

Pension protection fund changes following Olympic Airlines case

The regulatory amendments drawn up by the Secretary of State for Work and Pensions following the outcome in *Trustees of Olympic Airlines SA Pension & Life Assurance Scheme v Olympic Airlines SA* have been drafted narrowly and may end up protecting no one other than the beneficiaries of the Olympic Airlines pension scheme.

The issue

In the recent case of *Trustees of Olympic Airlines SA Pension & Life Assurance Scheme v Olympic Airlines SA*, the High Court decided that it had jurisdiction to issue a winding up order in relation to Olympic Airlines (the “**Airline**”) on the petition of the Airline’s pension scheme trustees on the basis that the Airline had an establishment in England within the meaning of Council Regulation EC 1346/2000 on insolvency proceedings (the “**Insolvency Regulation**”). The Court of Appeal¹ overturned that decision on the basis that the meaning of “establishment” for the purposes of the Insolvency Regulation required more economic activity than the mere process of winding up a business. The Court of Appeal’s decision denied the UK beneficiaries of the Olympic Airlines SA Pension & Life Assurance Scheme (the “**Scheme**”) entry into the Pension Protection Fund (“**PPF**”), a UK lifeboat fund for members of eligible pension schemes which is funded by those eligible schemes. This was because absent a winding up order in the UK, no qualifying insolvency event had occurred in relation to the Airline for the purposes of the Pensions Act 2004.

Background

The Airline was a Greek state-owned airline which commenced operations in Greece in 2003. It flew to many European destinations, including London Heathrow, and carried on business in England from a head office in Conduit Street, London, which it leased from an associate company. It also had premises at

Heathrow and Manchester Airports and employed about 27 employees in England. Most of those employees were members of the Scheme.

TIMELINE OF EVENTS:

- On 2 October 2009, following the decision of the European Commission that the Airline had received illegal state aid from the Greek State, it entered “special” liquidation in Greece. This “special” liquidation constituted “main proceedings” for the purpose of the Insolvency Regulation.
- In November 2009 the ticket office at Heathrow was closed.
- On 24 March 2010 the Greek liquidator gave instruction for the disposal of the Airline’s assets at its branches outside Greece.
- In May 2010 the premises in Manchester were vacated and their contents moved to the Conduit Street office.
- On 24 June 2010 the bank manager reported to the English branch’s financial and planning manager that he had insufficient funds to pay the Airline’s English employees under the BACS payroll mechanism.
- On 29 June 2010 all standing orders and direct debits from the English branch were cancelled.
- On 2 July 2010 the Greek liquidator wrote to all of the Airline’s employees in England terminating their employment from 14 July 2010. Final salary payments to English employees down to 14 July 2010 were funded by a remittance from the Greek liquidator. The English branch’s financial and planning manager and former general manager were both retained on short term contracts which continued after 14 July 2010.
- The retained managers paid suppliers and utility bills, reconciled bank statements, copied and sent relevant documents and records to the liquidator in Athens and dealt with other instructions or requests from the liquidator.

¹ [2013] EWCA Civ 643

- The trustees of the Scheme presented a petition to wind up the Airline in England on 20 July 2010 which, if successful, would result in the Airline suffering a qualifying insolvency event and the Scheme being eligible to enter the PPF.

At first instance, the High Court decided that it had jurisdiction to issue a winding up order on the trustees' petition on the basis that the Airline had an establishment in England on 20 July 2010 within the meaning of the Insolvency Regulation. The Airline appealed that decision on the basis that the Insolvency Regulation's definition of establishment required more than what had been identified by the High Court and in particular required some more than transitory economic activity which was external and market facing. It argued that the desultory running down of a business did not count. The Court of Appeal allowed the appeal. Accordingly, the Airline had not suffered a qualifying insolvency event for the purposes of the Pensions Act 2004 and the UK based beneficiaries of the Scheme were denied entry into the PPF.

The Pension Protection Fund (Entry Rules) (Amendment) Regulations 2014

The Court of Appeal noted its regret that its conclusion would leave the beneficiaries of the Scheme unprotected by the PPF. It is against this backdrop that the Secretary of State for Work and Pensions recently drew up The Pension Protection Fund (Entry Rules) (Amendment) Regulations 2014 (the "**Amendment Regulations**"), which will come into force on 21 July 2014.

The Amendment Regulations provide that an insolvency event occurs on the fifth anniversary of the date of commencement of insolvency proceedings which:

- (a) on 20 July 2014: (i) relate to an employer with its centre of main interests in a Member State of the European Economic Area other than the United Kingdom; (ii) have been commenced in that Member State; and (iii) have not come to an end;

- (b) relate to an employer in relation to which a winding up order was granted by the English court and which was later set aside on the basis that the court did not have sufficient jurisdiction to grant the order because the employer did not have an establishment in the United Kingdom; and
- (c) relate to an employer which would have suffered a qualifying insolvency event as a result of the grant of the winding up order.

Unfortunately for UK employees of overseas employers, the conditions required to be satisfied in order to suffer a qualifying insolvency event have been so narrowly drafted that the sole beneficiaries may end up being the employees of the Airline. Even if the Amendment Regulations were to have a wider application, the benefit to UK employees of an overseas employer would still be short lived as the Amendment Regulations will cease to have effect on 21 July 2017.

Comment

It seems that the Amendment Regulations have been drafted from a paternalistic point of view solely to protect the Airline employees. It remains to be seen whether this approach will be adopted more widely and if it is, what impact this will have on the PPF's resources and levies.

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