

2014/037642

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

BETWEEN:

PAUL BROWNE

Petitioning Debtor

and

DAVID MAVROUDIS

Objecting Creditor

MASTER KELLY

INTRODUCTION

[1] On 8th April 2014 Mr Browne, a native of the Republic of Ireland, presented a petition to this court in which he seeks his own bankruptcy. Apart from one small historic debt in this jurisdiction arising from a partnership dissolved some 5 years ago, Mr Browne does not have any other debts or assets in this jurisdiction. The root of his insolvency lies in commercial property investment activities conducted by him in the Republic of Ireland. His liabilities amount to several million euro with his principal creditor being NAMA (now National Asset Loan Management Ltd – “NALM”).

[2] The petition was accompanied by a statement of affairs and a substantial affidavit sworn on 3rd April 2014. In his affidavit, Mr Browne claims that he moved his centre of main interests (COMI) from the Republic of Ireland to Northern Ireland some time between 2012 and 2013, and he argues that Northern Ireland is now where his COMI is for the purposes of EC Regulation 1346/2000 (“the Regulation”). Specifically he contends that his COMI is located at 32 Lurganare Cross, Lurganare, Newry.

[3] Mr Browne's case that his COMI has moved out of the Republic of Ireland and into the UK is set out in the following paragraphs of his affidavit:

At paragraph 2 he says:

"I moved my centre of economic interest to the United Kingdom in October 2012, when I rented commercial business premises in the Carnbane Business Centre, Newry."

He goes on to say at paragraph 3:

"I confirm that I have lived in the United Kingdom since April 2013. I further confirm that Northern Ireland is the place in which I conduct the administration of my interests on a regular basis and is ascertainable to third parties. As such, I have corresponded with my primary creditors (NAMA and their legal representatives, solicitors for OLM Consultancy Limited, David Mavroudas architect and the Sherriff's Office, County Kildare) and have made them aware that I am resident in the United Kingdom."

Finally, he says at paragraph 9:

"I have no intention of returning to the Republic of Ireland and consider Northern Ireland to be my home and centre of economic interest. As such I have registered with the electoral register in Northern Ireland and I deregistered to vote in the Republic of Ireland in November 2013. My creditors were made aware of my move to the United Kingdom as soon as I secured employment in Sheffield."

[4] Against that background it should be noted that at paragraph 1 of his affidavit Mr Browne states:

"I am the father of four dependent children, aged 15, 13, 12 and 9 years, all of whom live with their mother, my wife Bairbre Wall in County Kildare."

[5] It follows therefore that Mr Browne's case is that he moved his business interests to Northern Ireland in October 2012; that he moved his residence to the UK in April 2013; that his creditors were made aware of his move in April 2013 (but not it seems in October 2012); that both moves are permanent moves and that he has effectively severed his ties with the Republic of Ireland. In so saying, I have to say that I think Mr Browne was also inviting the court to draw an inference that he and his wife were separated.

[6] However, as other evidence in Mr Browne's affidavit did not appear to support these contentions - indeed contradicted them - I directed that Mr Browne's solicitor, Mr Neary, notify his creditors about his petition for bankruptcy in Northern Ireland. I also directed that further affidavit evidence be submitted by Mr Browne and adjourned the petition to 11th June 2014 for review of compliance with those directions.

[7] On 11th June 2014, a creditor, Mr Mavroudas, appeared indicating that he wished to exercise his rights under Rule 6.020 of the Insolvency Rules (Northern Ireland) 1991 to oppose the making of the bankruptcy order.

[8] Mr Mavroudas is an architect by profession and has secured a judgment against Mr Browne (and his partners) for some €400k owed in respect of professional fees. As at the date of Mr Browne's bankruptcy petition, Mr Mavroudas had been in the process of enforcing that judgment in the Republic of Ireland for some months. But the litigious history between the two parties goes back much further than that and was at its most active during the period 2012 and 2013.

[9] Mr Mavroudas argues that this Court lacks international jurisdiction under the Regulation to make the bankruptcy order sought by Mr Browne. His case is that Mr Browne's COMI in truth lies in Republic of Ireland not the United Kingdom. He submits that Mr Browne is simply engaged in bankruptcy tourism, and attempting to mislead the court in the process. He argues that Mr Browne's claim as to COMI in the UK is, in effect, a sham; an illusion, created to deprive his creditors in the Republic of Ireland from bankrupting him in that jurisdiction. He further argues that Mr Browne has not made full disclosure to the court of all facts relevant to his case, and that the court should refuse to make the bankruptcy order against him on that ground even if it is satisfied that it has the jurisdiction to do so.

