England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2013] EWCA Civ 643
Case No: A3/2012/1494

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
Chancellor of the High Court, Sir Andrew Morritt
[2012] EWHC 1413 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL
6th June 2013

B e f o r e :

LORD JUSTICE MOORE-BICK
SIR STEPHEN SEDLEY
and
SIR BERNARD RIX

Between:

The Trustees of the Olympic Airlines SA Pension & Life Insurance Scheme	**Petitioners/ Respondents**
- and -	
Olympic Airlines SA	**Respondent/Appellant**

(Transcript of the Handed Down Judgment of
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David Chivers QC and Mr Sebastian Prentis (instructed by Philip Ross Solicitors) for the Appellant
Mr Marcus Haywood (instructed by Baker & McKenzie LLP) for the Respondent

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HTML VERSION OF JUDGMENT

SIR BERNARD RIX :

1. This appeal is about the jurisdiction under EU law to commence a secondary winding-up in England of a company whose main liquidation is taking place in Greece. That jurisdiction, under the Insolvency Regulation (Council Regulation (EC) 1346/2000), depends on the existence of an "establishment" in England. Article 2(h) of the Regulation provides:

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

2. The judge, the Chancellor of the High Court, Sir Andrew Morritt, held [2012] EWHC 1413 (Ch) that there was such an establishment at the relevant time, which it was common ground was on 20 July 2010 when the petition to wind-up in England was presented. The company concerned, Olympic Airlines SA, the appellant, maintains that there was in fact no jurisdiction for it to be wound up in England, because it no longer had an establishment in England within the meaning of the Regulation.

3. Olympic Airlines, a company incorporated in Greece (the "airline"), commenced operations as a state-owned airline in December 2003. It flew to London Heathrow among other destinations. On 2 October 2009, however, it entered "special" liquidation in Greece. Ethniki Kephaleou SA was appointed its liquidator. It had already ceased all commercial operations at midnight on 28 September 2009. The airline was brought down by the European Commission's determination on 17 September 2008 that it had received illegal state aid from the Greek State. It is common ground that the Greek liquidation constitutes the "main proceedings" for the purpose of the Regulation.

4. The airline had carried on business in England from a head office at 11 Conduit Street, London W1, which it leased from an associate company. It also had premises at Heathrow and at Manchester and employed about 27 employees. Those employees, or most of them, were members of the airline's pension and life assurance scheme (the "scheme"). The petitioners (here the respondents) are the trustees of that scheme. Their interest in this litigation is that it is only if a secondary winding-up of the airline can be constituted in England that responsibility for the scheme may be assumed by the Pension Protection Fund under section 127 of the Pensions Act 2004. The airline's liquidation in Greece is not a qualifying insolvency event for these purposes. The deficit on the scheme, due to the trustees from the airline, is in excess of £15 million.

5. The following events happened to the airline's operations in England prior to the critical date of 20 July 2010. It will be recalled that the Greek liquidation commenced on 2 October 2009. Thereafter the ticket office at Heathrow was closed in November 2009. On 24 March 2010 the Greek liquidator gave instructions for the disposal of the airline's assets at its branches abroad. The premises in Manchester were vacated in May 2010 and their contents moved to Conduit Street. On 29 June 2010 the airline's bank in England was instructed to cancel all direct debits and standing orders with immediate effect. On 2 July 2010 the Greek liquidator wrote to all 27 of the airline's employees in England terminating their employment as from 14 July 2010.

6. However, the English branch's financial and planning manager, Mr Vasilis Platanias, was retained on a short term ad hoc contract with effect from 1 March 2010, and this continued after 14 July. He earned £2,500 per month. He had previously retired in February 2010. He attended the Conduit Street premises daily until 14 July

2010, but thereafter only "as required". It is not clear what that means. He had previously paid suppliers and utility bills, reconciled bank statements, copied and sent relevant documents and records to the liquidator in Athens and dealt generally with the post and telephone calls. On 1 June 2010 he had reported to the liquidator in Athens on the disposal of the airline's furniture, equipment and a van. This was disposed of for £1600, but apparently was not an asset of the airline anyway. "Mr Platanias agreed that the rest had no worthwhile value" as the Chancellor found at his para [13]. However, it seems that the furniture and equipment was not actually disposed of until some time later.

