Neutral Citation Number: [2020] EWHC 65 (Ch)

Case No: CR-2020-000043

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

7 Rolls Buildings,
Fetter Lane, London,
EC4A 1NL

Date: 17/01/2020

Before:

Mrs Justice Falk

IN THE MATTER OF NEKTAN (GIBRALTAR) LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Mr James Bailey Q.C. (instructed by **Moon Beever LLP**)
appeared for Nektan (Gibraltar) Limited

Hearing dates: 6 and 7 January 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE FALK

Mrs Justice Falk:

1. On Friday 3 January 2020 Nektan (Gibraltar) Limited ("the Company") made an urgent application for an administration order pursuant to paragraph 12(1)(a) of Schedule B1 to the Insolvency Act 1986 ("Schedule B1"), seeking the appointment of administrators over the Company. The application came before me on 6 January in the interim applications court. I heard some submissions on that date on the question of jurisdiction and adjourned the matter to the following day, directing that in the meantime the application, supporting evidence and Counsel's skeleton argument be served forthwith on Her Majesty's Revenue & Customs ("HMRC") and that HMRC be given the opportunity to address the court or to make submissions in writing. I also gave permission to the Company to file further evidence, having indicated that additional evidence on the location of the Company's centre of main interests ("COMI") and in respect of the valuation of the Company's business (in the context of a sale proposed to be entered into by the administrators immediately following their appointment) would assist the court.

2. I am grateful to the Company's advisers, and to HMRC, for dealing very promptly with the first of these matters, such that at the adjourned hearing I had the benefit of written confirmation from HMRC's Solicitor's Office that HMRC had no submissions to make in respect of the application. I was also significantly assisted by the additional evidence filed on behalf of the Company, as well as by Mr Bailey's submissions, for which I am grateful.

3. At the adjourned hearing I made the administration order requested, and stated that I would provide written reasons subsequently. These are those written reasons.

Background facts

4. The Company is incorporated in Gibraltar. It is a wholly-owned subsidiary of another Gibraltar incorporated company, Nektan plc, which is listed on AIM ("Nektan"). Part of the reason for the urgency was that Nektan's shares had been suspended since 2 January, without the market having the benefit of information about what was proposed.

5. The Company was the only material operating subsidiary of Nektan. In broad terms its primary business, also referred to as its "B2C" business, involved the provision to other businesses of an online gambling platform in what is known as "white label" form. That form allows a customer ("partner", using the nomenclature adopted by Nektan) to brand the product as it wishes and provide it to consumers. The B2C business involved contracts not only with the partners, but also with individual players who as a legal matter contracted with the Company.

6. Prior to 16 December 2019, the Company also conducted a much smaller "B2B" business under which it distributed gaming content from game suppliers to operators. This business was sold to another subsidiary of Nektan on that date.

7. The Company is licensed by the UK Gambling Commission, and the vast majority of its customers are in England. As a result of its business activities it is liable to HMRC for Remote Gaming Duty ("RGD"). The rate of RGD was increased from 15% to 21% with effect from 1 April 2019. As a result the Company incurred a liability to HMRC which increased daily while it was continuing to trade, and was calculated at £5.6

million at the end of November 2019. This has made HMRC by far the most substantial creditor.

8. The increasing liability meant that it was not possible for the Company to put a viable proposal to HMRC to discharge the debt. The evidence indicated that it had sought to engage with HMRC for a number of months but without success. Having sought professional advice about its options, it concluded that it should transfer the B2B business and divest itself of the B2C business in order to cease escalation of the HMRC debt.

9. The Company negotiated a sale of the B2C business to a third party company incorporated in England and Wales, but determined that an administration order was required before the sale could be concluded (such that the sale contract would be entered into by the administrators immediately following their appointment). As explained to me, this was for reasons essentially relating to HMRC and the gambling licence. The concern was that, absent an administration, HMRC would be in a position to present a petition to wind the Company up. Liquidation, but not administration, would result in the loss of the licence. Under the proposed terms of sale the purchaser will operate the business using the Company's licence for a transitional period, and so the licence needed to remain in place in order for the sale to proceed.

