Neutral Citation Number: [2021] EWHC 1523 (Ch)

Appeal Claim No: CH-2020-000216

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

IN THE MATTER OF MELARS GROUP LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 28/05/2021

Before:

MR. JUSTICE MILES

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Between:

MELARS GROUP LIMITED	**Appellant**
(in liquidation)	
- and -	
EAST-WEST LOGISTICS LLP	**Respondent**

- -
- -

MR. JAMES SHEEHAN and **MR. STEPHEN DONNELLY** (instructed by **Hogan Lovells International LLP**) appeared for the **Appellant.**

MR. ROBERT LEVY QC and **MR. OWEN CURRY** (instructed by **Fortior Law SA**) appeared for the **Respondent.**

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Approved Judgment

(revised version 10/06/21)

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE MILES:

1. This is an appeal from the order of Deputy ICC Judge Baister ("the judge"), dated 4th August 2020 [2020] EWHC 2090 (Ch), whereby he wound up the appellant company ("the company"). The judge concluded that the company's centre of main interests was in England and Wales, rather than Malta, where the company's registered office is located. Permission to appeal was given by the judge.

2. The winding-up petition was presented on 19th July 2016. An order allowing service out of the jurisdiction in the BVI was made in July 2017. The petition was stayed in August 2017 to enable the company to take steps to set aside the judgment on which it was based. The company failed to take those steps. In September 2019 the petitioner applied for the petition to be relisted, which resulted in its eventually coming on for hearing before the judge in July 2020.

3. The background is set out in the judgment at paragraphs 5-9 as follows:

> "5. The company was incorporated in the British Virgin Islands on 11 January 2005. It trades, or traded, in oil and petroleum. The petitioner is an English limited liability partnership and appears to be in the same line of business.
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> "6. The petitioner and the company entered into a charterparty dated 14 December 2011 under the terms of which the petitioner agreed to ship cargo to Turkmenistan. The petitioner claimed that the company had breached the terms of the charterparty and began arbitration proceedings in London and later proceedings in the BVI court.
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> "7. The company remained registered in the BVI until 10 December 2015 when it moved its registered office to Malta two months after service of the claim form in the BVI proceedings and a month after acknowledging service.
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> "8. The petitioner obtained judgment in default on 1 March 2016, and damages and costs were assessed on 13 June 2016 in the total sum of US$657,839.18.
>
> "9. At some point before 2015, it is said, the company ceased to trade. I am not certain that that has been proved or conceded, but it does seem likely: in spite of the fact that this petition has been on foot for some time, no application has been made to validate or ratify any transactions, and the evidence is that two of the company's bank accounts have been frozen for some time as a result of steps taken in Switzerland rather than because of presentation of the petition."

4. The company argues on this appeal that the judge took the wrong approach to determining the centre of main interests of the company, that he took into account irrelevant factors and failed to take into account relevant factors, and that the conclusion

was one that no reasonable judge could reach on the evidence. The company also seeks to adduce a witness statement of one of its directors, Mr. Dmitri Palivoda, which was produced after the hearing below. The petitioner seeks to uphold the decision of the judge.

The legal framework

5. Before turning to the grounds of appeal, it is helpful to set out the legal framework. It is common ground that the court's jurisdiction to wind up the company is to be determined by the application of Regulation (EU) 2015/845 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) ("the Recast Regulation"). That regulation recasts an earlier EU regulation on insolvency proceedings in, for present purposes, materially the same terms. The parties agreed that the authorities concerning the earlier regulation are applicable to the interpretation and application of the Recast Regulation.

6. Article 3(1) of the Recast Regulation provides:

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

7. The following recitals to the regulation are relevant:

> "(27) Before opening insolvency proceedings, the competent court should examine of its own motion whether the centre of the debtor's main interests or the debtor's establishment is actually located within its jurisdiction.
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> "(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. In the case of an individual not exercising an independent business or professional activity, it should be possible to rebut this presumption, for example where the major part of the debtor's assets is located outside the Member State of the debtor's habitual residence, or where it can be established that the principal reason for moving was to file for insolvency proceedings in the new jurisdiction and where such filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation.

"(31) With the same objective of preventing fraudulent or abusive forum shopping, the presumption that the centre of main interests is at the place of the registered office, at the individual's principal place of business or at the individual's habitual residence should not apply where, respectively, in the case of a company, legal person or individual exercising an independent business or professional activity, the debtor has relocated its registered office or principal place of business to another Member State within the 3-month period prior to the request for opening insolvency proceedings, or, in the case of an individual not exercising an independent business or professional activity, the debtor has relocated his habitual residence to another Member State within the 6-month period prior to the request for opening insolvency proceedings.

"(32) In all cases, where the circumstances of the matter give rise to doubts about the court's jurisdiction, the court should require the debtor to submit additional evidence to support its assertions and, where the law applicable to the insolvency proceedings so allows, give the debtor's creditors the opportunity to present their views on the question of jurisdiction.

"(33) In the event that the court seised of the request to open insolvency proceedings finds that the centre of main

> interests is not located on its territory, it should not open main insolvency proceedings."

