along the M40 in July 2017 and that he understood that Mr Lal and Mr Burgwin worked for Mr Downer. He does not explain how this understanding arose. Over the next few months he had numerous conference calls with Mr Burgwin, Mr Lal and Mr Downer. He goes on to say:

> "I understood that Mr Burgwin, Mr Lal and Ms Burgwin were part of Mr Downer's 'in-house' team which was based in his Solihull office which provided an administrative and legal support function to Mr Downer and his special purpose vehicles. I would also deal with Lisa McGinn whilst she worked at Browne Jacobson and subsequently when Mr Downer hired her as his in-house solicitor in February 2018. Mr Downer's in-house team carried out the following roles:-
>
> a. Jon Burgwin was Mr Downer's "eyes and ears" and would be on the ground overseeing the refurbishment programme on behalf of Mr Downer. I would meet with Mr Burgwin at Quay House regularly.
>
> b. Emily Burgwin was Mr Burgwin's daughter and she was involved in the marketing and promotion of Quay House for prospective business occupiers.
>
> c. Ms McGinn would advise on the form of licence to be granted to the business occupiers of Quay House and would deal with any other legal matters that may arise.

> d. Roger Lal was Mr Downer's head of accounting and would oversee the financial operations of the joint venture including the internal accounting and payment of third party suppliers."

43. He explains that Mr Downer and he agreed to formalise the use of Quay House as serviced offices in an office management agreement entered into on 20th December 2017 between the Company and Local London, which was a special purpose vehicle incorporated by Mr Heilpern. He says that he only negotiated with Mr Downer and all key decisions were taken by him solely. If a decision had to be made "he would make it there and then". Mr Heilpern would also deal with "members of his staff on matters which [Mr Downer] had delegated to them and they were all based in Solihull".

44. He complains that Quay House was sold without his knowledge and his staff and the building occupiers were required to leave the building. Local London brought a claim for breach of the agreement which was referred for expert determination, in accordance with the terms of the agreement. It was awarded £665,300 by the appointed expert.

45. For his part Mr Isaacs relied upon *Mackellar v Griffin* [2014] EWHC 2644 (Ch), in addition to the principal authorities that I have referred to above. Mann J said at paragraph 27:

> "(7) So far as management is concerned all control, operational management and development decisions were always made at the offices of Chatsworth Property Services Limited in Jersey. The accounting function was carried out in the offices of Chatsworth in Jersey and, perhaps most importantly, so far as concerns interaction with third parties, all correspondence and electronic communications of the company were managed from and directed to the offices of Chatsworth in Jersey. That includes communications with creditors such as Credit Suisse and HMRC. Contractual negotiations and dealing with suppliers including professional agents acting in this jurisdiction were conducted from the Dublin offices or Jersey offices. Invoices were addressed to the company at its Jersey offices and all other correspondence went to Jersey. The company never had any employees in England or Wales.
>
> 28 That is a summary of Mr Albericci's evidence. None of that at all enables even a start to be made on rebutting the presumption that the COMI of the company is in the BVI. All relevant activities were taking place outside the jurisdiction. Mr Al-Attar was able to point to only two factors which might be said to suggest otherwise. The first is the existence of the property in this country…. I accept that agents operating in this country and managing head office-type affairs might be material from which it could be inferred that the COMI of the company was in this jurisdiction. However, that would require a detailed investigation of the particular facts and it would require the involvement of agents or servants in the sense of

> those acting for the company to be not just limited commercial activities, but to be the discharge of the sort of functions that one would expect head office to discharge. All Mr Al-Attar's evidence does is to refer to the existence of professional agents in this country. That is not even the beginnings of a case which would enable the rebuttal of the presumption as to where the COMI is."

Mr Isaacs submitted that this was similar to the position here and that the carrying out of accounting functions, location of contractual negotiations and discharge of limited commercial functions otherwise than in the jurisdiction in which the Company was registered did not begin to rebut the presumption as to the location of its COMI. Ms Staynings rightly points out, however, that Mann J was considering a different situation. The company in that case conducted operations, including head office functions, in Jersey, Portugal and Ireland. There was very limited and unparticularised evidence of agents operating in the UK, but Mann J accepted that the existence of such agents could be relevant to determining a company's COMI.

46. In relation to the evidence Mr Isaacs submitted that the role of Countrywide was to provide "limited commercial services" by way of advice. Mr Downer's first witness statement says that Countrywide's employees did not take decisions on behalf of the Company and exhibits the contract with it. This contract includes the following provisions –

i) The services are to be provided "where instructed";

ii) Clause 3.2 states:

> "For the avoidance of doubt, the Adviser shall not have authority to bind the Company in any way whatsoever and shall not have the authority to conclude contracts on behalf of the Company or to acquire the Prospective Properties or Other Properties or to sell, mortgage, transfer or otherwise dispose of the same";

iii) Clause 3.3 states:

> "For the avoidance of doubt, the Advisory Services do not give any delegated authority to the Adviser to make management decisions or to hold itself out as such on behalf of the Company";

iv) Finally, clause 22 states that the agreement shall not create a partnership or relationship of principal and agent between the parties.