10. The proposed sale of the B2C business was for a limited amount of consideration payable immediately (£200,000), together with the possibility of deferred consideration. The price was lower than the amount at which the business was previously valued by a professional third party. However, the evidence of the Company's sole director, Gary Shaw, was that this was attributable to a further decline in the fortunes of the business. I was also shown an email from the third party valuer which confirmed that the price offered was at an attractive level, and recommended that it be accepted if no new offers or indications of interest were received.

11. In addition to hoping to receive further funds from the buyer in due course, Nektan expects to continue to generate funds from the B2B business. Its aim is that available funds will go towards the unmet HMRC liability, and that over a period of two years it will meet the Company's liabilities to creditors in full. In contrast, it is clear that a liquidation would leave creditors very significantly out of pocket.

12. The Company has no secured creditors and no other insolvency proceedings have been commenced. Creditors apart from HMRC are relatively limited in number and quantum. They do not include partners or individual consumers. Although funds are held for consumers, they are held on trust.

The issue

13. Based on the evidence I had no doubt that the Company is insolvent, both on a balance sheet basis and by reason of its inability to pay the HMRC debt. I am also satisfied that an administration order would be reasonably likely to achieve the purpose of administration, namely (in this case) achieving a better result for the company's creditors as a whole than would be likely if the company were to be wound up (paragraph 3(1)(b) of Schedule 1B). The conditions for making an administration order in paragraph 11(a) and (b) of Schedule B1 therefore appear to be met.

14. The difficulty to which this case gave rise, and indeed the reason an application was made to the court rather than proceeding through an out-of-court process, was a jurisdictional one. The question, which appears not to have been addressed before (at least by reference to the current version of the legislation), relates to whether a company incorporated in Gibraltar, and which has a COMI that might be in Gibraltar rather than in this jurisdiction, is necessarily a "company" for the purposes of Schedule B1, such that there is jurisdiction for an administration in England.

15. This has proved without doubt to be a very difficult point, and one that is far from ideal to have to address on an *ex parte* and urgent basis. However, ultimately I concluded that it was appropriate to make an administration order on the basis that, if it was relevant, the Company's COMI is in England, and jurisdiction was established on that basis.

16. I have also concluded that, although this was an *ex parte* application and I have been able to decide the matter on the basis of COMI, I should set out the jurisdictional analysis in relation to Gibraltar incorporated companies in some detail, not only in case it assists in the future but to highlight what is at least a lack of clarity in the current drafting of the definition of "company" for the purposes of Schedule B1.

The EU Regulation and Gibraltar

17. The starting point is Regulation (EU) 2015/848 of the European Parliament and of the Council, generally known as "the Recast Insolvency Regulation" ("the EU Regulation")[1], which is directly applicable. Whilst the EU Regulation determines the correct Member State in which to open insolvency proceedings, it does not operate so as to determine which territory within a Member State is the correct place to open proceedings. That remains a matter of domestic law. This is made clear by recital (26) to the EU Regulation, which states as follows:

> "The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State should be established by the national law of the Member State concerned."

The same point is made in the decision of the Court of Session (Outer House) in *Re Bank Leumi* [2017] B.C.C. 753 at [9], where Lord Doherty stated:

> "The component parts of the United Kingdom are treated as one jurisdiction for the purposes of the EU Regulation."

18. The question then arises as to the precise status of Gibraltar for these purposes. Gibraltar is not expressly referred to in the EU Regulation. However, it is a territory to which the EU Regulation is regarded as applying, both by commentators and by Gibraltar itself. For example, in *Sealy & Milman: Annotated Guide to the Insolvency Legislation 2019* the following is said at Vol. 2 p.79:

[1] Previously Council Regulation (EC) 1346/2000, generally referred to as the EC Regulation.

> "For the purposes of the Regulation, the UK is regarded as one jurisdiction, and, until 1 November 2014, included Gibraltar. However, on that date, new insolvency legislation came into force in Gibraltar which provided, inter alia, that the EC Regulation should apply as if Gibraltar and the UK were separate Member States: see *Re Regent Centre Ltd* [2015] B.P.I.R. 730. This is, however, only effective as between these two jurisdictions: Gibraltar has not become a separate State vis-a-vis the other Member States and this has not led to any changes in the Annexes to the Regulation…"

A similar point is made in *Muir Hunter* on Personal Insolvency, Vol. 2 paragraph 6A-01.