8. In *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, at paragraph 55, Chadwick LJ said this:

> "I have set out the authorities to which we were referred in deference to the arguments which were addressed to us and in recognition that the point in the present appeal has not previously been before this Court. But, as it seems to me, they provide little assistance in the context of the present appeal. The question raised in this appeal must be determined by construing article 3.1 of the Regulation in the light of the Community purpose which the Regulation was intended to promote. I can summarise my own conclusions as follows:
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> "(1) A debtor's centre of main interests is to be determined at the time that the court is required to decide whether to open insolvency proceedings. In a case where those proceedings are commenced by the presentation of a bankruptcy petition, that time will normally be the hearing of the petition. But, in a case such as the present, where the issue arises in the context of an application for permission to serve the petition out of the jurisdiction, the time at which the centre of the debtor's main interests falls to be determined will be at the hearing of that application. Similar considerations would apply if the court were faced with an application for interim relief in advance of the hearing of the petition.
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> "(2) The centre of main interests is to be determined in the light of the facts as they are at the relevant time for determination. But those facts include historical facts which have led to the position as it is at the time for determination.
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> "(3) In making its determination the court must have regard to the need for the centre of main interests to be ascertainable by third parties; in particular, creditors and potential creditors. It is important, therefore, to have regard not only to what the debtor is doing but also to what he would be perceived to be doing by an objective observer. And it is important, also, to have regard to the need, if the centre of main interests is to be ascertainable by third parties, for an element of permanence. The court should be slow to accept that an established centre of main interests has been changed by activities which may turn out to be temporary or transitory.
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> "(4) There is no principle of immutability. A debtor must be free to choose where he carries on those activities which fall within the concept of 'administration of his interests'. He must be free to relocate his home and his business. And, if he has altered the place at which he conducts the administration of his interests on

> a regular basis - by choosing to carry on the relevant activities (in a way which is ascertainable by third parties) at another place – the court must recognise and give effect to that.
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> "(5) It is a necessary incident of the debtor's freedom to choose where he carries on those activities which fall within the concept of 'administration of his interests', that he may choose to do so for a self-serving purpose. In particular, he may choose to do so at time when insolvency threatens. In circumstances where there are grounds for suspicion that a debtor has sought, deliberately, to change his centre of main interests at a time when he is insolvent, or threatened with insolvency, in order to alter the insolvency rules which will apply to him in respect of existing debts, the court will need to scrutinise the facts which are said to give rise to a change in the centre of main interests with that in mind. The court will need to be satisfied that the change in the place where the activities which fall within the concept of 'administration of his interests' are carried on which is said to have occurred is a change based on substance and not an illusion; and that that change has the necessary element of permanence."

9. In *Re Eurofood IFSC Ltd* (Case C-341/04), the ECJ said this:

> "33. That definition shows that the centre of main interest must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with article 4(I) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.
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> "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.
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> "35. That could be so in particular in the case of a 'letterbox' company not carrying out any business in the territory of the member state in which its registered office is situated."

10. In *Re Lennox Holdings Plc* [2009] BCC 155, Lewison J, who did not have the benefit of adversarial argument, adopted a suggestion of the Advocate General in the *Eurofood*

case that the ascertainability by third parties of the centre of main interests is not central to the concept.

11. In *Re Stanford International Bank* [2009] EWHC 1441 (Ch) Lewison J, after adversarial argument, decided that the approach that he had taken in the *Lennox* case was wrong.

12. In the Court of Appeal in *Stanford* [2010] EWCA Civ 137, Sir Andrew Morritt C agreed with Lewison J that the approach he had taken in *Lennox* was wrong. At paragraph 56, Sir Andrew Morritt C said this:

> "I have quoted the relevant passages from the judgment of ECJ in *Eurofood* in paragraphs 40 to 42 above. In my view it clearly established the following propositions:
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> "(1) It is apparent from paragraph 30 of the judgment of the ECJ that each company or individual has its own COMI. Under UNCITRAL, as applied in England and Wales, it is not possible to have a COMI of some loose aggregation of companies and individuals. It follows that there can be no COMI by reference to an entity comprising all those involved in the fraudulent Ponzi scheme. The COMI of SIB depends on the application of the presumption to SIB.
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> "(2) It is clear from paragraph 34 of the judgment of the ECJ that the presumption 'can be rebutted only [by] factors which are both objective and ascertainable'. That this test is not the same as the head office functions test adopted by Lewison J in *Re Lennox Holdings Ltd* and Lawrence Collins J in *Re Collins & Aikman Corp Group* [2006] BCC 606 para 16 is plain. Moreover the specific criticism of paragraph 98 of the judgment of Lewison J, quoted in paragraph 35 above, that he wrongly elevated the ascertainability test into a pre-condition for consideration is not correct. The judge was there accurately paraphrasing the effect of the ECJ's judgment in *Eurofood*.
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> "(3) Thus it is conclusively established that the factors relevant to a rebuttal of the presumption must be both objective and ascertainable by third parties. Lewison J confined factors ascertainable by third parties to matters already in the public domain and what a typical third party would learn as a result of dealing with the company and excluded those which might be ascertained on enquiry. The good sense of this conclusion is demonstrated by the cases in English domestic law relating to constructive notice and its various degrees, see, for example, *Baden v Societe Generale S.A* [1993] 1 WLR 509, 575 paras 250-274. To extend ascertainability to factors, not already in the public domain or apparent to a typical third party doing business with the company, which might be discovered on enquiry would introduce into this area of the law a most undesirable element of uncertainty.

