

In 2017, Nabarro, Olswang and CMS combined to form CMS

The Lowcostholidays Group had grown to become one of the largest sellers of package holidays and hotel accommodation worldwide, with a 500 strong workforce, annual transaction values in the region of £500m and more than three million flights arranged to destinations across the globe each year. Its abrupt collapse this summer left over 27,000 travelling holidaymakers in a panic over whether their hotel and travel arrangements would be honoured and a further 110,000 future holiday bookings at risk of being cancelled. The speed of its demise and the cross-border aspects have raised some interesting issues for the administrators at Smith & Williamson and CMB Partners and also for our legal advisors. A number of these issues could very well have had a very different conclusion in a post-Brexit world outside of the current EU insolvency regulation, if that is the type of world that Brexit will bring.

#### Background

Founded in 2004, the group principally focused on selling hotel accommodation (essentially a 'bed bank') through lowcostbeds.com Limited (Beds.com) before progressing also into selling accommodation-only and package

“

**Holidays Limited held all the travel agent and tour operator licences, including ATOL.**”

holidays through lowcostholidays Limited (Holidays Limited). Its structure morphed over the last decade and was latterly based in Spain, the UK, Switzerland and Poland. Early financial success allowed the group to roll out the business internationally and it made additional acquisitions including a transfer service business (Resorthoppa) and a high-specification software business (Intuitive), the latter being credited with assisting the group in achieving significant growth during that period.

Holidays Limited held all the travel agent and tour operator licences, including the Air Travel Organisers' Licence (ATOL). By law, every UK travel company that sells air holidays and flights is required to hold an ATOL licence. If a travel company ceases trading, the ATOL scheme protects customers who have booked holidays with that firm. The scheme is designed to reassure consumers that their money is safe, and will provide assistance in the event of a travel company's failure. Holidays Limited also provided a bond through the Irish Commission for Aviation



Regulation (CAR) that enabled customers whose bookings originated in the Republic of Ireland to receive a refund in the event of the company's failure.

In 2012, to improve its liquidity position, the group sold Resorthoppa and Intuitive, which had been profitable and significantly cash generative. The following year, the group made the much publicised and controversial decision to bring its licensing arrangements under one EU licence – that of the Balearics licensing authority, Govern de les Illes Balears (CAIB). Consequently, all existing bookings with Holidays Limited were transferred to a Spanish subsidiary, Lowcostholidays Spain SL (LCH Spain SL). At the time, the Civil Aviation Authority (CAA), which was only given 48 hours' notice of the group's intentions, expressed concerns over the transfer of the licence out of ATOL protection. While the group had notified all customers with forward bookings of the transfer and had offered them a full refund, the CAA considered

that the communication was unclear. The group only gave customers seven days' notice to make a decision, as the protection provided was less than that which ATOL

“

**Following the transfer of the group's business abroad to Spain and Switzerland, the group's financial performance deteriorated significantly.**”

could provide to UK customers (who constituted approximately 60 per cent of the group's bookings), despite the fact that notice may have been adhering to EU law.

The Air Travel Insolvency Protection Advisory Committee (ATIPAC), set up by



ultimately made the decision for the group to cease trading, making the majority of the workforce redundant and subsequently appointing me (Colin Hardman), Finbarr O'Connell and Henry Shinnars of Smith & Williamson LLP together with Lane Bednash of CMB Partners as administrators over four of the UK group companies on 15 July 2016. However, the majority of customers (and indeed suppliers) had contracted with Spain SL and Beds.com AG.

On 21 July 2016 the High Court, being satisfied that Spain SL's centre of main interest (COMI) was in the UK, rather than Spain, made a UK administration order over that company and appointed the same four administrators as had been appointed in the earlier administrations. Glen Flannery,

“  
To date we have  
received more than  
30,000 separate email  
communications from  
affected customers.”

who led the Nabarro LLP team advising the administrators, commented: 'Making effective use of the European Insolvency Regulation, it was possible to anchor the group's insolvency proceedings in the UK, thereby avoiding the complication and cost of disparate proceedings across a range of jurisdictions. It would be unfortunate for future cases if we were to lose this tool as a result of Brexit.'

In preparing the administration order, it was decided that the administrators' objectives, functions and powers, as well as the other effects of the administration, such as the moratorium, should be recited in the administration order, to assist in getting recognition of such matters in Spain.

Glen Flannery commented that: 'This was a practical measure to assist in getting local recognition. We adopted it to useful effect in the Eurodis case and similar has been done in a series of other high-profile cases, including Nortel.'

The Spain SL administration order also included other forms of relief designed to streamline the process and minimise costs in a case with such a large and global consumer and creditor base, in particular, the use of emails for formal communication purposes.

Unfortunately, even though the Swiss registered company, Beds.com AG, also had a strong connection with the UK and could potentially have been placed into an English insolvency process using the European Insolvency Regulation or other means, Swiss law would not have »

the secretary of state for transport to support the CAA on situations such as this, voiced its disapproval in its 2013/14 annual report, raising wider concerns that other UK travel companies, particularly those operating at the cheaper end of the market, would follow suit in order to reduce their overhead base — effectively a 'race to the bottom'. The concerns of ATOL and ATIPAC were ultimately proved to be justified.

In 2013, to facilitate the group's expansion plans, a Swiss branch was also set up with the assets and business of Beds.com Ltd transferred to a new Swiss entity, lowcostbeds.com AG (Beds.com AG).