19. The new legislation referred to is Gibraltar's Insolvency (Cross Border Insolvencies) Regulations 2014, which came into force on 1 November 2014. Regulation 3 of these regulations provides:

> "For all purposes connected to the operation of the EC Insolvency Regulation, and its application to the Act, Gibraltar and the United Kingdom shall be treated as if each were a separate EEA State."

20. *Re Regent Centre Ltd* [2015] B.P.I.R. 730 was a decision of the Supreme Court of Gibraltar. In that decision, Jack J referred at [5] to the effect of the new rules as being that the EC Regulation (now the EU Regulation) applies as between Gibraltar and the UK as if they were separate Member States. Later in the decision he said this:

> "[19] I turn now to the application of the EC Insolvency Regulation. The importance of this is in relation to the issue as to whether a liquidation in Gibraltar would be the main or only secondary insolvency proceedings. Gibraltar as part of the European Union has always been subject to the EC Regulation, but the Regulation did not apply as between Gibraltar and United Kingdom, so its relevance was limited to insolvency proceedings commenced in EEA member states other than the United Kingdom….
>
> [20] Before 1 November 2014, therefore, the applicability of the EC Insolvency Regulation was not an issue in relation to Gibraltarian companies against which the English Companies Court had made a winding up order: the Supreme Court of Gibraltar could and did make a winding up order regardless of the English order."

21. I agree with Mr Bailey that regulation 3 of the 2014 regulations, as part of the domestic law of Gibraltar, cannot affect the question whether this court has jurisdiction as a matter of national law, and a course it has no impact on the effect of the EU Regulation itself. However, in reaching my decision I have been conscious of the fact that the effect of the change in domestic law in Gibraltar is, essentially, that the courts of Gibraltar will now test the location of COMI as between Gibraltar and the UK.

Gibraltar's EU status and why the EU Regulation applies to it

22. The basis for the view that the EU Regulation applies to Gibraltar, effectively as part of the UK for those purposes, must be what is now Article 355(3) of the Treaty on the Functioning of the European Union ("TFEU"), which provides:

> "The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible."

23. There is also a declaration annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, which provides as follows (declaration 55):

> "55. Declaration by the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland
>
> The Treaties apply to Gibraltar as a European territory for whose external relations a Member State is responsible. This shall not imply changes in the respective positions of the Member States concerned."

24. European case law is consistent with this. In *Spain v United Kingdom* (Case C-145/04) [2006] ECR I-7917 the Court of Justice stated at [19]:

> "In Community law, Gibraltar is a European territory for whose external relations a Member State is responsible within the meaning of Article 299(4) EC [now Article 355(3) TFEU] and to which the provisions of the EC Treaty apply. The Act concerning the conditions of accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland and the adjustments to the Treaties (OJ 1972 L 73, p. 14) provides, however, that certain parts of the Treaty are not to apply to Gibraltar.."

25. It is worth noting that it is not stated that Gibraltar is deemed to be a Member State, or part of a Member State, simply that the Treaties apply to it as a territory for whose external relations a Member State (the UK) is responsible. Indeed, the wording of Article 355(3) seems to indicate that the territory being referred to is considered to be separate from the Member State, rather than part of it, hence the need for specific provision (the reference to territories for whose external relations a Member State is "responsible" suggests that the territory in question exists, in some form at least, separately from the Member State). Nonetheless, the EU Regulation is considered to apply to Gibraltar, effectively as being part of the UK. This must be right given the obvious intention that EU rules apply to it (subject to certain exclusions). In terms of the wording of the EU Regulation itself, I also note that some assistance might be obtained from the way in which the key provisions of Article 3 are worded. Article 3(1) relevantly provides as follows:

> "The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have

> jurisdiction to open insolvency proceedings ('main insolvency proceedings')..." (Emphasis supplied.)