> "(4) Whether or not factors, not already in the public domain or so apparent, ascertainable on reasonable enquiry are relevant to a rebuttal of the presumption that cannot extend the range of ascertainable factors to the fraudulent Ponzi scheme. That, inevitably, is neither a matter of general knowledge nor ascertainable on reasonable enquiry. It was suggested that after the fraudulent scheme had been uncovered the facts as to its previous existence had become public knowledge and should be relevant to the rebuttal of the presumption. No doubt the COMI of a company may change as the situation of its registered office may change, but it can only do so by reference to main interests which it still has and facts within the public domain or so apparent at the time of their occurrence. The allegations of fraud have not yet been proved before a court of competent jurisdiction (but Mr James Davis has pleaded guilty to three counts in relation to the fraud), SIB's interests main or otherwise ceased on discovery of the alleged fraudulent scheme and the activities now said to rebut the presumption were not in the public domain or so apparent when they occurred.
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> "(5) If and insofar as the ECJ in its judgment may have formulated a test different from that suggested by the Advocate-General (having regard to the references to ascertainability in paragraph 126 of his opinion quoted in paragraph 41 above I do not believe he did) the definitive test has to be that to which the court referred.
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> "For all these reasons I would reject the submission that Lewison J applied the wrong test."

13. In *Interedil Srl v Fallimento Interedil Srl* (Case C-396/09), given on 20th October 2011, the ECJ commented again on the presumption that a company's COMI is its place of registration, and the factors capable of rebutting it:

> "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 at [32] of *Eurofood IFSC*, 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 [69] of her opinion, the presumption in the second sentence of art.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, at [33] of *Eurofood IFSC*, 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 art.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 [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 art.3(1) of the Regulation may be rebutted, however, where, from the viewpoint of third parties, the place in which a company's central administration is located is not the same as that of its registered office. As the court held at [34] of *Eurofood IFSC*, the simple presumption laid down by the EU legislature in favour of the registered office of that company can be rebutted if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.

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

"53. In that context, the location, in a Member State other than that in which the registered office is situated, of immovable

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

14. In *O'Donnell v Bank of Ireland* [2012] EWHC 3749 (Ch), Newey J emphasised that the court is concerned with where decision-making takes place, and the company's administrative connections must take precedence over its operational connections.

The judgment

15. The judge started by setting out the factual background, as cited above. He then turned to the law. He referred to the Recast Regulation and set out Article 3(1), together with a number of recitals. He cited *Interedil* and *Eurofood*. In my judgment he correctly summarised those decisions.

16. At paragraph 16 the judge referred to the *Re Lennox Holdings* case, and said, "Lewison J's attention to what the Advocate General said about ascertainability is of note." At paragraph 17 the judge referred to the *Shierson* case. He then referred to some other cases, which I need not refer to at this stage.

17. At paragraph 21 the judge said that because the company traded virtually, rather than physically, much of the case law is of little assistance.

18. At paragraph 22 he said that the case was, to some extent, about forum shopping. On the one hand the petitioner was seeking a winding-up order here, because it was easier, quicker and less costly, than to do it in Malta. The company, on the other hand, had, the judge concluded, moved its registered office to Malta in order to avoid or delay being wound up.

19. In paragraphs 22 and 23 he said that, as *Shierson* shows, the debtor is entitled to move his or its centre of main interests and to do so for self-serving reasons, but said that the question was whether the move was real or illusory. The court must scrutinise an apparently suspicious shift of the debtor's centre of main interests to establish the answer to that question.

20. At paragraph 24 the judge commented on the unsatisfactory nature of the evidence on both sides that was given by solicitors, was long on hearsay and short on content. It

was, though, he concluded, open to him to draw inferences. At paragraph 25 he said that the evidence was, in part, unsatisfactory because of what it omitted to say, and sometimes it is the dog that does not bark that gives the clue. He concluded that he should draw adverse inferences from the company's failure to provide even the most basic information about what it does where.

21. At paragraph 26 he said that there was some documentary material which provided assistance. He considered that the court was obliged to make an examination of all the facts. He rejected the company's argument, which he recorded, that where ascertaining the company's centre of main interests was difficult, the court could regard the registered office presumption as providing the default outcome.

22. At paragraph 28 he said:

> "There is a difference between applying a presumption and making a finding by default ... In my judgment, when faced with competing claims, the court must inquire into the basis on which its jurisdiction is being invoked (or contested) and reach a principled decision on the evidence as opposed to using the registered office presumption as a fall back to avoid having to do so."

23. At paragraph 29 the judge said that much of the company's business appeared to have been conducted in the ether. He recorded at various times the company had had officers who had addresses in Estonia and South Africa and said that this information did not much assist. He said that the evidence about where the charterparty between the parties was entered into was inconclusive and pointed out that the contract related to the performance of obligations wholly outside the UK.

24. At paragraph 32 the judge listed several places where it could potentially be said that the affairs of the company were administered: the BVI, Malta, Estonia, Switzerland and the UK.

25. At paragraphs 33 and 34 he eliminated the BVI and Estonia.

26. At paragraph 35, he said this:

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

27. The judge then turned, from paragraph 36 onwards, to consider possible connecting factors with either the UK or Switzerland. He concluded that the language in which the company's business was conducted was irrelevant, as English is widely used in international trade and the use of English tells one nothing about where the business

was being administered from. Nor did the judge think that the place where the company's directors had an address at the time the charterparty was entered into had any real bearing.