7. On 24 June 2010 the bank manager reported to Mr Platanias that he had insufficient funds to pay the airline's employees under the BACS payroll mechanism. The result was that Mr Platanias cancelled all standing orders and direct debits on 29 June 2010 (see above), and arranged for the final salary payments to employees down to 14 July to be funded by a remittance from the Greek liquidator. Mr Platanias gave evidence at trial below, and was accepted as a truthful witness.

8. Mr Platanias was assisted by the London branch's former general manager, Mr Tom Savva. He had retired in August 2008 but was re-engaged on the terms of another ad hoc contract, and was also paid £2,500 monthly. The Chancellor found (at para [15]): "He attended the offices of OA at 11 Conduit Street three or four days a week to deal generally with what required attention, not least instructions or requests from the liquidator in Athens." Mr Savva did not give evidence.

9. The Chancellor concluded:

> "21. I accept that, in this case, the relevant time when the existence or not of an establishment has to be judged is Tuesday 20th July 2010 for that is when this petition was presented to the court. I also accept that the facts as established at that date need to be evaluated in the light of what came before and what followed after. Thus, until Thursday the previous week OA had a work force of 27 other employees and for many months thereafter it had a fully equipped office with computers, telephone and internet facilities and a skeleton staff of two with a third for the first three weeks. In that period the remaining staff were reconciling accounts, dealing with creditors, responding to enquiries from the head office in Athens and dealing with anything else which required attention. What they were not doing, and had not done for many months, was selling air tickets."

10. It is not easy to take from these findings what exactly was happening at Conduit Street from and after 20 July 2010. It seems (para [14] of the judgment below) that telephone and internet services in Conduit Street continued until the end of 2010, and that final closure of the office was not until December 2011. However, Mr Platanias' witness statement says that the branch's bank accounts were frozen at the end of August 2010 as a result of the advertising of the winding-up petition in the London Gazette on 24 August 2010. He sets out the cheques paid during the period from petition to closure and they comprise solely payments of salary to Mr Platanias and Mr Savva, payments for telecommunications services, and a small payment for repairs following a break-in at the premises. Although furniture and equipment may not have been disposed of until later, they were without value.

11. Be that as it may, the airline does not challenge the primary facts found by the Chancellor, but raises an issue of law, which it had argued below, to the effect that the Regulation's definition of "establishment" (see at para [1] above) required more than the Chancellor's findings allowed and in particular required some more than transitory economic activity which was external and market-facing. The desultory internal running down of a business such as may have been indicated by the Chancellor's findings did not count.

The Regulation

12. It is necessary to consider the structure of the Regulation and then, below, some jurisprudence on its definition of "establishment".

13. The Regulation's recitals explain the purpose of the Regulation in distinguishing between main insolvency proceedings and secondary insolvency proceedings. Thus recitals (12) and (19) state:

> "(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community."
>
> "(19) Secondary insolvency proceedings may serve different purposes, besides the protection of local interests. Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires."

Recitals (17) and (18) indicate that secondary proceedings may precede or follow main proceedings: there are however relevant restrictions on such cases, see article 3, especially 3(4). And recital (13) states that –

> "(13) 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."

14. Article 1 states that the Regulation applies to "insolvency proceedings". Article 2 is the definition section and contains the critical definition of "establishment" in article 2(h). It also provides that "insolvency proceedings" means the collective proceedings listed in Annex A, that "liquidator" means the persons or bodies listed in Annex C, and that "winding-up proceedings" means the proceedings listed in Annex B. Article 3(2) explains the importance of the existence of an "establishment" to the opening of secondary proceedings:

> "Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State."