26. The reference to territory provides some link to Article 355(3) of the TFEU. The same applies to the reference to "territorial jurisdiction" in recital (26) to the EU Regulation (see [17] above). In the context of the EU Regulation determining the correct location of insolvency proceedings *as between* Member States, and the Treaties applying to Gibraltar on the basis that the UK is responsible for its external relations, it must be right that for the purposes of the EU Regulation Gibraltar is regarded as a "territory of" the UK.

Effect of the EU Regulation on the facts

27. It follows from the above that there is nothing in the EU Regulation that prevents the English courts exercising jurisdiction in this case. On the facts it is clear that the Company does not have its COMI in a Member State other than the UK (including for these purposes Gibraltar).

The definition of company: paragraph 111 Schedule B1

28. Having concluded that the EU Regulation does not preclude jurisdiction, the question becomes one of domestic law. Under paragraph 11 of Schedule B1, the court may make an administration order only in relation to a "company".

The "court"

29. Before going on to consider meaning of "company" in this context it is worth referring to the meaning of the "court" for these purposes, since that is also relevant in determining jurisdiction. The "court" is defined in s 251 of the Insolvency Act 1986 as follows:

> "'the court', in relation to a company, means a court having jurisdiction to wind up the company;"

30. Winding up jurisdiction for companies incorporated in Great Britain is dealt with by Chapter VI of Part IV. Section 117 provides that the High Court has jurisdiction to wind up a company registered in England and Wales, subject to Article 3 of the EU Regulation (s 117(1) and (7)). Similar provision in relation to companies registered in Scotland is made by s 120, granting jurisdiction to the Court of Session. (Northern Ireland has separate legislation.)

31. Part V deals with the winding up of unregistered companies, defined in s 220 as including:

> "… any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom."

32. Section 221 provides, subject to certain exceptions and to special provision for Northern Ireland, that any unregistered company may be wound up under the Act if (among other things) it is unable to pay its debts. Jurisdiction is allocated between Scotland on the one hand and England and Wales on the other according to a company's "principal

place of business". A company is deemed to be registered in England and Wales or Scotland according to whether the location of its principal place of business is situated in either jurisdiction (s 221(3))[2].

33. The Company is clearly an unregistered company because it falls within the definition in s 220. It is unable to pay its debts, and there is no suggestion that it has a principal place of business in Scotland (or for that matter Northern Ireland), whereas in contrast business activities have as discussed further below been conducted in England and it has incurred significant liabilities here, in particular to HMRC. Subject to the following discussion the courts of this jurisdiction can therefore, in principle, exercise jurisdiction.

The definition of "company": introduction

34. For the purposes of Schedule B1, "company" is defined in paragraph 111 of the Schedule, which relevantly provides as follows at sub-paragraphs (1A) and (1B):

> "(1A) In this Schedule, "company" means—
>
> (a) a company registered under the Companies Act 2006 in England and Wales or Scotland,
>
> (b) a company incorporated in an EEA State other than the United Kingdom, or
>
> (c) a company not incorporated in an EEA State but having its centre of main interests in a member State other than Denmark.
>
> (1B) In sub-paragraph (1A), in relation to a company, 'centre of main interests' has the same meaning as in Article 3 of the EU Regulation."

The EEA State concept

35. The definition of EEA State can be found at s 436 of the Act, which provides:

> "'EEA State' means a state that is a Contracting Party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 is adjusted by the Protocol signed at Brussels on 17th March 1993."

36. Although Mr Bailey did not originally direct me to this definition, the approach he adopted in his skeleton argument is that Gibraltar is not an "EEA State" as defined.

37. The UK was of course was a signatory to the Oporto agreement (referred to below as the "EEA Agreement"), and therefore is indubitably an EEA State. Looking at the EEA Agreement, I see that it defines "Contracting Parties" at the start of the agreement, by

[2] If there is a principal place of business in both Scotland and England and Wales, the company is treated as registered in both jurisdictions.

reference to a list of States which includes "The United Kingdom of Great Britain and Northern Ireland" (and does not include any reference to Gibraltar).

38. Article 126(1) of the EEA Agreement provides:

> "The Agreement shall apply to the territories to which the Treaty establishing the European Economic Community is applied and under the conditions laid down in that Treaty, and to the territories of Iceland, the Principality of Liechtenstein and the Kingdom of Norway."

