**[2016 Gib LR 164]**

# IN THE MATTER OF PEABODY HOLDINGS (GIBRALTAR) LIMITED

# IN THE MATTER OF AN APPLICATION BY SCHWETZ (as foreign representative of Peabody Holdings (Gibraltar) Ltd.) FOR RECOGNITION UNDER THE INSOLVENCY (CROSS BORDER INSOLVENCIES) REGULATIONS 2014

SUPREME COURT (Jack, J.): May 31st, 2016

*Bankruptcy and Insolvency—recognition of foreign insolvency proceedings—foreign main proceeding—under Insolvency (Cross Border Insolvencies) Regulations 2014, reg. 18(2), foreign proceeding recognized as foreign main proceeding if in country of debtor's centre of main interests—COMI presumed to be location of registered office—rebuttable by objective factors ascertainable by third parties, e.g. if company incorporated in Gibraltar for fiscal purposes but effectively owned and controlled by US parent company*

The applicant sought recognition of US bankruptcy proceedings as main insolvency proceedings for the purposes of the Insolvency (Cross Border Insolvencies) Regulations 2014.

Peabody Energy Corporation was one of the biggest energy companies in the world. Its head office was in Missouri, United States. On April 13th, 2016, Peabody Energy Corporation and 153 subsidiaries filed for Chapter 11 bankruptcy protection in Missouri. One of the subsidiaries, Peabody Holdings (Gibraltar) Ltd. ("Holdings"), was incorporated in Gibraltar and its shares were owned by two other subsidiaries. Holdings was administered in Gibraltar but its head office functions were coordinated from Missouri. Peabody Energy Corporation and its advisers were involved in all transactions and fully aware of all board discussions.

Holdings' sole asset was the shares in Peabody Investments (Gibraltar) Ltd. ("Investments"). Investments held almost all of the group's Australian assets and had not entered Chapter 11 bankruptcy. In 2013 and 2015, Holdings had pledged 65% of its shares in Investments to Citibank N.A., the lead agents for a syndicate of banks that had lent money to Peabody Energy Corporation against various securities.

On April 18th, 2016, Peabody Energy Corporation and the subsidiaries in Chapter 11 proceedings entered an agreement with Citibank and the syndicate lenders to provide the group with working capital, with the

lenders obtaining super priority over all other secured lenders. Among the security to be provided was 65% of Holdings' shareholding in Investments. The US bankruptcy judge approved the agreement ("the D.I.P. agreement"). Holdings sought an order permitting it to grant the charge over the shares.

The applicant had been appointed by the US bankruptcy judge as the foreign representative of Holdings. She applied for recognition of the US bankruptcy proceedings as foreign main insolvency proceedings under the Insolvency (Cross Border Insolvencies) Regulations 2014. Regulation 18(2) provided that a foreign proceeding would be recognized as a foreign main proceeding if it took place in the country where the debtor had its centre of main interests ("COMI"). Under reg. 21, a foreign main proceeding governed the execution against the debtor's property in Gibraltar and any right to transfer, encumber or otherwise dispose of any property in Gibraltar. There was a stay of any pending action and any attempt at execution of judgments.

**Held,** ruling as follows:

(1) Holdings' COMI was in the United States and the Chapter 11 proceedings would be treated as foreign main proceedings. A company's COMI would be presumed to be in the jurisdiction where it had its registered office. That presumption could be rebutted if factors showed that the actual situation was different. Those factors had to be objective and ascertainable by third parties from information in the public domain and information that an ordinary third party would acquire as a result of dealing with the company. In the present case, although Holdings' registered office was in Gibraltar, a comprehensive assessment of all the relevant factors made it possible for third parties to establish that Holdings' actual centre of management and supervision and the management of its interests was located in Missouri, where Peabody Energy Corporation's head office was situated. Holdings had four directors: two Gibraltar-registered companies; and two senior officers of Peabody Energy Corporation who were resident in the United States. Holdings was effectively owned and controlled by Peabody Energy Corporation, which was its ultimate parent. Holdings had been incorporated in Gibraltar for fiscal purposes and was properly administered in Gibraltar, but its head office functions were coordinated and driven strategically from Missouri. When operational or business decisions fell to be considered, they stemmed from discussions in Missouri that were shared with Holdings. Peabody Energy Corporation and its advisers were invariably intimately involved in all transactions and were made fully aware of all board discussions by Holdings. Holdings' Gibraltar directors would only pass resolutions in the absence of participation from the US directors if all legal, tax and commercial issues had previously been discussed with Peabody Energy Corporation. This arrangement was exactly what a third party would expect in such a situation and all of these factors, except the precise

attendance of particular directors at board meetings, would be ordinarily ascertainable by a third party (paras. 30–33).

