

# International Corporate Rescue



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## CASE REVIEW SECTION

### *In The Matter of Nektan (Gibraltar) Limited* [2020] EHWC 65 (Ch)

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#### Synopsis

The Court granted an administration order to appoint administrators over Nektan Gibraltar Limited ('Nektan'), a company registered in Gibraltar. The Court concluded that Nektan's centre of main interests (COMI) was in England, rebutting the presumption that COMI is located in the place of the registered office despite Nektan not having a physical address in England. The Court also concluded, *obiter*, that the English court has jurisdiction over a Gibraltar incorporated company, even if that company's COMI is in Gibraltar.

#### Abstract

Nektan, an online gambling platform provider, made an urgent application for an administration order pursuant to paragraph 12(1)(a) of Schedule B1 to the Insolvency Act 1986 (the 'Act'), seeking the appointment of administrators over Nektan. Nektan is a company incorporated in Gibraltar without a physical address in England. The administration of Nektan was required to facilitate a sale of the company's primary business. Absent an administration, HMRC, Nektan's largest creditor, would have been able to petition to wind Nektan up. This would result in the loss by Nektan of its gambling licence, which the proposed third-party purchaser would require to operate the business during a transitional period. HMRC did not oppose the administration application.

The Court concluded that Nektan was insolvent and that an administration order would be reasonably likely to achieve the purpose of administration, in this case by achieving a better result for the company's creditors as a whole than would be likely if the company were wound up. The matter was complicated by jurisdictional issues: the company was incorporated and had its registered office in Gibraltar and there was a presumption under Article 3(1) of the Recast Insolvency Regulation (2015/848) (the 'Recast Regulation') that its COMI was also in Gibraltar. There was a question, therefore, as to whether the English court had jurisdiction to make an administration order over Nektan.

#### Held

The Court granted the administration order.

**Rebutting the COMI presumption without a physical address** – The Court concluded that Nektan's COMI was in England, rebutting the presumption that the company's COMI was in Gibraltar as the place of its registered office despite Nektan not having a physical address in England and having a physical presence in Gibraltar (a call centre). The absence of a single physical address in England was held not to be determinative. Rather, the Court recognised that 'modern ways of working', and in particular the nature of some online businesses, require a conception of COMI that does not rely on there being a single physical location that can be identified as a 'head office', provided the company's relevant functions are carried out in the jurisdiction in a manner that is ascertainable by third parties. Nektan's key staff were based in the UK, including its CFO, accounts manager, human resources manager and sales manager. These staff worked in England despite the company having no office there: the accounts manager worked from home; the sales manager worked from a shared office facility; and the CFO worked mainly from his private members club in London. The decision in this case reflects evolving COMI analysis by the English courts, seeking to reflect the realities of modern business practices where, for some types of businesses, the concept of a 'head office' is becoming increasingly irrelevant (see paragraphs 59 and 62 of the judgment).

**Perception of third parties when determining COMI** – The Court placed significant emphasis on where third parties were likely to perceive Nektan to be managed and supervised, as required under Recital (30) of the Recast Regulation. The factors the Court considered when determining the company's COMI to be in England included: (i) consumers and partners of the company were provided with a London phone number, so would not be aware that calls were diverted to a Gibraltar-based call centre; and (ii) the company's creditors used the same London phone number referred to above and so would believe they were contacting someone in England should they contact the company

using that number. The company's key staff were based in the UK, so the dealings in person of any creditor with the company would take place in the UK. Nektan's most significant creditor was HMRC and the majority of Nektan's trade creditors and customers were also based in the UK. Board meetings had been held in both Gibraltar and the UK in the 12 months preceding the application. However, the location of such board meetings would not be readily ascertainable by third parties so this was not held to be a material factor (paragraph 59)

**The English court's jurisdiction over a company incorporated and with its COMI in Gibraltar –**

Although the Court determined that Nektan's COMI was in England, the Court also examined the counterfactual scenario in which the company's COMI was in Gibraltar. The reason for the detailed treatment of this in the judgment was to highlight 'a lack of clarity' in the current drafting of Schedule B1 of the Act. The issue revolved around the definition of 'company' for the purposes of Schedule B1. Nektan did not fall within definitions (a) ('a company registered under the Companies Act 2006 in England and Wales or Scotland') or (b) ('a company incorporated in an EEA State other than the United Kingdom'), as set out in sub-paragraph (1A) of paragraph 111 of Schedule B1 of the Act, as it was registered under the law of Gibraltar and the Court determined that Gibraltar is not 'an EEA State other than the United Kingdom'. For Nektan to be captured by the definition of 'company' for the purposes of going into administration, it would therefore have to

fall under the definition in limb (c) of sub-paragraph (1A): 'a company not incorporated in an EEA State but having its centre of main interests in a member state other than Denmark'. Assuming the company's COMI was in Gibraltar, for this definition to apply Gibraltar would have to be both not part of an EEA State but also part of a 'member State' (of the European Union). The Court concluded, *obiter*, that Nektan did fall within the definition under limb (c), on the basis that the reference to 'member State' should be read as a reference to that concept as used in Article 3 of the Recast Regulation, which the Court explained encompasses Gibraltar as a territory of the UK.

As well as providing guidance in future for the interpretation of paragraph 111 of Schedule B1 of the Act, the considerations in the judgment highlight the lack of clarity in the current drafting of this section. It is of note that the proposed changes to this paragraph 111 set out in s44 of the Insolvency (Amendment) (EU Exit) Regulations 2019/146 (the 'Amendment Regulation'), which will come into force on the event of a no-deal Brexit, do not provide greater clarity. The Amendment Regulation would amend limb (c) of paragraph 111 by adding 'or in the United Kingdom' to the end of the limb. The status of a company incorporated and with its COMI in Gibraltar would therefore depend on whether Gibraltar was 'in the United Kingdom'. The Court was able to conclude in this case that Gibraltar was part of the United Kingdom on the basis of the Recast Regulation; in a no-deal Brexit scenario the Recast Regulation would no longer apply.

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