The effect of this, when read with what is now Article 355(3) of the TFEU, is that Gibraltar falls within the territorial scope of the EEA Agreement. But that is not the same as saying that Gibraltar is an EEA State as defined.

39. The website of the government of Gibraltar includes an opinion by Mr Michael Llamas QC in his capacity as the Chief Legal Adviser to the Government of Gibraltar. This opinion states that the EEA Agreement applies to Gibraltar by virtue of Article 126(1) of the EEA Agreement and Article 355(3) of the TFEU. The opinion also refers to the CJEU's ruling referred to at [24] above, and concludes that "Gibraltar forms part of the European Economic Area", albeit that provisions concerning free movement of goods do not apply.

40. I have concluded that Gibraltar is not an "EEA State" as defined in s 436, because although the provisions of the EEA Agreement apply to it, it is not a "Contracting Party" as defined. Although the UK effectively signed up to the EEA Agreement not only for itself but on behalf of Gibraltar, that neither made Gibraltar a "Contracting Party" itself, nor did it mean that the reference to "The United Kingdom of Great Britain and Northern Ireland" should be read as extending to Gibraltar. Gibraltar is not listed as one of the "Contracting Parties", and I do not consider that the term "The United Kingdom of Great Britain and Northern Ireland" itself extends to Gibraltar.

41. I am fortified in my conclusion on this last point by a consideration of the consequences were my analysis to be incorrect and the concept of "The United Kingdom of Great Britain and Northern Ireland" did extend to Gibraltar. That would mean that a company incorporated in Gibraltar could not be put into administration in this jurisdiction even if its COMI were located here. It would obviously not fall within paragraph 111(1A)(a) because it would not be registered under the Companies Act 2006 in England and Wales or Scotland. It would not appear to be incorporated in an "EEA State other than the United Kingdom" within sub-paragraph (b). It would also not be within sub-paragraph (c) because it would not be a "company not incorporated in an EEA State". Bearing in mind also that current legislation in Gibraltar means that its courts will determine COMI as between Gibraltar and the UK, the result would seem to be that administration would not be available because its COMI is in this jurisdiction rather than that of Gibraltar.

Paragraph 111(1A)(c)

42. Turning to the definition in paragraph 111, it follows from the above that the only potentially applicable paragraph is sub-paragraph (1A)(c), read with sub-paragraph (1B). The Company is not registered under the Companies Act 2006 within paragraph

(a), and it is not incorporated in an EEA State other than the United Kingdom within paragraph (b).

43. However, in order for paragraph (c) to apply, it is necessary to conclude *both* that the Company is not incorporated in an EEA State, *and* that it has its "centre of main interests in a member State other than Denmark". The question therefore arises whether, if the Company's COMI is in the place of its registered office (Gibraltar), it is not located in a "member State". Put another way, to conclude that a company which is incorporated and has its COMI in Gibraltar does have that COMI in a "member State" requires Gibraltar to be treated as part of a "member State" for the purposes of sub-paragraph (c), whilst the company is also treated as not being incorporated in an "EEA State" for the purposes of the same sub-paragraph. It is probably an understatement to say that these two propositions sit somewhat uncomfortably with each other.

44. Mr Bailey's principal submission on this point was that I should adopt an approach to construing paragraph 111(1A) and (1B) which recognises that what the draftsman was seeking to do was to reflect the effect of the EU Regulation in relation to non-EEA incorporated entities. In doing that, the draftsman would have been aware, or should be treated as having been aware, that the EU Regulation does not address the question of COMI within the territories of an individual Member State, but only as between Member States, and specifically does not distinguish between England (or other parts of the UK) and Gibraltar. Accordingly, the reference to "member State" should be read as a reference to that concept as used in Article 3 of the EU Regulation, so encompassing Gibraltar as a territory of the UK. Mr Bailey suggested that there would be no difficulty if the reference to "member State" had also been picked up in paragraph (1B), tying it explicitly to the use of that concept in the EU Regulation.

45. Mr Bailey's submission has force for the reasons he gives. I also note that it is consistent with the specific exclusion of Denmark from paragraph (c). That exclusion is in line with the non-application of the EU Regulation to that jurisdiction (see recital (88) to the EU Regulation).