### The group's financial difficulties

Following the transfer of the group's business abroad to Spain and Switzerland, the group's financial performance deteriorated significantly. Some of the reasons given for this include:

- software difficulties;
- shorter credit terms being provided by

travel industry suppliers;

- the increasing incidence of lower deposits being offered by (better funded) competitors;
- the deterioration of the group's preferred status across hotel groups, as major competitors offered significantly better (lower) credit terms;
- the increased utilisation by customers of online holiday search facilities at the expense of the more traditional (higher margin) telephone bookings;
- the escalation of terrorist incidents targeting a number of hitherto popular holiday destinations throughout 2016; and
- the Brexit decision in June 2016, which impacted bookings from exchange rate-sensitive customers and spooked investors.

### Appointment of administrators, COMI and the Swiss problem

Following unsuccessful attempts to restructure the business, the directors

recognised the English insolvency practitioners. Therefore Beds.com AG entered into Swiss bankruptcy on 25 August 2016.

### Communication strategy

Given that there were over 250,000 customers who were either in the middle of or due to depart on holiday in the days/weeks after the administrators' appointment, it was imperative for support and information to be provided to those affected quickly, including during the hiatus period between the appointments over the UK companies and that of Spain SL, one week later.

An external call centre was set up to assist customers with their bookings and refund enquiries. In the early weeks of the administration we were dealing with thousands of enquiries from affected customers. To date we have received more than 30,000 separate email communications from affected customers.

### Supporting the customer refund process

The majority of customers were found to have valid flights that were booked and paid for but with accommodation and/or transfers unpaid. We recognised early on that a significant proportion of customers had paid all or part of their holidays via their credit or debit cards or through online payment providers and consequently had rights under statute and/or contract for compensation for non-delivered services. Customers were provided with direct access to information on the status of their bookings and also with assistance as regards the various avenues by which an application for reimbursement could be pursued (or by which a claim could be submitted in the administration).

The administrators have been working closely with the UK Card Association (UKCA), the trade body for the card payments industry in the UK representing financial institutions that act as card issuers and acquirers, to support their members in processing customer refunds. The UKCA continues to provide guidance on protections available to consumers who have purchased travel or holiday packages using a debit or credit card, in particular in respect of customers' rights to receive a chargeback for credit and debit card transactions and, for credit card purchases only, entitlement to a refund under Section 75 of the Consumer Credit Act 1974 (Section 75). We have also supported acquirer banks directly, these being the financial institutions that maintain the accounts that process credit and debit card transactions and which, ultimately, are likely to be the principal parties to reimburse customers and thus, through subrogation, become the principle creditors in the administrations.

Through our efforts and those of the UKCA and their members, and the online payment providers, a significant number of

customers have already obtained refunds, largely facilitated by applications made to credit card companies under Section 75 and via debit card chargeback schemes. We currently estimate that the cumulative payments made to the group's customers by acquirer banks (and online payment providers) will exceed £125m. From our work on this case to date, it is evident that the credit card industry, with the UKCA at the helm, has developed a joined-up and effective approach to dealing with large-scale retail insolvencies like this one.

“One complication is how to ensure that customers do not ‘double dip’ and get compensated for more than they are entitled to.”

We have also worked alongside CAR, which held a bond that enabled customers whose booking originated in the Republic of Ireland to receive a refund, which has made substantial progress in processing many of those claims. The situation is very different as regards holidays booked in the UK and other countries. CAIB will only pay out up to the level of the bond held (which only amounts to circa €2m). Consequently, for those not covered by the credit/debit card/online payment providers or holiday insurance, they can expect only a very small recovery under the CAIB scheme and, from our experience on other travel related insolvencies, may unfortunately have to wait years before receiving any payment.

The institutions that provide refunds to customers may ultimately step into the shoes of customers, as creditors, either under the terms of the relevant merchant contracts or by subrogation. For this reason, it is anticipated that there are likely to be relatively few consumers that booked with Spain SL or Beds.com AG, who will remain as creditors.

One complication for those institutions that are liable to pay out to customers is how to ensure that customers do not ‘double dip’ and get compensated for more than they are entitled to. We are working with a number of these organisations to minimise the risk of this occurring as far as possible.

### Employee-related matters

Under the European Insolvency Regulation, although the law of the main insolvency proceedings governs matters arising in them, there is an exception for employment contracts. The effect of the insolvency proceedings on employment contracts and relationships is governed by the law of the member state applicable to the contract.

There has been extensive focus on employee legal matters, across various jurisdictions, ensuring that group companies were compliant with the various laws and protocols applicable to staff based in the UK, Poland and Spain.

Consequently, the staff in Poland and Spain needed to be dismissed in accordance with Polish and Spanish laws and customs (as applicable). In these jurisdictions the laws and procedures for terminating employment contracts are more onerous than in the UK and there can be adverse consequences if they are not carefully followed, eg ineffective termination of employment contracts, resulting in claims continuing to accrue against the estate and difficulties for employees accessing state guarantees.

Tracey Marsden, employment partner at Nabarro LLP, commented that: ‘Cases such as this highlight the tension that can exist between discharge of functions under UK insolvency laws and compliance with local employment laws, particularly in foreign jurisdictions.’

### Conclusions

Lane Bednash has commented, on behalf of the administrators, that, ‘The demise of the Lowcostholidays Group shows that whatever legislative safety nets are put in place to protect the public in this historically dangerous sector, potential cost savings will still cause travel companies to take big risks with their customers’ travel arrangements. While this business failure did not result in many thousands of customers stranded abroad or at airports, it could have.’

It is clear that Brexit will add even further challenges to the risks involved in booking the ever-popular package holiday. We will all be looking with interest as to whether the cross-border insolvency regime returns to one similar to the pre-2002 landscape. One sobering thought: if the music world were to take a similar leap back in time then we can all look forward to the nauseating beats of the Ketchup Song all over again, and again... ■

The author would like to thank Lane Bednash, Glen Flannery and Tracey Marsden for their assistance with this article.



**COLIN HARDMAN** is a director and restructuring and recovery specialist at Smith & Williamson LLP.