15. Annexes A, B and C throw further light on the meaning of insolvency proceedings etc. Thus Annex A demonstrates that they encompass administration and voluntary arrangements as well as winding-up, Annex C correspondingly shows that "liquidator" covers the roles of administrators and supervisors of voluntary arrangements among other roles, and Annex B extends winding-up proceedings to include creditors' voluntary winding-up.

16. Article 3(3) states that secondary proceedings which *follow* the opening of main proceedings elsewhere "must be winding-up proceedings". However, it follows that secondary proceedings that *precede* the opening of main proceedings may be insolvency proceedings of any kind. It also follows that the requirement and definition of "establishment" applies to all kinds of secondary insolvency proceedings.

17. The article 2(h) definition of "establishment" is used not only in EU law but is itself shared in the earlier UNCITRAL Model Law on Cross-Border Insolvency adopted by the General Assembly of the United Nations on 15 December 1997. That Model Law similarly provides for proceedings in separate nations, described as "main proceedings" and "non-main proceedings", with the main proceedings taking place in the State where the debtor has the centre of its main interests, and the non-main proceedings taking place in another State "where the debtor has an establishment within the meaning of subparagraph (f) of article 2 (the definitions article) and article 2(f) being identical to the Regulation's article 2(h) definition of "establishment".

18. The relationship of the Regulation, the Model Law, and the still earlier European Convention on Insolvency Proceedings was helpfully explained by Sir Andrew Morritt C in *In re Stanford International Bank Ltd* [2011] Ch 33:

> "[36] To understand the arguments and explain my conclusion it is necessary to consider the evolution of both the Insolvency Proceedings Regulation and UNCITRAL. Both were preceded by the European Convention on Insolvency Proceedings. Its preparation began in 1960. It was open for signature by member states from 23 November 1995. The Convention applied to proceedings which satisfied four conditions but as there might be more than one proceeding satisfying those conditions it also provided for "main insolvency proceedings". They were defined as proceedings in the contracting state where the debtor had his centre of main interests. In May 1996 the UK Government refused to sign the Convention. In July 1996 there was signed what became known as the *Virgós-Schmit Report on the Convention (Report on the Convention on Insolvency Proceedings*, Brussels, 3 May 1996). Though never formally adopted, it was and is regarded as an authoritative commentary on the Convention and the subsequent regulation derived from it."

19. The *Virgós-Schmit Report* at its para 71 states as follows:

> "71. For the Convention on insolvency proceedings, "establishment" is understood to mean a place of operations through which the debtor carries out an economic activity on a non-transitory basis, and where he uses human resources and goods.
>
> Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional.
>
> The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an "establishment". A certain stability is required. The negative formula ("non-transitory") aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor.
>
> The rationale behind the rule is that economic operators conducting their economic activities through a local establishment should be subject to the same rules as national economic operators as long as they are both operating in the same market. In this way, potential creditors concluding a contract with a local establishment will not have to worry about whether the company is a national or a foreign one. Their information costs and legal risks in the event of insolvency of the debtor will be the same whether they conclude a contract with a national undertaking or a foreign undertaking with a local presence on that market.
>
> Naturally, the possibility of opening local territorial insolvency proceedings makes sense only if the debtor possesses sufficient assets within the jurisdiction. Whether or not those assets are linked to the economic activities of the establishment is of no relevance."

20. Of particular relevance to the current appeal is the observation in the report that "Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional". The rationale provided in the fourth sub-paragraph is also instructive. In *Stanford* Sir Andrew Morritt had said that the *Virgós-Schmit* report is regarded as authoritative commentary on the Regulation. This court had previously said as much in *Shierson v. Vlieland-Boddy* [2005] EWCA Civ 974, [2005] 1 WLR 3966, with particular regard to the definition of "establishment" at article 2(h): see at paras [47], [65]-[68], [73] and [76] (*per* Chadwick and Longmore LJJ and Sir Martin Nourse).