46. The definition of company in paragraph 111 has been amended on a number of occasions. Although there have been later changes, the key amendment that introduced sub-paragraphs (1A) and (1B), including the text in paragraph (c), was The Insolvency Act 1986 (Amendment) Regulations 2005, SI 2005/879. The same regulations introduced the definition of EEA State into s 436 and introduced a similar definition of company into s 1(4) and (5) of the Act, which applies to company voluntary arrangements. In its notes on s 1, *Sealy & Milman* state that the purpose of this statutory instrument was to neutralise an unintended consequence of *Re Salvage Association* [2004] 1 WLR 174, where it was held that a CVA was available to a company incorporated by Royal Charter, and that the intention was to reverse this whilst allowing companies incorporated in EEA states and those having their COMI in a Member State (other than Denmark) to access the procedure.

47. Given this background, I found it instructive to consider the predecessor wording interpreted in *Re Salvage Association*. That provided that:

> "…a reference to a company includes a reference to a company in relation to which an administration order may be made by virtue of article 3 of the EC Regulation."[3]

48. On the basis that the EC (now EU) Regulation applies to Gibraltar, there is little difficulty in concluding that this earlier wording would have provided jurisdiction to the English court in relation to a Gibraltar incorporated company, irrespective of whether its COMI could be found in Gibraltar or the UK. There is no indication that the 2005 amendments were intended to effect a change in this respect.

49. In contrast to the previous drafting, there are two difficulties with the current wording. One difficulty is the use by the draftsman of the concept of EEA State. What the revised rules do is retain the concept of COMI, but not for all companies. Companies incorporated in EEA States other than the UK are captured under paragraph (b), but companies incorporated outside EEA States are only captured if they satisfy a COMI requirement. *Sealy & Milman's* notes on paragraph 111 refer to the use of the concept of EEA State as being a "rather surprising extension" beyond Member States to the EEA, but do not otherwise comment on it. The limited Explanatory Note to the 2005 regulations also casts no light on the point.

50. The second difficulty is that the way in which the EU Regulation is referred to has been altered. Rather than referring to whether the EU Regulation is actually engaged to allow an administration order to be made, where a company is incorporated outside an EEA State it is now necessary to identify that it has its COMI "in a member State other than Denmark".

51. It is likely that status of Gibraltar was not addressed when the changes to the definition were made in 2005. This would not be the first time that anomalies have arisen out of the definition of "company" for administration purposes. *Re Salvage Association* is one example, and another relates to Northern Ireland, for which there is now specific provision in paragraph 111A, presumably in response to *Re 3T Telecom Ltd* [2005] EWHC 275 (Ch), where it was held that the English court had jurisdiction to make an administration order in relation to a company incorporated in Northern Ireland but whose COMI was in England (a case, incidentally, on which *Sealy & Milman* cast some doubt, on the basis that the approach in *Bank Leumi* is to be preferred).

52. Whilst the status of Gibraltar was probably not considered, it is however fair to make the point that (leaving companies incorporated by Royal Charter on one side) the changes made in 2005 generally broaden the definition of company, rather than narrow it. In particular, in relation to companies incorporated in other EEA States there is now no requirement to establish COMI for the purposes of the definition of company (see paragraph 111(1A)(b)). It would be somewhat anomalous if this extension were combined with a restriction of the court's jurisdiction so that it could no longer grant an administration order in respect of a Gibraltar incorporated company unless its COMI was established in the jurisdiction.

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[3] This is the wording as set out in *Re Salvage Association* at [8]. In fact, by the time the 2005 Regulations were made the definition that they replaced, in what was by then Schedule B1, was slightly, but not substantively, different. It read: "'company' includes a company which may enter administration by virtue of Article 3 of the EC Regulation".

53. Overall, if it was necessary to decide the point, then on the basis of the submissions I have heard and the limited additional research I have been able to undertake I would conclude that the English court does have jurisdiction in relation to a Gibraltar incorporated company, even if its COMI is in Gibraltar rather than the UK (and assuming COMI is not established elsewhere). My reasons for this are those in Mr Bailey's principal submission recorded at [44] above, the history of the rules and the reasons behind the introduction of the current wording (so far as I have been able to determine those matters), the fact that the draftsman must have had the EC (now EU) Regulation in mind in introducing the slightly sloppy reference to "member State", and the specific exclusion of Denmark. However, the position is far from clear.