28. At paragraph 39 the judge said that a more objective and reliable indication of place where the company had administered its interests can be gleaned from the few documents in evidence. He then concluded that there were a number of contracts entered into by the company which stipulated that English law was the governing law, and/or that they were subject to arbitration or litigation in London. These included the charterparty between the parties, and some contracts with other parties. He also noted that there was at least one contract with a Geneva arbitration clause.

29. At paragraph 45 the judge referred to the *Interedil* case as a warning against reliance on the existence of contracts as sufficient to rebut the registered office rule of presumption but said that the contracts were nonetheless of some relevance. The judge also noted that the company had, from time to time, instructed some Swiss lawyers and some English lawyers.

30. Returning to the contracts he said at paragraph 48 that the governing law and where disputes are to be resolved is indicative of where the interests attendant on the contractual rights and obligations were to be administered.

31. At paragraph 49 he said that the choice of law and legal venue clauses had given rise to at least some litigation in this country, which "necessarily involves a company's interests, and that involvement in legal proceedings and instructing and paying solicitors to conduct them (or incurring a liability to pay for them to do so) goes to administering the company's interests." He relied on the Irish decision of *Irish Bank Resolution Corporation Limited v Quinn* [2012] NICh 1.

32. At paragraph 50 the judge rejected the relevance of certain proceedings having been brought against the company in Malta.

33. At paragraph 51 he referred to the banking arrangements. He referred to the bank accounts of the company in Switzerland, of which there had been two at the date of the commencement of the winding-up petition, and an account with an English online money institution called Revolut, which was opened in December 2018. He said that the company's banking arrangements pointed to the administration of interests in both the UK and Switzerland and accepted that they tended to point rather more to Switzerland than the UK.

34. At paragraph 52 he referred to the debt owed to the petitioner as an English creditor and said this was another matter that went to the place where the company's interests are or may be administered.

35. At paragraph 54 he concluded by a narrow margin, and with misgivings that, on balance, a greater use of English law and dispute resolution clauses, and the actual record of involvement in legal proceedings here, and the consequential use of English lawyers, made the UK, on the balance of probabilities, the main centre of interests.

36. At paragraph 55 he came back to the question of ascertainability, and said this:

> "As to ascertainability, I agree with [counsel for the petitioner] that what is required by the Regulation is just that, not actual ascertainment at the relevant date. I make the obvious observation that the petitioning creditor, a third party, has in fact ascertained the company's centre of main interests and done so in the face of a cloud of obscurity. I also note, as Lewison J did, that ascertainability by third parties of the centre of main interests is not central to the concept of the centre of main interests but seems to flow from the fact of where the interests lie; and that in *Irish Bank Resolution Corporation Limited v Quinn* Deeny J said,
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> > '"[A] debtor does not appear to be obliged to advertise his centre of main interest but nor may he hide it. It should be reasonably or sufficiently ascertainable or ascertainable by a reasonably diligent creditor' (paragraph 28).
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> Whilst the fact of the company's registered office being in Malta was and remains, as Mr Comiskey rightly says, ascertainable from public records, the fact that its centre of main interests was and remains in the UK was and still is similarly ascertainable, albeit less readily, by one reasonably diligent creditor and could be by others."

37. The judge concluded at paragraph 56 that, albeit by a small margin, there was sufficient material for the court to conclude that the centre of main interests of the company was in a place different from its registered office and was in the UK.

The grounds of appeal

38. There are five grounds of appeal which may be summarised as follows: (1) the judge erred in his approach to the determination of centre of main interests and the relevance of the statutory presumption, in that he focused on whether the appellant could establish that its centre of main interests was in Malta or somewhere other than England, rather than focusing on whether the respondent petitioner had adduced sufficient evidence to rebut the statutory presumption; (2) the judge erred in failing to draw a distinction between administrative connections and operational connections; (3) the judge erred in reaching a decision that the company's centre of main interests was established in England and that he took into account a number of factors which ought not to have been taken into account: these were then listed; (4) the judge erred in discounting a number of factors that ought to have been taken into account: again these were listed; and (5) that in the circumstances the judge reached a decision which no reasonable tribunal could have reached.

The approach of the appellate court

39. It is common ground that this appeal is a true appeal, in the sense of being a review, rather than a rehearing, and that the judge's decision was an evaluative one based on an assessment of a number of factors. The petitioner referred to *Stanford* (per Sir Andrew Morritt C) at paragraph 58:

> "I have no hesitation in rejecting the US receiver's submission. Provided that he applied the right test, and for the reasons already given I believe that he did, the conclusion of the judge was a matter of fact for him. Moreover it was a multi-factorial conclusion of fact, such as was referred to by Lord Hoffmann in *Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington DC)* [2003] 1 WLR 2416, 2423H-2424B: see also *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577, para 16. It is not suggested that there was no evidence to justify the conclusion of the judge or that his conclusion is plainly wrong. It follows that it is not open to this court to contradict the judge s conclusion on the same evidence as was before him."

40. Arden LJ took a slightly different approach, but Hughes LJ agreed with the summary given by Sir Andrew Morritt C.

41. In paragraph 58 the Chancellor referred to a number of well-known authorities. These and other authorities were recently reviewed by the Court of Appeal in *Re Sprintroom* [2019] EWCA Civ 932 and were summed up as follows at paragraph [76]:

> "So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'."