Jurisprudence

21. In *Shierson* this court held, by reference to article 2(h) and the commentary of the *Virgós-Schmit* report, that the carrying on of the activity of letting and managing a multi-let unit at a business park was an "establishment" for the purposes of the Regulation.

22. In *Re Office Metro Ltd* [2012] EWHC 1191 (Ch), [2012] BCC 829 Mann J held that there was no establishment

within the Regulation such as to give the English court jurisdiction to wind up the debtor company. There was a "place of operations", namely a Chertsey office, and there was also some activity by "human means" (and presumably there were some assets within the office). However, there was nothing which amounted to economic activity within the meaning of the Regulation. Mann J explained:

> "[31] However, I do not think that it amounts to economic activity within the meaning of the Regulation. By the time of the petition it seems that the only "activity" (and I deliberately put it in inverted commas) was to sit there being liable on guarantees, sometimes paying out on them, and perhaps doing whatever else was necessary to keep itself alive in terms of compliance with formalities such as company filings. Mr Wetheral (or perhaps his staff) occasionally sought legal or accounting advice, but there is no evidence it was doing anything else. Being in a state of liability, with the need sometimes to pay out on that liability and take a bit of advice, is not an economic activity for the purposes of the Regulation. Neither is seeking accounting or legal assistance on other matters. Forwarding post (which is said to have happened at Chertsey) is not an economic activity carried on there. It is something which goes on so that someone can carry it on somewhere else. Utilising the guidance given in the Virgós-Schmit report, it is not conducting activities on the market.
>
> [32] The activities necessary for compliance (filing and so on) are not, apparently, carried out at the Chertsey office. They are therefore not carried out at the only candidate for a place of operations.
>
> [33] Even if I am wrong as to whether Office Metro's residual activities are economic activity for the purposes of the Regulation, I do not consider that they are non-transitory. They are not a consistent activity. The activities involved in paying up on guarantees do not have the character of a consistent business or business-type activity. They arise as and when needed, and were all going well in the underlying group they would not arise at all. The concept of "establishment" is the one chosen as the touchstone of sufficient presence to justify the opening of insolvency proceedings. There are three ingredients for these purposes: (i) a place where things happen, and (ii) sufficient things (iii) of sufficient quality happening there. The concept of non-transitoriness goes to the third of them. In my view the converse of something being transitory is not confined merely to things which are "fleeting" (to use one English synonym) but is also intended to encapsulate such things as the frequency of the activity; whether it is planned or accidental or uncertain in its occurrence; the nature of the activity; and the length of time of the activity itself. When measured against all these elements I consider that the activities of procuring payment on the guarantees is transitory (or not non-transitory) for the purposes of the Regulation. This is to a large extent a value judgment in respect of which one cannot be prescriptive of the elements to be fulfilled (or not fulfilled), but in my view it is plain that if the activities were otherwise economic activities they would, for these purposes, be "transitory" for the purposes of the Regulation."

23. *In re British American Insurance Company Limited* 425 BR 844 (SD Florida, 2010) was a decision in a bankruptcy court under the federal Bankruptcy Code which incorporated the UNCITRAL definition of "establishment". Kimball J held that there was no establishment in the Bahamas for the purposes of constituting secondary proceedings there. It is clear that the US courts looked for assistance both to the Model Law and to the EU Convention and therefore also to the *Virgós-Schmit* report and in particular para 71 of the latter: see at para [27]. Kimball J continued:

> "[30] To have an establishment in a country, the debtor must conduct business in that country. The location should constitute a "seat for local business activity" for the debtor. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 131. The term "operations" and "economic activity" require showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property.
>
> It is undisputed that at the time of the Bahamas Petition, BAICO had no business operation in the Bahamas other than the judicial manager's activities pursuant to his appointment. BAICO does not