COMI

54. Part of Article 3(1) of the EU Regulation is set out at [25] above. A fuller version is as follows:

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

55. Further guidance on the meaning of COMI is provided in the recitals, in particular as follows:

> "(28) When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.
>
> (29) This Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping.
>
> (30) Accordingly, the presumptions that the registered office, the principal place of business and the habitual residence are the

> centre of main interests should be rebuttable, and the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State. In the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, 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…"

56. These recitals reflect decisions of the Court of Justice on the predecessor Regulation, *Re Eurofood IFSC* (Case C-341/04) [2006] Ch 508 and *Interedil Srl (in liq.) v Fallimento Interedil Srl* (Case C-396/09) [2012] B.C.C. 851.

57. I do not propose to set out a detailed discussion of the meaning of COMI in this decision. A comprehensive analysis of the authorities was recently undertaken by Snowden J in *Re Videology Ltd* [2019] B.C.C. 195. Without wishing to detract from the detailed analysis set out there, I have focused only on those aspects that are particularly relevant to the decision I needed to make.

58. The first key point to note is the presumption that COMI is located in the place of the registered office, here Gibraltar. However, this presumption can be rebutted, so the question is whether evidence, or sufficient evidence, has been produced to rebut the presumption.

59. I concluded that sufficient evidence had been produced. My reasons are as follows:

    i) Key management and administrative functions are undertaken in England. Although the Company does not now have premises in the UK, its key staff are based here. (It had a UK office until October 2018, when the previous Chief Financial Officer left.) The Chief Financial Officer is based in the UK. The accounts manager, human resources manager and sales manager are all UK-based. Until she left in September 2019, the former Chief Executive Officer was also located in the UK.

    ii) When these individuals interact with third parties, they do so in this jurisdiction. The great majority of the trading activities are UK focused. So, for example, the accounts manager (who works from home in England) visits partners at their offices in the UK. The sales manager, who works from a shared office facility in London, handles enquiries from prospective partners and negotiates contracts in the UK, albeit that contracts would be prepared by the in-house legal officer located in Gibraltar. Sales meetings with partners are exclusively held in London. Post contract enquiries would predominantly be dealt with by the accounts manager, who works from home in England and travels to meet partners at their UK offices. The UK-based human resources manager is a full-time employee of a UK subsidiary of Nektan.

    iii) The CFO is responsible for all financial aspects of the Company (and indeed the wider group). Financial management decisions are made by him predominantly

in the UK. The actual bank accounts are located in Gibraltar, but banking arrangements are dealt with predominantly by the CFO in the UK (and the bank is not a creditor: there is no overdraft or loan outstanding). The CFO works mainly from his private members club in London, where he meets with partners and investors. Although the CEO role has, since September 2019, been conducted by Mr Shaw, who is resident in Gibraltar, he spends a significant amount of business hours in the UK.

iv) Although the Nektan group has a Gibraltar office with 32 members of staff, its role in relation to the Company has been that of a call centre. The call centre deals with consumer (player) queries and other "after-care" matters relating to them, for example in relation to passwords, accounts and IT issues. Furthermore, consumers and partners are provided with a London (0207) telephone number. From their perspective, they would not know without further enquiry that, when they use that number, the call is being diverted to a Gibraltar based call centre. Consumers who wish to pursue complaints are directed to the UK-based Independent Betting Adjudication Service.

v) Although Board meetings of the Company are held both in Gibraltar and the UK (equally over the last 12 months), this is not a material factor because the location of Board meetings would not be readily ascertainable by third parties, and in any event because the concept of COMI is not limited to the functions of the Board.