42. As the Court of Appeal explained in the paragraphs following [76], the court will also apply the usual appellate caution and deference due to all first instance decisions.

The application to rely on fresh evidence

43. The company seeks to rely on the witness statement of Mr. Palivoda dated 18 May 2021. He is a director of the company. He says that he was appointed as a director on 22 March 2016 but has been involved in its management since 2005.

44. The court has a power to admit such evidence under CPR 52.21(2)(b). It is well established that in applying those principles the criteria in the case of *Ladd v Marshall* [1954] 1 WLR 1489 effectively occupy the whole field of relevant considerations to which the court must have regard.

45. Those guidelines are, first, that it must be shown that the evidence could not have been obtained without reasonable diligence for use at trial; second, the evidence must be such that, if given, it would probably have had an important influence on the result of the case, though it need not be decisive; and third, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible, though it need not be incontrovertible. These remain highly material considerations, although the jurisdiction of the court is found in CPR 52.21(2)(b) and is to be exercised in accordance with the overriding objective.

46. I am able to deal with this application shortly. There is no explanation at all to justify the evidence being produced at this stage, rather than for use at the trial of the petition. There is no explanation for why it could not have been obtained with reasonable diligence before the trial. The witness statement covers historical events going back to 2011. It addresses, for instance, the dealings between the parties leading up to the charterparty and what happened thereafter. It seeks to explain the company's reasons for moving its registration to Malta.

47. The company understood that the question of its centre of main interests was to be determined by court at the trial. There were indeed several rounds of evidence before the substantive hearing before the judge, and the company's solicitor had put in a witness statement at a fairly early stage saying that the company intended to gather evidence on the question of the centre of main interests. The material now sought to be relied upon is plainly evidence that could have been gathered before the trial of the petition, and, as I have said, no explanation has been given for it only being served afterwards.

48. One of the principles embodied in the overriding objective is, it seems to me, the need for proceedings to be conducted efficiently and effectively. Another underlying principle is that of finality. It is very important that parties should understand that the trial is not a dress rehearsal for an appeal, and that if they fail to put forward their evidence at the trial, it is going to be very unlikely that they will be able to do so on an appeal. This seems to me to be a clear case in which the principle of finality should be applied, and I therefore refuse to admit this evidence.

Did the judge go wrong in principle?

49. The first and second grounds of appeal concern the approach taken by the judge. The company contends that the judge went wrong in principle. It submits that he failed properly to give effect to the presumption in favour of the registered office. The company observes that the judge also placed reliance on the approach commended by Lewison J in *Re Lennox*, and therefore downplayed the need to identify ascertainable objective factors to rebut the presumption that arose from a registration of the company's office in Malta. This, unfortunately, arose because the judge was not referred to *Stanford*, where the Court of Appeal expressly disapproved the approach taken in *Lennox*.

50. The company submits that the judge also erred in discounting the significance of a registered office on the basis that, as he found, the company had deliberately re-registered in Malta to avoid being wound up, and that it was, in effect, a mere letterbox. He then went down the wrong track. Instead of asking whether there were ascertainable factors which rebutted the presumption, he effectively concluded (at the threshold) that Malta was not the centre of main interests, and then looked for factors that might connect the operations of the company's administration with other countries.

51. The judge also failed, so the company says, to consider whether the various features he relied on were readily ascertainable to typical third-party creditors; and failed to distinguish between matters of administration of the company and matters better seen as its operations.

52. Counsel for the company made the following submissions of law, based on the authorities I have already referred to: (a) the presumption in Article 3(1) is a real presumption; (b) there may well be cases where the registered office presumption will not be rebutted even if there is relatively little activity in that place; (c) the centre of main interests is concerned with the administration and management of the debtor's interests, not with the commercial operations of the debtor; (d) ascertainability by typical third parties is a necessary feature of the analysis; (e) the concept of COMI implies a degree of permanence and foreseeability; (f) the relevant time for determining the COMI is the date of presentation of the petition; and (g) the concept of an establishment, as used in the regulation, requires a lesser degree of connection with the country than does the ascertainment of its centre of main interests. Factors which are not enough to show the existence of establishment are unlikely to suffice to show a COMI.

53. The petitioner contends, in outline, that the judge made no error of principle. He properly directed himself, by reference to the relevant authorities. In particular, he accurately summarised the jurisprudence of the European Court of Justice, and understood, for example, the need for ascertainability of any relevant factors. He did not, on a proper analysis of the judgment, misdirect himself in reliance on the *Re Lennox Holdings* case. This can indeed be seen from his repeated references to the need for ascertainability.

54. The petitioner says that the grounds of appeal amount, in reality, to a challenge to the judge's overall evaluation and, as *Stanford* shows, the question for court is not whether it would have reached the same decision itself, but whether the judge below took the right approach and addressed himself to the evidence. The question is whether the judge can be shown to have followed a wrong approach or failed fundamentally to assess the right factors. That is a high hurdle to overcome. The judge was entitled to draw adverse inferences against the company for its failure to provide any real evidence as to where its interests were being administered in July 2016.

55. The petitioner emphasises that this is, in some ways, an unusual case. The company has been given an opportunity to put in evidence as to its centre of main interests and has largely failed to do so. The judge was, in those circumstances, as well as being entitled to draw adverse inferences, right to take into account such documentary evidence as there was. The specific factors he assessed were proper ones to take into account. He reached an evaluative conclusion, and there is no basis for interfering with the outcome.