(2) Holdings would be permitted to grant the charge over 65% of its shares in Investments, as provided under the D.I.P. agreement. The making of the share charge was in the obvious interest of the Chapter 11 restructuring. The D.I.P. agreement was vital to enable Peabody Energy Corporation and the group to continue carrying on business. The agreement had been approved by the US bankruptcy court and the provision of the security was a key part of it (para. 34).

**Cases cited:**
(1) *Eurofood IFSC Ltd.*, *In re*, [2006] Ch. 508; [2006] 3 W.L.R. 309; [2006] E.C.R. I-3813; [2006] B.C.C. 397; [2007] 2 BCLC 151, applied.
(2) *Interedil Srl (in liquidation)* v. *Fallimento Interedil Srl*, [2012] Bus. L.R. 1582; [2011] E.C.R. I-9915; [2012] B.C.C. 851; [2011] B.P.I.R. 1639, applied.
(3) *Stanford Intl. Bank Ltd.*, *Re*, [2009] EWHC 1441 (Ch); [2009] B.P.I.R. 1157; further proceedings, [2010] EWCA Civ 137; [2011] Ch. 33; [2010] 3 W.L.R. 941; [2010] Bus. L.R. 1270, applied.

**Legislation construed:**
Insolvency (Cross Border Insolvencies) Regulations 2014, reg. 2: The relevant terms of this regulation are set out at para. 18.
reg. 6: The relevant terms of this regulation are set out at para. 17.
reg. 16: The relevant terms of this regulation are set out at para. 14.
reg. 17: The relevant terms of this regulation are set out at para. 15.
reg. 18: The relevant terms of this regulation are set out at para. 16.

*K. Azopardi*, *Q.C.*, *K. Powers* and *J. Wahnon* for the applicant;
*D. Feetham* and *N. Feetham* for Citibank N.A.

1 **JACK, J.:** Peabody Energy Corporation is one of the biggest energy companies in the world. It traces its origins back to 1883 though its current corporate form is more recent. I shall call the head company "Corp" and the business as a whole "the Group" without meaning that as a technical expression.

2 The main business of Corp is coal mining and it conducts extensive operations in the United States and in Australia. It has almost unimaginable reserves of some 6.3 bn. tonnes of coal in those two continents covering half a million acres of surface area. The head office of Corp is in St. Louis, Missouri.

3 As of December 31st, 2015, the Group had consolidated assets and liabilities of $11 bn. and $10.1 bn. respectively and a turnover of $5.6bn. On a balance-sheet basis, the Group was solvent although its financial

position has declined since then. The Group has been hit by declining coal prices both for thermal coal, particularly in the United States, and for metallurgical coal used for steel making, especially due to the declining demand from China. This has led to pressure on its cash flow.

4 The Group failed to make two payments of interest of $21.1m. and $50m. due on March 15th, 2016. This was not an immediate act of insolvency because the Group had a 30-day grace period. Within the grace period, on April 13th, 2016, Corp and 153 subsidiaries filed for Chapter 11 bankruptcy protection in the Bankruptcy Court of the Eastern District of Missouri. The case was allocated to Barry S. Schermer, a US bankruptcy judge.

5 As is well known, Chapter 11 is a distinctively American insolvency process where the existing management remains in place and a restructuring plan is agreed under the supervision of the Bankruptcy Court. In the meantime there is a stay of enforcement of debts due by Corp and the subsidiaries who entered Chapter 11.

6 One of those subsidiaries is Peabody Holdings (Gibraltar) Ltd., the company with which I am concerned today. I shall call that company "Holdings." It was incorporated in Gibraltar on August 22nd, 2006 and its shares are held by two Delaware companies. One of those is a direct subsidiary of Corp; the other is wholly owned by another Delaware company which is, in turn, a direct subsidiary of Corp. These three Delaware companies all entered Chapter 11 on April 13th, 2016. Holdings' sole asset is the shares in another Gibraltar company called Peabody Investments (Gibraltar) Ltd., which I shall call "Investments."