> presently do business in the Bahamas. Mr. Lopez's retention of counsel and accountants, investigation of assets and liabilities, and reporting to the Bahamas Court, do not constitute business activities of BAICO. The court in *Bear Stearns* rejected this same argument in finding that the petitioners failed to prove an establishment in the Cayman Islands. 389 B.R. at 339; *accord Lavie v. Ran*, 406 B.R. 277, 286 (S.D.Tex.2009) ("From the outset, it stretches credulity to view a bankruptcy proceeding as an industrial or professional activity…Further, though a bankruptcy proceeding does pertain to economic matters, it does not comport with traditional notions of economic activity in the marketplace.")"

24. The only decision of the European Court of Justice ("ECJ") which has been cited to us is *Interedil SRL (in liq.) v. Palimento Interedil SRL* (2011) Case C-396/09, [2012] BCC 851, but it is not of direct relevance because it treats its subject-matter at a higher level of abstraction. The issue was whether a lease agreement in respect of two hotel complexes and a contract with a bank was enough to constitute an establishment. That question was not answered directly, but was left for the national court to answer in the light of the following guidance:

> "62. The fact that that definition links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organisation and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification of an "establishment".
>
> 63. Since, in accordance with art.3(2) of the Regulation, the presence of an establishment in the territory of a Member State confers jurisdiction on the courts of that State to open secondary insolvency proceedings against the debtor, it must be concluded that, in order to ensure legal certainty and foreseeability concerning the determination of the courts with jurisdiction, the existence of an establishment must be determined, in the same way as the centre of main interests, on the basis of objective factors which are ascertainable by third parties.
>
> 64. The answer to the second part of Question 3 is therefore that the term "establishment" within the meaning of art.3(2) of the Regulation must be interpreted as requiring the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition."

25. The ECJ had previously ruled, in connection with a separate question about the determination of the centre of main interests of the debtor company, that that depended on objective factors ascertainable by third parties, in the following terms, equally applicable, as its para 63 stated, to the question of determining an "establishment":

> "49. With reference to that recital [13], the court also stated, at [33] of *Eurofood IFSC* [Case C-341/04 [2006] Ch 508, [2006] ECR I-3813] 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."

26. Mr Marcus Haywood submitted on behalf of the trustees that the ECJ was indicating by such language as "minimum level" of organisation and "a degree" of stability that these requirements were minimal as well as minimum; and that the requirement of activity being ascertainable to third parties such as creditors could be met by the mere presence of contacts with utility companies (providing heating or telephone services). He submitted that the definition of establishment was intended to be very broad and was easily met; and that the requirement of an outward facing economic activity suggested by the *Virgós-Schmit* report was not justified by the

Regulation's language and was inconsistent with the ECJ's approach in *Interedil*.

27. In my judgment, however, in *Interedil* the ECJ was, if anything, indicating that the debtor company's assets and contractual relationships in Italy might not be enough to justify jurisdiction for insolvency proceedings in Italy, whether main or secondary. The company had been registered in England, and therefore there was a presumption that its central administration was in the same place. While the insolvency proceedings were still at an early stage and there was a lack of detailed findings, the ECJ was underlining the possible inadequacy of evidence of economic activity in Italy, despite the existence there of leasing and banking agreements.

The judgment below

28. In his judgment below the Chancellor guided himself by the Regulation and *Interedil*, and otherwise found no real assistance elsewhere, not even in the *Virgós-Schmit* report (at para [9]). He considered that he simply had to apply the *Interedil* learning that an establishment as defined in the Regulation involved "a structure with a minimum level or organisation and a degree of stability necessary for the pursuit of an economic activity" (at paras [11] and [20]), and that its existence as such was ascertainable by third parties on the basis of objective factors (at para [23]). In particular, he rejected the submission for the airline that the concept of "economic activity" implies some market activity (at para [22]), and he did so without citing the *Virgós-Schmit* report's support for that proposition, or the acceptance of such support by Mann J in *Re Office Metro*, which was cited to him. I do not know if the Florida case, *British American Insurance*, was cited below.