Discussion

56. The starting point is to identify the right approach in principle. The authorities establish a number of things. First, the principles of legal certainty and foreseeability require that the centre of main interests should be capable of ascertainment by reference to publicly available objective features. The applicable insolvency law will generally follow the rules on jurisdiction, and creditors generally should be able to predict which insolvency law will apply from ascertainable features without having to make more detailed enquiries. For this reason the right perspective is that of typical third parties.

57. Second, in the case of corporate debtors there is, of course, the statutory presumption that the centre of main interests is in the place of the registered office. The place of a registered office is a fact in the public domain. Creditors can, therefore, assume, absent

other factors which are ascertainable, and which point the other way, that the centre of main interests will be in that place.

58. Third, a corporate debtor may move its registered office, including for self-serving reasons. There is protection within the regulation itself against changes within three months of the request to open insolvency proceedings. Equally, the presumption based on the place of the registered office may be rebutted by other evidence. It is likely to be easier to rebut the presumption, where the registered office may be seen as a letterbox, rather than the place of actual administrative conduct. However, it does not follow, even in such cases, that there is no presumption. Part of the reason for the presumption is to enable creditors to be able to predict, with reasonable certainty, which insolvency law is likely to be applicable, in the event of the insolvency of their counterparty. Creditors are therefore able to base their expectations on the place of the registered office unless there are objective pointers going the other way. It is clear from the *Eurofood* case that although, in the case of a letterbox office, the presumption may be more readily rebutted, it nonetheless remains a real presumption.

59. Fourth, the burden is on a party seeking to rebut the presumption to show that there is another place where the debtor conducts the administration of its interests on a regular basis. That again seems to me to flow from the principles of certainty and foreseeability.

60. Fifth, the focus is on the place where the interests of the debtor are being administered, not where it happens to operate commercially (though these may be relevant to determining the former).

61. Sixth, the matter has to be examined at the date of the petition. Earlier or later events may be relevant, but only in so far as they may throw helpful light on the position as at that date.

62. Seventh, the centre of main interests of a debtor may change, but the concept of COMI connotes a degree of permanence. It would be inimical for the purposes of the concept and the rules in which it is embodied if the centre of main interests could fluctuate too easily depending on the place where things happened to be occurring from time to time.

63. Applying these principles I have concluded that the judge erred in principle in his approach to the determination of the company's centre of main interests. He essentially reasoned as follows. The registered office of the company was moved to Malta in order to avoid or delay winding-up proceedings. There was no evidence of any substantive steps being taken there to administer the company's interests. Therefore, the registration of the office of the company in Malta essentially constituted it a letterbox. Malta was not therefore the place where the company actually conducted the administration of its business, and was, therefore, not its centre of main interests. The use of the business office in Malta was illusory and not real. It followed that Malta could be disregarded as the COMI and the court therefore had to consider the other connecting factors. The candidates were either Switzerland or the UK, where at least some activities appeared to have occurred. On balance and marginally, those factors were connected more with the UK than with Switzerland.

64. That the judge took this approach seems to me to be shown by paragraph 35 of his judgment, and, again, by paragraph 54, where he made a comparison between the UK and Switzerland but said nothing at all about the presumption in Article 3(1).

65. In my judgment, there are a number of basic problems with the judge's approach. The first is his approach to the statutory presumption in favour of the registered office. The company had its registered office in Malta. Its creditors could have ascertained that by inspecting the register. By virtue of Article 3(1), Malta was presumed to be the centre of main interests, in the absence of proof to the contrary on the basis of ascertainable factors.

66. The judge appears to have considered that because there was no evidence of any actual administration in Malta, it should be disregarded, so that the court had to search (doing the best it could) for the best possible alternative candidate. That, it seems to me, is wrong in principle. The registration of the office in Malta was a real fact. Indeed, counsel for the petitioner accepted that the presumption did arise, and the fact that, as he put it, the company's office was no more than a letterbox, went to the strength of the presumption, rather than its existence.

67. As already explained, the judge treated the registration of the office in Malta as "illusory". Again that is wrong: the company was undoubtedly registered there. In my view the judge failed to appreciate the importance given by the Recast Regulation to the place of a registered office, and the reason for the statutory presumption. The registered office is stated on a public register, which is open to public inspection, and a company's creditors are, therefore, *prima facie*, able to rely on it, in order to predict the applicable insolvency law in the event of the company's insolvency.

68. The second related flaw in the judge's reasoning is his approach to ascertainability. A leitmotif of the European jurisprudence is that only those features of a debtor's administration of its interests which are readily identifiable by third parties will be relevant for determination of its centre of main interests. That, again, is because of a need for legal certainty and foreseeability. Unfortunately, the judge was not referred to the *Stanford* case, which emphasised this point (and held that *Re Lennox* was wrong to suggest otherwise). When the judge ascertained the various connecting factors, such as the governing law or the contracts for the company's banking arrangements, he did not go on to examine the further question whether such aspects of the company's business were ascertainable, in the sense of being available to typical third parties of the company, without further enquiry.

69. To my mind, the judge's error is well illustrated by his comment in paragraph 55, that the petitioner had ascertained the company's centre of main interests in the face of a cloud of obscurity. He said that it had been discovered by a reasonably diligent creditor (the petitioner). The judge was referring there to the petitioner reaching that conclusion in the light of all of the evidence that was before the court, including evidence, for example, about the banking contracts and the various contracts that had been disclosed in the course of the proceedings. There is no reason to suppose that those matters would have been ascertainable to typical creditors of the company, and the judge did not address that question separately.