7 Investments did not enter Chapter 11. Investments holds almost all the Group's Australian assets. By agreements of September 24th, 2013, February 25th, 2015 and March 16th, 2015, Holdings pledged 65% of its shares in Investments to Citibank N.A. I shall call Citibank N.A. "Citi." Citi are the lead agents for a syndicate of banks who have lent money to Corp against various securities of which the 65% of Investments are one.

8 On April 15th, 2016, Judge Schermer appointed Amy Schwetz as the foreign representative of Holdings. Ms. Schwetz is an Executive Vice President and the Chief Financial Officer of Corp. By an application dated April 21st, 2016 she applies to this court for recognition of the US bankruptcy proceedings as the main insolvency proceedings in respect of Holdings for the purposes of the Insolvency (Cross Border Insolvencies) Regulations 2014, which is the Gibraltarian legislation giving effect to the UNCITRAL model law on cross border insolvency.

9 The relief sought in her application is set out in the application. She seeks interim relief—

> "(i) that execution against [Holdings'] assets be stayed;

(ii) that the administration of [Holdings'] assets be entrusted to her as the foreign representative;

(iii) [that] except in respect of any new financings that may be approved by an order of the US Bankruptcy Court and subsequently by the Gibraltar Court [there be suspended] the right to transfer, encumber or otherwise dispose of any property of [Holdings];

(iv) (without prejudice to the generality of (i)–(iii) above) staying the enforcement of the security granted by the debtor under the 2013 and 2015 credit agreements [these being the first and third agreements I have mentioned], and the first share charge and second share charge, [and further] suspending the right to transfer, encumber or otherwise dispose of the shares, those are the shares in investments, except with respect of any new financings that may be approved by an order of the US Bankruptcy Court and subsequently by the Gibraltar Court and entrusting the administration of the shares to the foreign representative; and

(v) . . . such other relief . . . as the court should deem fit."

The final relief claimed substantially matches the interim relief sought.

10 On April 22nd, 2016, Dudley, C.J. granted an interim stay and fixed a day for the substantive hearing of the full recognition application and for the post-recognition relief sought. I heard Mr. Keith Azopardi, Q.C. for Ms. Schwetz and Mr. Daniel Feetham for Citi.

11 In the meantime, on April 18th, 2016, Corp and the subsidiaries in Chapter 11 entered an agreement with Citi and the syndicate lenders to provide the Group with working capital. The agreement is titled "Super-priority Secured Debtor-in-Possession Credit Agreement." As the title implies, the effect is that the lenders obtain super priority over all other secured lenders to the Group. Among the security to be provided was the 65% shareholding in Investments. I shall call this the "D.I.P. agreement."

12 On May 18th, 2016, Schermer, J. approved the making of the D.I.P. agreement. Holdings now seeks an order from me permitting it to grant a charge over those 65% of shares in Investments as provided for in the D.I.P. agreement.

13 There are two issues before me: first, should this court recognize the US bankruptcy proceedings in respect of Holdings as foreign main proceedings under the 2014 Regulations? and secondly, should this court permit Holdings to grant a share charge as provided under the D.I.P. agreement?

14 Turning to the first issue, reg. 16 of the 2014 Regulations so far as material provides:

"(1) A foreign representative may apply to the Court for recognition of the foreign proceeding in which the foreign representative has been appointed.

(2) An application for recognition shall be accompanied by . . . [and there are various certificates and other evidence required].

(3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative."

15 Regulation 17 creates presumptions concerning recognition and the authentication of documents. Regulation 17(1) provides:

"If the decision or certificate referred to in regulation 16(2) indicates that the proceeding is a foreign proceeding and that the person or body is a foreign representative, the Court is entitled to presume that this is the case."

16 Regulation 18 provides that—

"(1) subject to regulation 6, a foreign proceeding shall be recognised if—

(a) the proceeding is a foreign proceeding within the meaning of regulation 2;

(b) the person or body applying for recognition is a foreign representative within the meaning of regulation 2;

(c) the application meets the requirements of regulation 16(2); and

(d) the application has been made in accordance with this Part and the [Insolvency] Rules.

(2) The foreign proceeding shall be recognised—

(a) as a foreign main proceeding if it is taking place in the country where the debtor has the centre of his main interests; or

(b) as a foreign ancillary proceeding if the debtor has an establishment in the foreign country.

(3) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.

(4) The provisions of this Part do not prevent the modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist."