29. In this connection the Chancellor's reasoning appears to have been as follows. First, he observed that winding-up could not in itself be incompatible with a company in liquidation having an establishment, as otherwise "there would be no scope for the secondary proceedings the Insolvency Regulation clearly envisages" (at para [20]). Secondly, he rejected the need for economic activity to be market facing (at para [22]). He did so on the grounds, first, that the word "economic" does not "at least in English" carry any external market overtones (albeit he recognised that the Regulation's definition required a uniform and autonomous interpretation throughout the European Union); and secondly, that the generality of companies in liquidation "by definition" do not engage in external market activities any longer. As for the requirement that the existence of the establishment be ascertainable by third parties, he considered that anyone who went to the Conduit Street office or rang it up on the telephone was in a position to ascertain the situation (at para [23]).

Discussion and decision

30. In my judgment, and with respect to the Chancellor, he erred in overlooking the *Virgós-Schmit* report as an authoritative commentary on the Regulation, but also in failing to take into account that the Regulation is concerned with insolvency proceedings of all kinds. As I have observed above, the definition of "establishment" applies to secondary insolvency proceedings of any kind, even though secondary proceedings which follow the opening of main proceedings must be winding-up proceedings (see at para [16] above). However, secondary proceedings which precede the opening of main proceedings need not be winding-up proceedings. It follows that secondary proceedings may involve forms of insolvency proceedings under which the debtor company may well seek to trade out of its difficulties. In such cases it simply is not true that the Regulation contemplates that a debtor company in secondary proceedings cannot be a trading company with outward facing market activity. Moreover, even a debtor company in liquidation may continue to trade for a while, for instance as a means of liquidating its stock. And in any case, the question is not so much what the debtor company does in the period *after* the commencement of insolvency proceedings, but in the period immediately leading up to the commencement of such proceedings: for, as was and remains common ground, the issue of whether or not a debtor company has an "establishment" for the purposes of the Regulation has to be answered as at the point at which the jurisdiction of the insolvency court is invoked.

31. This analysis is supported by the rationale of secondary proceedings, as indicated by the Regulation itself and the commentary on it contained in the *Virgós-Schmit* report. The main proceedings can only be started "where the debtor has the centre of his main interests" (recital (12)). As an exception to that, however, secondary proceedings may also be opened in a different state but only where the debtor has an "establishment" as defined.

This establishment plainly does not amount to a centre of main interests, but it provides the analogous requirement "on the ground" to make it appropriate to invoke the jurisdiction of the local supervisory courts. As recital (19) of the Regulation indicates, the primary purpose of secondary proceedings is "the protection of local interests", namely the interests of creditors who have been dealing with an establishment which survives as such up to the date in question. If, however, such an establishment could be provided by the desultory winding-up of any business with a former "place of operations" as long as the location of such has, at the critical date, not yet been disposed of, and as long as some "human means" activity is involved (such as could be provided by almost a single caretaker of a dormant operation, or even by the obtaining of ad hoc legal or accountancy advice) and as long as some assets survive, perhaps, as in this very case, no more than the worthless detritus of a defunct operation, then there would hardly ever be secondary proceedings which did not come within the definition: which is plainly not intended to be the case. However, in my judgment what is being looked for is a location where there is still, at the critical date, a business operation ("a place of operations" performing "economic activity") such as will justify secondary proceedings in a state outside the state of the centre of main interests. This is fully supported by the passage in paragraph 71 of the *Virgós-Schmit* report which discusses the rationale of secondary proceedings in terms of the fairness of treating creditors of a business operation alike, whether they transact with a national or a foreign undertaking (see at para [19] above).