70. It also seems to me, from paragraph 55 of the judgment and the judge's reference back to the comments of Lewison J in the *Re Lennox* case, that he considered that what Lewison J had said there was material to his reasoning. Another indication of this is that he referred, as I have said, to the petitioner as a reasonably diligent creditor. That is, it seems to me, a reference to the petitioner having dug below the surface and, through further enquiries, reached certain conclusions.

71. The third flaw in the judge's reasoning is that he failed properly to distinguish between the matters of the administration of the company, on the one hand, and matters of the operations of its business on the other hand. It seems to me that a number of the factors he relied upon, such as the proper law of the contracts and the seat of any potential arbitration, and the employment of lawyers in relation to litigation in various countries, are matters going to the operations of its business, rather than the place of the administration of its interests.

72. This seems to me to have arisen because of his conclusion, reached at an early stage in the analysis, that the administration of the company's interests was not happening in Malta (see above). He therefore concluded that the company's business must in fact have been administered somewhere else, and then, basing himself on such evidence as there was about the affairs of the company, concluded that the company's business must have been administered in the same place as its business was operating.

73. I therefore conclude that the approach taken by the judge was wrong, and I should therefore assess the evidence applying the right test. For these reasons it seems to me that there is little to be gained in going point by point through the other grounds of appeal, which are concerned with the factors taken into account by the judge following an approach which I have held to be erroneous. I will consider those other factors in reaching my own assessment based on the evidence that was before the judge.

74. I turn then to redetermine the question of the company's centre of main interests, as at July 2016.

75. The starting point is that the company's office was registered in Malta. The question is whether there is proof that its centre of main interests was somewhere else. That depends on establishing relevant factors, ascertainable to third parties, in the sense explained by the authorities.

76. Before I turn to those factors, I should also address the question of adverse inferences to be drawn from the absence of evidence on obvious points. There is no doubt that a court is, of course, entitled to draw adverse inferences, where a *prima facie* case is raised on a particular point, and a party fails to produce evidence which it may be expected to adduce, in order to deal with those points. I bear this in mind but also note that the ultimate target of the exercise is to discern whether the statutory presumption has been rebutted. If the petitioner fails to show, on the basis of objective ascertainable facts that the company's interests were being administered elsewhere, Malta will constitute the centre of main interests: that is what Article 3(1) says.

77. It seems to me that it was open, and properly open, to the company to assert that its centre of main interests was in Malta, because of the terms of Article 3(1). I do not entirely follow the judge's comment in paragraph 28 of his judgment that there is a difference between applying a presumption and making a finding by default. Article 3(1) seems to me to provide the answer unless there is proof to the contrary based on facts which would have been ascertainable to typical third-party creditors.

78. I turn then to the factors relied on by the petitioner. The first is that the company moved its registered office to delay winding-up. That granted, as *Shierson* shows, a debtor may move its centre of main interests in order to change the applicable bankruptcy law. Moreover, the reasons for re-registering the office do not undermine the fact that, as a

matter of public record, Malta became the place where the office was registered with the rebuttable consequences under the regulation.

79. This point is plainly relevant to the strength of the presumption, and the ease with which it might be possible for countervailing evidence to rebut it. But the fact that there is no evidence of actual activities in Malta does not, without more, provide an answer. As I have said, the place of a registered office is an important signifier of the centre of main interests, and that is why under Article 3(1) of the Recast Regulation there is a presumption. The absence of activity there would, of course, mean that if there were objective ascertainable indicia that the debtor was administered or managed from another country, it would be that much easier to rebut the presumption, but that is all. This follows, as I have already said, from the *Eurofood* case.

80. The next potential feature identified in the evidence is the fact that the directors were living in Estonia and South Africa. To my mind, this adds nothing of substance. The judge rejected it and I agree with him.

81. The petitioner then relies on a number of other factors, the details of which are helpfully listed in the judgment, as already summarised.

82. These are, first, that many, if not all, of the contracts of the company were in English; second, that those contracts contained English governing law clauses; third, that most of them contained arbitration clauses in favour of London; fourth, the instruction of lawyers in the UK to litigate a dispute in which the company was involved; fifth, the opening of digital payment services with Revolut in December 2018 in London; and sixth, the fact that the petitioner was an English creditor.

83. I do not consider that these features, considered individually or cumulatively, operate to rebut the statutory presumption in favour of Malta. I will consider them in turn.

84. As to the language of the contract, the company was an oil and commodities business. It is commonplace that international trade contracts are in English. There is nothing in this point.

85. It is also commonplace of international trade that English law and English-seated arbitration are agreed. There is no suggestion here that the contracts were to be performed in England, or that any form of administration of the company's business in relation to the contracts was to be carried out here. The charterparty between the parties is a good example of this, as the judge himself found. The contract was concerned with the transportation of a cargo of oil wholly outside the UK. There was nothing in the contracts to suggest that there were any obligations to be performed within the UK. Many companies which are administered abroad use contracts containing such terms, and it would be very surprising to them, and their creditors, to be told that their centre of main interests was in England.