17 Regulation 6 provides that "nothing in this Part prevents the Court from refusing to take an action governed by this Part if the action would be contrary to the public policy of Gibraltar." No issue arises under this in this case.

18 Regulation 2 is the definition section and defines "foreign proceeding" as meaning—

> "a collective judicial or administrative proceeding in a designated foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation, liquidation or bankruptcy . . ."

19 There is no question that the Chapter 11 proceedings in the United States of America constitute "foreign proceedings" within that definition. The sole question is whether they are "foreign ancillary proceeding[s]," defined as "a foreign proceeding, other than a foreign main proceeding, taking place in a country where the debtor has an establishment" or "foreign main proceeding[s]," defined as "a foreign proceeding taking place in the country where the debtor has the centre of his main interests."

20 It is establishing the centre of main interest which is the key issue in the current case. Regulation 21 provides, in effect, that a foreign main proceeding will govern the execution against the debtor's property within Gibraltar and any right to transfer, encumber or otherwise dispose of any property of the debtor within Gibraltar. There is a stay of any pending action and of any pending attempts at execution of judgments. Regulation 21(2) gives a power to lift a stay or suspension in individual cases. Regulation 22 gives extensive powers to grant relief but I do not need to set those out.

21 The key issue, as I have said, is reg. 18(2): are the US proceedings foreign main proceedings or foreign ancillary proceedings? This issue can in fact be narrowed further to the question as to whether Holdings' centre of main interests is in St. Louis, Missouri or in Gibraltar.

22 The definition of "centre of main interests," often referred to as the COMI, has been the subject of much case law. It is convenient to take the summary of the law from Lewison, J.'s judgment in *Re Stanford Intl. Bank Ltd.* (3). There the judge started by dealing with the UNCITRAL provisions and said ([2009] EWHC 1441 (Ch), at paras. 43–46):

> "43. UNCITRAL reported to the UN on the work of the 30th session of UNCITRAL. One of the points raised in the report was that [the] meaning of COMI was not clear. The report stated (§ 153):
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> > 'In response, it was stated that the term was used in the European Union Convention on Insolvency Proceedings and

that the interpretation of the term in the context of the Convention would be useful also in the context of the Model Provisions.'

44. The Convention has since been superseded by the EC Regulation on Insolvency Proceedings. In the Guide to Enactment it is said (§ 31):

'A foreign proceeding is deemed to be the "main" proceedings if it has been commenced in the State where "the debtor has the centre of its main interests." This corresponds to the formulation in article 3 of the EC Regulation, thus building on the emerging harmonization as regards the notion of a "main" proceeding.'

45. In my judgment it is a reasonable inference that the intention of the framers of the Model Law was that COMI in the Model Law would bear the same meaning as in the EC Regulation, since it 'corresponds' to the formulation in the EC Regulation; and one of the purposes of the Model Law is to provide EU member states with a 'complementary regime' to the EC Regulation. It is true that in the EC Regulation some help can be derived from recital (13) which says:

'The centre of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.'

46. However, the absence of that recital from the Model Law does not in my judgment alter the position, because in my judgment the framers of the Model Law envisaged that the interpretation of COMI in the EC Regulation (which would necessarily take into account recital (13)) would be equally applicable to COMI in the Model Law."

23 The judge then discusses the Diego Schmitz report on the proposed EU Convention on Insolvency Proceedings which was superseded by the EC Regulation. He deals with the decision of the ECJ in *In re Eurofood IFSC Ltd.* (1) and says (*ibid.*, at para. 51):

"Eurofood was an Irish company which was a subsidiary of Parmalat, an Italian company. Eurofood's registered office was in Dublin. Its principal objective was the provision of financing facilities for companies in the Parmalat group. Its day to day administration was managed by Bank of America under the terms of an agreement. It engaged in at least three large financial transactions. Insolvency proceedings were opened in both Italy and Ireland, and the courts of each Member State decided that they had jurisdiction. The Italian administrator appealed to the Irish Supreme Court which

referred a number of questions to the ECJ. The relevant one, for present purposes is the fourth question:

> 'Where (a) the registered offices of a parent company and its subsidiary are in two different member states, (b) the subsidiary conducts the administration of its interests on a regular basis in a manner ascertainable by third parties and in complete and regular respect for its own corporate identity in the member state where its registered office is situated, and (c) the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control and does in fact control the policy of the subsidiary—in determining the "centre of main interests," are the governing factors those referred to at (b) above or on the other hand those referred to at (c) above?'"

