



PRESS SUMMARY

Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme (Appellants) v Olympic Airlines SA (Respondent) [2015] UKSC 27
On appeal from [2013] EWCA Civ 643

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Sumption, Lord Reed and Lord Toulson

BACKGROUND TO THE APPEAL

Olympic Airlines SA was wound up by a court in Athens on 2 October 2009. The main liquidation proceedings are ongoing in Greece. The company pension scheme has a £16m deficit. Olympic Airlines SA is liable to make good the deficit by s 75 of the Pensions Act 1995. It is unlikely to be able to do so. Members of the pension scheme are eligible for compensation under the Pensions Act 2004 from the UK's Pension Protection Fund in respect of the shortfall. Such compensation is payable from the date when a “qualifying insolvency event” occurred. There are two possible dates in this case.

The first possible date is 20 July 2010, which is when the trustees of the pension scheme presented a winding-up petition in England. The winding up of a company under the Insolvency Act 1986 is a qualifying insolvency event: Pensions Act 2004, s 121(3)(g). English courts have jurisdiction to wind up a foreign company under the Insolvency Act 1986. However, under EU Regulation 1346/2000 on Insolvency Proceedings (“the Regulation”), where (as here) the company has its “centre of main interests” in another member state of the European Union, the English court is only permitted to wind it up if it has an “establishment” in England, meaning “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods” (article 2(h)).

The second possible date is 2 October 2014, which is the fifth anniversary of the commencement of the proceedings in Greece. The possibility of treating this date as the date of a qualifying insolvency event in the specific circumstances of this case was created by a change in legislation subsequent to the Court of Appeal's decision in this case refusing to make a winding-up order on the basis of lack of jurisdiction: Pension Fund (Entry Rules) (Amendment) Regulations 2014.

The trustees of the pension scheme would prefer compensation to be treated as payable from the earlier of those two dates, namely 20 July 2010. The only question for the court is therefore whether Olympic Airlines SA had an “establishment” in the UK on 20 July 2010 entitling the English court to make a winding-up order under the Regulation, so that it can be said that a qualifying insolvency event occurred on that date.

By 20 July 2010, Olympic Airlines SA had: closed all of its offices in the UK except for its head office at 11 Conduit Street in London; ceased all commercial operations; and terminated the contracts of all remaining UK staff except for the General Manager, the Purchasing Manager, and an accounts clerk, who were retained on short-term ad hoc contracts to implement instructions from the liquidator in Athens, supervise the disposal of the company's assets in the UK, and pay bills and conduct other administration relating to the head office building.

At first instance, the judge held that these activities constituted “non-transitory economic activities” and Olympic Airlines SA therefore had an “establishment” in the UK entitling him to make the winding-up order. The Court of Appeal disagreed and held that the remaining activity consisted only in the winding up of the company’s affairs, which was not enough to give the court jurisdiction to make the order. The trustees of the pension scheme appeal from the Court of Appeal’s decision.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Sumption gives the only judgment.

REASONS FOR THE JUDGMENT

Lord Sumption holds that the Regulation’s definition of “establishment”, which must be read as a whole, envisages a fixed place of business and business activity carried on there consisting in dealings with third parties, and not merely acts of internal administration [13]. For example, disposal of stock in trade would clearly satisfy the definition, but mere internal administration of the winding up including administration of remaining premises in the UK would not [14]. Olympic Airlines SA was not carrying on business activity at its head office on 20 July 2010 and did not therefore have an “establishment” in the UK at that date [16]. The requirement of showing at least some subsisting business with third parties is *acte clair* and so no reference to the Court of Justice of the European Union is necessary [16].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.shtml>