32. For all these reasons, there is no difficulty whatsoever in giving to the Regulation's definition of "establishment" a meaning which requires more to its "economic activity" than the mere process of winding-up. On the contrary, as at the point of entering insolvency proceedings, it is likely that a debtor company will be trading, and indeed will continue to trade to some extent or other. The question is whether at that point it has an establishment in a country other than the country of its "main interests", and that depends on whether it has in that other country a "place of operations" where non-transitory "economic activity" is carried on "with human means and goods", ie with human and physical resources.

33. In the context of that question, it would seem that the opinion expressed in para 71 of the *Virgós-Schmit* report, namely that the reference to "economic activity" means activity "exercised on the market (i.e. externally)", is likely to be correct. What happens subsequently is beside the point save to the extent that it might throw relevant light on what was happening immediately before and at the time when the jurisdiction of the court was invoked. The definition is clearly intended to lay down a rule that the mere presence of an office or branch, a "place" at which the debtor is located, is not sufficient. It has to be a place "of operations": human and physical resources have to be involved in those operations; and there has to be "economic activity" involving those resources. Thus, a dormant branch, or one which has not yet started operating, or one which has fallen into economic inactivity, will not suffice. Moreover, the need for external activity is supported, even if only inferentially, by *Interedil's* requirement for something which can be ascertained by third parties.

34. The view of the *Virgós-Schmit* report is also supported by jurisprudence. It may be the case that none of that jurisprudence is binding on this court: I refer to *Re Office Metro* and the US authorities. Nevertheless, there appears to be unanimity in that jurisprudence in both the regard paid to the opinion of the *Virgós-Schmit* report and in the application of the statutory definition in accordance with that opinion. No case has been cited to any opposite effect. Certainly there is nothing in *Interedil* which is contrary to that opinion. In the case of a definition which is part of an international code, which requires an autonomous meaning, and which has been applied internationally in a certain direction, in line with an authoritative (even if not binding) report, it would need something special to make it necessary to strike out in a different direction. I find nothing in the language of the definition to necessitate such a new departure.

35. If, therefore, the *Virgós-Schmit* report and that jurisprudence are applied to the facts of this case, as found by the Chancellor, I can see no possible alternative on the facts to concluding that the definition of "establishment" as required by the Regulation has not been fulfilled in this case. The critical day is 20 July 2010. By that day, the airline had already been in liquidation in Greece for some ten months, had ceased all commercial operations for almost as long, and, albeit much more recently, the remaining staff of 27 had been dismissed and paid off, with monies which had to be acquired from the liquidator in Greece. Thereafter, only a skeleton and ad hoc complement of two ex-officers was maintained, for the purposes of the winding-up. Presumably the funds to pay those ex-officers had been obtained or were also required to be obtained from the Greek liquidator. The London

office had no assets of any value: just a van which did not even belong to the airline and some furniture or equipment which had no value. The following month's banking details emphasise the paucity to which the airline's "economic activity" had been reduced as of 20 July. Nothing which was happening at or beyond that date seems to have any external economic function other than as part of a desultory liquidation. There is no finding that any customer even had any contact with the office during that period. The facts of our case essentially reproduce the facts of *Re Office Metro* and the Florida case.

36. In the circumstances, I do not need to consider the question whether any economic activity was or was not "non-transitory". However, there is much to be said for the view of Mann J in *Re Office Metro* that on what are similar facts any relevant activity fails to meet that requirement of the definition.

37. I would therefore hold that the airline failed to have an establishment within the meaning of the Regulation as at 20 July 2010, and that the subsequent winding-up of the airline in England, even if relevant at all, did not amount to "economic activity" within the definition.

Conclusion

38. In sum, for the reasons which I have sought to express above, I would allow the airline's appeal and hold that there was no jurisdiction as of 20 July 2010 for the trustees to commence secondary insolvency proceedings in England. I regret that this conclusion would leave the beneficiaries of the scheme unprotected under the Pension Protection Fund.

Sir Stephen Sedley :

39. I agree.

Lord Justice Moore-Bick :

40. I also agree.