24 The judge then discusses the opinion of Advocate-General Jacobs and then came to the European Court's decision itself. He said (*ibid.*, at para. 59):

> "The court first said that in the case of a group of companies the EC Regulation had to be applied to each company individually (§ 3). It then considered the question of COMI. It is necessary for me to set out their reasoning:
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> > '33 That definition [*i.e.* recital (13)] shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.
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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.

> 36 By contrast, where a company carries on its business in the territory of the member state where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another member state is not enough to rebut the presumption laid down by the Regulation.'"

25 He then discusses whether under the UNCITRAL legislation he was bound to follow *Eurofood* (1) and concluded that he was. On appeal, the Court of Appeal agreed with him. He then says (*ibid.*, at paras. 61–63):

> "61. Mr Zacaroli submitted that I was wrong to apply the simple test of 'head office functions' propounded by Jacobs A-G. He said that Jacobs A-G had expressly accepted the submission of the Italian administrator that ascertainability by third parties of the centre of main interests is *not* central to the concept of COMI (§ 114). That was inconsistent with the Advocate-General's own subsequent stress on the need for elements relied on to rebut the presumption in favour of the registered office to satisfy the twin requirements of transparency and ascertainability. More to the point, it was not consistent with the decision of the ECJ itself which emphasised that COMI *must* be identified by reference to criteria that are both objective and ascertainable by third parties (§ 33); and said in terms that the presumption in favour of COMI coinciding with the company's registered office could *only* be rebutted by factors which are *both* objective *and* ascertainable by third parties. Simply to look at the place where head office functions are actually carried out, without considering whether the location of those functions is ascertainable by third parties, is the wrong test. The way in which the ECJ approached recital (13) was not to apply the factual assumption underlying it but to apply its rationale. I accept this submission. To the extent that I considered and applied the head office functions test in *Lennox Holdings* on the basis accepted by Jacobs A-G in § 114, I now consider that I was wrong to do so. Pre-*Eurofood* decisions by English courts should no longer be followed in this respect. I accept Mr Zacaroli's submission that COMI must be identified by reference to factors that are both objective and ascertainable by third parties. This, I think, coincides with the view expressed by Chadwick, L.J. (before the decision in *Eurofood*) in *Shierson* v. *Vlieland-Boddy* ([2005] 1 W.L.R. 3966 (§ 55)):
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> > '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.'

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

63. In *Eurofood* the ECJ emphasised the importance of the presumption in favour of COMI coinciding with a company's registered office. In my judgment this means that the decision in *Re Ci4net.com Inc*. . . . to the effect that the location of the registered office is no more than a factor to be considered, should also no longer be followed. In my judgment it follows from *Eurofood* that the location of a company's registered office is a true presumption, and the burden lies on the party seeking to rebut it." [Emphasis supplied.]

26 The judge then goes on to consider the position within the United States of America, where the law is different. He cites the expert on US law (*ibid*., at paras. 66–67):

"66. Professor Westbrook, the Receiver's expert on US law, explains in his first affidavit (§ 21) that:

> 'The United States jurisprudence has made it clear that the COMI lies in the jurisdiction [where] the most material "contacts" are to be found, especially management direction and control of assets.'

67. According to *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd.* these contacts can include the location of the debtor's headquarters, the location of those who actually manage the debtor, the location of the debtor's primary assets, the location of a majority of the debtor's creditors or of a majority of creditors who would be affected by the case and the jurisdiction

whose law would apply to most disputes. However, none of these factors in the American jurisprudence is qualified by any requirement of ascertainability. In my judgment this is not the position taken by the ECJ in *Eurofood*."

27 He then deals with the submission that fraud cases, such as were in issue in *Stanford* (3), were different and rejects that submission. He then concludes (*ibid*., at para. 70):

"i) The relevant COMI is the COMI of [the bank];

ii) Since its registered office is in Antigua, it is presumed in the absence of proof to the contrary, that its COMI is in Antigua;

iii) The burden of rebutting the presumption lies on the Receiver;

iv) The presumption will only be rebutted by factors that are objective;

v) But objective factors will not count unless they are also ascertainable by third parties;

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

28 That summary was, as I have said, approved by the Court of Appeal in a number of conjoined appeals from Lewison, J.'s decision.