47. In relation to the evidence of Mr Heaf as to the operation of the Company, Mr Isaacs submitted that it is simply his "subjective impression". Mr Alford and Mr Heilpern have, as Mr Issacs put it, "an axe to grind", given their claims against the Company.

48. Mr Downer's evidence is that the administration of the Company took place in Jersey and, in accordance with the requirements of the laws of Jersey, all meetings of

directors were conducted in person in that jurisdiction until about February or March 2018 when he became aware that the law had been relaxed and he could attend by video. He exhibits to his second witness statement some 158 pages of board minutes, of which only about 28 pages relate to the Company, the others being minutes of the boards of other companies connected with Mr Downer. The Company's board minutes are dated:

i) 16th January 2014;

ii) 27th February 2014;

iii) 27th February 2014;

iv) 27th February 2014;

v) 2nd June 2014;

vi) 17th July 2014;

vii) 4th September 2014;

viii) 10th December 2014;

ix) 24th February 2015;

x) 24th March 2015;

xi) 1st October 2015;

xii) 25th January 2017;

xiii) 29th May 2018; and

xiv) 29th June 2018.

They show the attendance of members of Countrywide at eight of them. There are obvious gaps in them. There are no minutes, for example, showing the authorisation of the appointment of the Petitioner or of the office management agreement with Local London for example. Nor do the minutes show anything other than a formal record of the Company's decision-making. There is no evidence of genuine discussion, still less dissent. There is nothing to suggest that any of the other board members had any input into the operations of the Company or engaged with third parties (other than signing formal documents). By contrast, the minutes of the meeting on 2nd June 2014 record that Mr Downer reported that "Countrywide" had approached the owners of a property adjoining Quay House with a view to the Company acquiring an option to purchase it.

49. I bear in mind that the COMI of a company is determined objectively and must be ascertainable by third parties, particularly its creditors. As such, there is limited weight that can be placed on the fact that the Company's board meetings in Jersey or on the terms of its contract with Countrywide. There is no reason to believe that third parties had knowledge of either of these. By contrast, the factors that are ascertainable to third parties, such as all the places in which the Company pursued its economic activities, held assets, conducted negotiations and exercised management functions all point to its COMI being in England. I say this for the following reasons –

i) The Company's sole economic purpose was to carry on business in the UK by the development of its principal asset, Quay House, as its very name suggests.

I do not agree with Mr Isaacs that the name of the Company is irrelevant. It is true that there might be many properties with the same name in other jurisdictions, but I am considering this company in its own context. It was dealing with third parties in connection with this specific property and the name brings into focus the likelihood that the Company was a special purpose vehicle in relation to that property.

ii) Its contracts were governed by English law and subject to the jurisdiction of the courts of England and Wales. Its representative with "full authority" to make decisions regarding the contract with the Petitioner was Mr Burgwin, whose address at Countrywide was given.

iii) The uncontradicted evidence of Mr Heilpern was that Mr Downer made decisions "there and then" without reference to anyone else. Similarly the unchallenged evidence of Mr Alford is that while he was aware there was a board in the background it was Mr Downer who made decisions. Meetings with the Petitioner and other potential creditors took place in England and Wales, either at Quay House or in hotels nearby.

iv) The evidence of Mr Heaf and Mr Heilpern is that the attendees from Countrywide at meetings appeared to be members of Mr Downer's "in-house" team. While this is dismissed as the subjective impression, Mr Alford's evidence, again uncontradicted, is that Mr Downer wished to create the impression of having such a team. For this reason Mr Alford was given an "investin" email address. I note that the correspondence with Ms McGinn of Countrywide in connection with this dispute is similarly sent to and from an email address for her ending "@investinplc.com".

v) Head office functions were carried out at the offices of Countrywide in Solihull. Mr Alford's invoices were sent there to be processed. Ms McGinn plainly currently undertakes, and according to the unchallenged evidence undertook at all relevant times, the legal affairs of the Company, including dealing with the terms of licences to occupy Quay House, albeit she joined Countrywide at the beginning of 2018. Mr Downer does not seek to contradict Mr Alford's evidence that Ms Bennett acted as his personal assistant or Mr Heilpern's evidence that Mr Lal was head of accounting and was responsible for overseeing the joint venture between the Company and London Local. Countrywide was also involved in contacting third parties in England with a view to acquiring options over property. It does not appear that this was at the direction of the board.

vi) There is nothing in the evidence to suggest that any "head office" type functions were undertaken at any other location, in particular the Company's addresses in Jersey from time to time, save for meetings of the board, which aside from Mr Downer, consisted of persons engaged to ensure the "administration" of the company in accordance with Jersey law. As I have said, the location of the meetings of the board were not ascertainable by third parties in any event but it is significant that there is nothing to suggest that any of the other directors engaged in the commercial direction or day-to-day management of the Company. The meetings appear to have been formalities. There is of course no evidence from any of the other directors in this petition.

vii) I also note that the Quay House project is held out as a project on the website of "Investin plc", which gives the same address as that of Countrywide at the foot of the same page. Given the large number of companies in which Mr Downer appears to have been involved some confusion between them is understandable, taken with the board minutes of a number of Mr Downer's other companies, exhibited to his second witness statement, which again show the attendance of representatives of Countrywide, it points to Countrywide's offices being the administrative hub of the companies in which Mr Downer was interested, and that of the Company in particular.