86. Moreover, it seems to me to be far-fetched to regard dispute resolution clauses, which presume that a contract has gone wrong in some way, as indicative in any way of a place where the company's administration or management is being conducted from. London is a major international arbitration centre and companies based all over the world agree that their disputes will be resolved in London. A great many such disputes

take place where the parties on both sides of the dispute are located and administered abroad.

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

88. The petitioner relied on two cases, where the judges in those cases, when considering the question of the COMI, had agreed English law as the governing law: see *Re European Directories* [2010] EWHC 3472 (Ch) and *Re FREP (Knowle)* Ltd [2017] EWHC 25 (Ch). I do not think that any real assistance can be drawn from those cases. In each case there was a plethora of factors which pointed towards the COMI being within the UK and the contracts were just one factor in the analysis. They were just decisions on their own facts. Moreover, in both cases the contracts in question concerned the financing of the operations of the business in question, and they can be seen, to some extent, as concerned with the capital structure of the companies. In the *FREP* case the contract in question also referred to the appointment of administrators under English law, which was an indicator that the applicable insolvency law would be English law, which, in turn, was an indicator that the COMI was located within the UK. I do not think it is possible to read across from those cases a conclusion that, in general, the governing law of the contract is likely to be a strong indicator of COMI. I particularly take that view in relation to mercantile contracts of the kind entered into by the company. As I have said, it is commonplace in international trade for contracts concerning the transportation of commodities to be governed by English law, and subject to arbitration in this country.

89. The next point is that I do not see that any great weight is to be given to the fact that the charterparty between the parties referred, under the heading "place", to London. The judge, at paragraph 40, appears to have considered that to be important. However, elsewhere in his judgment he had concluded that he could not reach a view that the contract had, in fact, been entered into in London, and refused to reach that conclusion. I also do not see how it could be said that typical third-party creditors of the company could ever have been aware of the reference to London in the contract. It seems to me that this factor is therefore exiguous.

90. I do not see how the employment of lawyers in this jurisdiction to deal with a dispute against the company can be seen as evidence capable of rebutting the Article 3(1) presumption. The relevant proceedings were arbitral proceedings brought by a claimant against the company in London. The arbitrator decided he lacked jurisdiction. There was then a challenge in the Commercial Court which failed, and an attempt to appeal to the Court of Appeal, which failed on grounds of jurisdiction. In the course of those proceedings, not surprisingly, the company employed lawyers in the UK. It was doing so in defending itself in proceedings. I do not see how the employment of London-based lawyers could be said to amount to an aspect of the administration or management of the business of the company, rather than a feature of the operations of its commercial business. In any event there is no reason to think the typical third-party creditors of the company would be aware of disputes of that kind or place any weight on it.

91. I also do not consider that the opening of a digital payment service with Revolut assists the analysis. First, the facility was only opened in December 2018, whereas the question here concerns the position as at July 2016. I accept that, in principle, later events may

throw light on earlier ones, but I do not think that opening an account more than two years after the relevant date can sensibly illuminate where the company was being managed or administered in July 2016. There are other reasons why this event does not assist the petitioner. The second is that the arrangement was an online digital payment facility which allowed the company to make payments in a variety of currencies. There is no reason to think its location would indicate to typical third-party creditors that the interests of the company were being administered from the UK. Third, the evidence of the company was that it was set up in London and used to make payments for the company's London solicitors who were representing it in relation to the winding-up petition. It was also used to pay the company's Maltese lawyers. Fourth, it again appears to me that, if anything, this is simply part of the operations of the business of the company, rather than an indication of a place where its interests were being managed or administered from. Fifth, there is no evidential basis for thinking that typical third-party creditors of the company would have been aware of the location of the money management facility. Sixth, as the European Court of Justice explained in the *Interedil* case at paragraph 53, the existence of a banking arrangement in a place other than the state in which the registered office is situated cannot be regarded as a sufficient factor to overcome the presumption laid down by the legislature unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a way that is ascertainable by third parties, that the company's actual centre of management and supervision of its interests is located in that other Member State. Finally, if the location of bank accounts were to be seen as a relevant factor, it seems to me far more telling that the company maintained two bank accounts in Geneva as at July 2016.

92. Finally, there is the domicile of the petitioner as a creditor of the company under the BVI judgment. I do not see how that debt can throw any light on where the administration of the company's interests was conducted from. It seems to me there is no logical connection between the two points. The location of the petitioner here is happenstance: the debt does not (for instance) arise from the non-performance of any contractual obligations to be performed within the UK. One can easily imagine a situation where there is a large number of creditors of the company located in different places, and it would be very hard to rely on the location of any of those creditors as showing where the company administered or managed its interests from.

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

94. I have taken into account the petitioner's submissions that adverse inferences should be drawn. However, it seems to me that, given the legal framework created by Article 3(1), the court is required to make a comprehensive analysis of all the evidence to determine whether the presumption has been rebutted by matters that would have been ascertainable to typical third-party creditors. I have made a comprehensive analysis of all the material relied on by the petitioner. I have taken account of the petitioner's complaints about the absence of evidence from the company.

95. I have considered the material by adopting the perspective of a typical third-party creditor. Such creditors would have been able to see that the company is registered in

Malta and would have been able to inspect the Maltese company register. I have concluded that the petitioner has failed to rebut the presumption in the second part of Article 3(1) of the Recast Regulation that the centre of main interest was Malta as the place where the company had its registered office.

96. I shall therefore allow the appeal and set aside the winding-up order.