29 Subsequently there has been a further decision of the European Court of Justice in *Interedil Srl (in liquidation)* v. *Fallimento Interedil Srl* (2). This was a case where an Italian company had transferred its registered office from Italy to the United Kingdom. It had then been struck off the UK register but it still had real property in Italy. The court held ([2012] Bus. L.R. 1582, at para. 59) that—

"a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties. 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 that provision cannot be rebutted. Where a company's central administration is not in the same place as its registered office, 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 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 . . ."

30 In the current case, at all material times Holdings had four directors. They were Abacus (Gibraltar) Ltd., Abacus Services (Gibraltar) Ltd., Mark David Stone, and Robert Francis Bruer. Mr. Stone and Mr. Bruer are both senior officers in Corp and are resident in St. Louis, Missouri. The two Abacus companies are incorporated in Gibraltar and are the nominee directors provided by PwC's company administration service.

31 The actual management of Holdings is described in a letter of May 27th, 2016 which is going to be exhibited to an affidavit deposing to its truth. It is written by Mr. Bruer and explains:

"(1) As it states in the affidavit of Amy Schwetz, [Holdings] is effectively ultimately owned and controlled in terms of its head office function by [Corp], which is its ultimate parent. [Holdings] was incorporated in Gibraltar for fiscal purposes and is properly administered in Gibraltar as required by Gibraltar Law. Its head office functions are coordinated and driven strategically from St. Louis, Missouri where [Corp] is headquartered and this is because it forms part of a much larger business headed by [Corp].

(2) In terms of process, when possible operational or business decisions fall to be considered, they stem from discussions driven in St. Louis that are shared with [Holdings]. It would be customary for there to be telephone discussions with [Corp], [Corp] officers and US resident directors of [Holdings] on important strategic operational financial decisions that [Corp] would contemplate or that [Corp] would want [Holdings] to act upon. Those discussions may also involve the international tax or legal advisors of [Corp] or [Holdings].

(3) When those discussions lead to an agreed strategic step being reached, it may also require board discussions by [Holdings]. Matters are tabled before the [Holdings] board for the passing of necessary resolutions. As the required quorum of the board is set at two, it has recently been the case that the resolution required the attendance of local directors, however before these are passed, [Corp] and their advisors are, as described above, invariably intimately involved in all transactions. They are also made fully aware of all meetings held with the above mentioned quorum and attendance and of any resolutions so passed. We make clear that the Gibraltar directors would only proceed to do so in the absence of participation of the US resident directors when the pertinent matter is of a routine

> nature or where all legal/tax/commercial issues have previously been discussed in correspondence and or teleconferences with [Corp] and all their international tax and legal advisors (for example PwC US) and the transaction has been therefore prescribed in an agreed legal step down. This is due to the fact that [Holdings'] head office functions are driven from St. Louis, Missouri."

32 The letter then deals with particular meetings, but I do not think I need set out any more. What is said in that letter is exactly what one would expect in a situation of this sort. In my judgment any third party would also expect that a holding company with a Gibraltar subsidiary with nominee Gibraltarian directors, as exists here, would expect a similar set-up to that described in Mr. Bruer's letter. All of those facts except the precise attendance of particular directors at particular meetings of the board at Holdings would be regularly ascertainable by a third party in my judgment. Adopting the words of the ECJ in *Interedil* (2), a comprehensive assessment of all the relevant factors makes it possible for third parties to establish that Holdings' actual centre of management and supervision and the management of its interests were located in St. Louis, Missouri.

33 Accordingly, in my judgment, Holdings' COMI was in St. Louis and I shall direct that the Chapter 11 proceedings be treated as foreign main proceedings.

34 That conclusion leaves very little to be decided in relation to the second issue. The D.I.P. agreement has been approved by the US Bankruptcy Court. A key part of the D.I.P. agreement is the provision of security in the form of the charge of the 65% of the shares in Investments. The letter of May 21st, 2016 from Damian S. Shaible, a New York attorney with the firm of Davis Polk & Wardwell LLP, explains that the giving of the security is a central component of the D.I.P. agreement. The D.I.P. agreement is vital for the ability of Corp and the Group to continue carrying on business. In those circumstances in my judgment the making by Holdings of the share charge is in the obvious interest of the Chapter 11 restructuring and I have no hesitation therefore in allowing Holdings to grant the charge.

*Ruling accordingly.*

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