vi) The Company's most significant creditor by far is HMRC. HMRC deal with the Company via BDO LLP, the Company's auditors and tax advisers, in London. Mr Bailey also informed me on instruction that obligations to trade creditors are governed by English law in the majority of cases. That was subsequently confirmed by further witness evidence from Mr Shaw which also confirmed that the majority by value of the trade debt was owed to creditors based in the UK. I also understood that, in order to contact the Company, creditors would use the same 0207 telephone number referred to above. In other words, their perspective would be that they were dealing with someone in England if they contacted the Company in that manner. Furthermore, given the location of the other key staff in England, I understood that any dealings in person would also take place here, and not in Gibraltar.

vii) As already indicated, the great majority of the Company's customers are in the UK. Of 30 partners, at least 25 are based in the UK market and all 30 are UK facing. Over 90% of players are UK domiciled, and the Company has 103 websites facing the UK market. Although it is also licensed by the Gibraltar Licensing Authority, it is fair to say that (given the extent of its UK activities) the primary licence under which it operated its business was that granted by the UK Gambling Commission. The annual trading audit for its business was undertaken by that authority. Mr Shaw's witness evidence described the Gibraltar licence as "almost supplementary". It is the case, however, that the contractual arrangements with partners and consumers are governed by the laws of Gibraltar.

viii) Of less relevance but possibly worth recording is the fact that not only did the Company have UK based professional advisers, including accountants, auditors

and solicitors, but the sale and purchase agreements for both the B2B and B2C businesses were negotiated in the UK.

60. Therefore, although it could be said that the Gibraltar office was a centre of administration of the Company in one sense, I consider that the Company's "central administration", as referred to in recital (30) to the EU Regulation, was located in England. Recital (30) explains that concept in terms of the "actual centre of management and supervision and of the management of its interests", determined in a "manner ascertainable by third parties" and by a comprehensive assessment of all relevant factors. These concepts of "actual centre of management and supervision" and "management of its interests" are derived from *Interedil* at [53]. The functions of a call centre are not functions of "management or supervision", or "management" of the Company's interests. In contrast, sales, accounts, human resources and finance functions do fall within these descriptions. The fact that these functions are carried out in this jurisdiction is also ascertainable by third parties, because third parties meet the relevant individuals only in the UK and are supplied only with a London telephone number.

61. I considered the fact that there was no physical address for the Company in England. I was not taken to the terms of contracts entered into by the Company, but I infer that any address provided may (at least following closure of the UK office) have been in Gibraltar. The website is a group website which also states that it is "headquartered" in Gibraltar, but goes on to state that it has additional offices in the UK, US and India.

62. However, whilst taking into account the need for COMI to be identified by reference to "objective and ascertainable" factors (*Eurofood* at [37] and *Interedil* at [49] and [51]), and the important requirement of legal certainty (*Interedil* at [49]), the absence of a single physical address cannot be determinative. Taking account of modern ways of working (and the nature of some modern businesses, including those such as this involving the provision of services online) it must be the case that a company is able to establish a COMI in a jurisdiction even if there is no single physical location that can be identified as a "head office" or similar, if the relevant functions are carried out in the jurisdiction in a manner that is ascertainable by third parties. I have concluded on the evidence that, in this case, they were.

63. I am conscious that the test is not simply one of where a company's customers are located, or indeed where it conducts most of its business. The test is one of the "administration of its interests". As Snowden J explained in *Videology* at [46], the phrase "head office functions" has been used as a proxy for this. But the functions he describes at [47], including "employment of staff, the placing of orders for goods and services, the sending of invoices, the making and collection of payments, and the operation of a company's bank account", are all functions that in this case have been undertaken in England, and in my view in a manner that is ascertainable by third parties.

64. Furthermore, the place where a company undertakes economic activity is relevant. In *Interedil* the CJEU referred at [52] to "places in which the debtor company pursues economic activities" as a relevant factor to take into account, so far as it is ascertainable by third parties. The fact that the vast majority of the Company's activities were not only UK facing, but were conducted in England by the activities of senior staff such as the sales and accounts managers, is a factor pointing to a COMI in this jurisdiction,

even though the relevant contracts were not governed by English law and were drafted by a lawyer based in Gibraltar.

65. In summary, I conclude that the presumption that the Company's COMI is located at its registered office in Gibraltar is rebutted, and its COMI is in this jurisdiction. On that basis it was appropriate to make the administration order.