50. I am satisfied that the COMI of the Company has at all times been in England and Wales. If follows that the court has jurisdiction to make a winding-up order,

Winding up as an unregistered company

51. If that is wrong, the question is whether the Company may be wound up as an unregistered company under ss. 220 and 221 IA 1986. Section 220 IA 1986 provides

> "For the purposes of this Part 'unregistered company' includes any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom."

It therefore includes a company registered in another jurisdiction. Section 221 goes on:

> "Subject to the provisions of this Part, any unregistered company may be wound up under this Act; and all the provisions of this Act about winding up apply to an unregistered company with the exceptions and additions mentioned in the following subsections."

52. In *Banco Nacional de Cuba v Cosmos Trading Corp* [2000] BCC 910, 913-914, Sir Richard Scott V-C, as he then was, cited with approval the three pre-conditions to the exercise of the jurisdiction enunciated by Knox J in *Re Real Estate Development Co Ltd* [1991] BCLC 210, 217. In summary:

i) there must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction;

ii) there must be 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 must be persons over whom the court can exercise a jurisdiction.

53. As to sufficient connection, this may include having a place of business within the jurisdiction and is broad enough to include places where the Company's agents stayed when transacting business (*Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch. 112, *per* Evershed MR at 126-127). Similarly, such a

connection may be found where the debt upon which the Petition is founded was incurred in the jurisdiction or was based upon a contract negotiated in the jurisdiction (*Re a Company (No. 00359 of 1987)* [1988] Ch. 210, *per* Peter Gibson J at 226B). It is not necessary that the company has assets in the jurisdiction but the court may take into account potential assets including the potential fruits of a claim that can only be made if the company is wound up (*Re Latreefers Inc* [1999] 1 BCLC 271 *per* Lloyd J at 279).

54. In my judgment there is plainly a sufficient connection with the jurisdiction. The Company was established for the purposes of developing Quay House in this jurisdiction. At the very least, delegated administrative and legal functions were carried out on its behalf by Countrywide in Solihull. It entered into contracts governed by English law and containing English jurisdiction clauses. The Petition debt arises from litigation conducted in this jurisdiction. There is a potential preference claim against Mr Downer under section 239 of the 1986 Act arising from the sale of the property and the use of the proceeds of sale to repay his loan and interest. The circumstances of these payments have not been discussed in detail in evidence but, on the face of it, payments were made towards Mr Downer's loan in the two years prior to presentation of the petition at a time when the Company was unable to pay all of its debts. Those payments were made to a director of the Company, and it is therefore presumed that the Company was influenced in deciding to give it by a desire to put him into a position which, in the event of the company going into insolvent liquidation, would be better than the position he would otherwise have been in. There is nothing in the evidence to suggest that the presumption is plainly ill-founded.

55. If follows that there is the potential benefit to the Petitioner, and creditors generally, in that there is a reasonable possibility of the liquidator recovering contributions from Mr Downer as a result of preference claims to augment the assets of the Company. It does not seem to be in issue that the 1986 Act offers greater scope for recovery than the equivalent provisions in the law of Jersey. At the very least, there is in excess of £100,000 available in the winding-up and there is no reason why liquidators could not recover those sums from the Company's accounts in Jersey. There are at least three creditors in this jurisdiction, claiming substantial sums, over which the court can exercise jurisdiction.

56. A possible objection is that this alternative ground was not foreshadowed in the petition itself. It does not appear to me that it needs to be. Section 221 of the 1986 Act has the effect of applying the provisions applicable to companies in the UK to unregistered companies, and none of the exceptions set out in that section apply here. IR 7.5 does not require the petition to make reference to sections 220 or 221. The petition contains the information prescribed and sets out the relevant ground.

57. If the Company's COMI is indeed in Jersey, I am nonetheless satisfied that the Court has jurisdiction to wind it up as an unregistered company.

Conclusion

58. I am satisfied that the court has jurisdiction to wind up the Company. I am similarly satisfied on the evidence before me that it is likely that the court will be able to make an order under section 122(1)(f) or 221(5)(b) of the 1986 Act having regard to the coronavirus test.

59. I will therefore list the petition for a hearing in the general winding-up list. As a result of the change in the Insolvency Rules at the conclusion of the Brexit transition period it will be necessary for the petition to be amended to refer to "COMI proceedings", rather than "main proceedings", and re-verified. I will give permission for the petition to be amended and reverified accordingly and served by first class post not less than seven days before the hearing of the petition.

60. I will invite counsel to agree a consequential order. This will need to address the costs reserved by the order of Miles J. If that cannot be agreed I will list a hearing to determine any outstanding issues.