[10] In the circumstances, I granted Mr Mavroudas permission to appear on the petition and time to file evidence in opposition to the making of the order. The petition was further reviewed on 4th July 2014 when I gave final directions for the exchange of skeleton arguments and set a trial date for the petition of 16th September 2014.

[11] At the hearing the debtor was represented by Mr Neary, solicitor, and Mr Mavroudas appeared as a litigant in person. At the hearing Mr Browne gave oral

evidence and submitted to cross-examination by Mr Mavroudas. I am grateful to both Mr Neary and Mr Mavroudas for their helpful skeleton arguments and well considered authorities which I have taken into consideration even if I do not make express reference to each one.

Legal principles

Forum shopping

[12] Before turning to the legal provisions in detail, it is necessary to first look at Recital 4 in the preamble to EC Regulation 1346/2000 which states:

“It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).”

While it is noted that there is now a new insolvency regime in place in the Republic of Ireland the period of discharge in that jurisdiction is still comparatively longer than it is here. I also note that as at October 2012 and April 2013, which are the relevant dates in this case, the relevant period of discharge in the Republic of Ireland was still 12 years. I further note that Mr Browne was aware of his personal insolvency since 2008 and that by 2012 he was being actively pursued by his creditors through the High Court in Dublin.

Regulation 1346/2000

[13] Other than Recital 13 of the preamble to the Regulation, there is no precise definition of COMI within the Regulation. Recital 13 states:

“The “centre of main interest” 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.”

The wording of Recital 13 denotes that there are two parts to the test for COMI. The first part is the factual question of where the debtor conducts the administration of his interests on a regular basis. The second part is the question as to whether that place is transparent and ascertainable by third parties, particularly creditors and potential creditors of the debtor.

[14] Article 3 (1) to (3) of the Regulation provides:

“International Jurisdiction

1. The courts of the Member States within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.
2. Where the centre of a debtor's main interests is situated within the territory of Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effect of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.
3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2, shall be secondary proceedings. These latter proceedings must be winding up proceedings."

[15] The Regulation was accompanied by an explanatory report of Professor Miguel Virgos and Mr Etienne Schmit ("The Virgos-Schmit Report") and it is generally considered to be an authoritative guide to the Regulation - in particular, paragraph 75 which states:

"The concept of "centre of main interests" must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.

By using the term 'interests', the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression "main" serves as a criterion for the cases where these interests include activities of different types which are run from different centres.

In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence. Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office."

[16] Professor Virgos and a Professor Garcimartin subsequently published further guidance (Kluwer Law International, 2004), wherein the learned professors expand upon paragraph 75 of the Virgos-Schmit report. The professors observe that that in the context of paragraph 75 of the Virgos-Schmit report the term "interests" must be interpreted as referring to the debtor's economic affairs. They also proceed to give examples of the application of the Regulation to individuals engaged in different types of economic activities. At page 43 paragraph 56(c) they say:

"For individuals, if the debtor is engaged in an independent business or professional activity, the centre of main interest will normally correspond to the State where he has his business or professional centre (ie. his "professional domicile"), provided that it is the business or professional activity that is at the root of the insolvency. In other cases it will be the individual's habitual residence."

[17] There being no definition of COMI other than that in Recital 13, the question of an individual's COMI is one for the court to ascertain, and this involves a mixture of law and fact in each individual case. With that in mind, I will now turn to case law applicable to this case together with a brief summary of the relevance of those cases to the facts of this case.

2. Case law relevant to Mr Browne's case

(i) An individual's COMI is to be determined as at the date of the request to open main proceedings ie the date of presentation of the bankruptcy petition. (**Re Staubitz-Schreiber**). In this case, that date is 8th April 2014.

(ii) The concept of the centre of main interest is peculiar to the Regulation. Therefore, it has an autonomous meaning and therefore must be interpreted in a uniform way, independently of national legislation. (**Eurofood IFSC Limited case C-341/04; [2006] Ch. 508.**)

(iii) There must be a relationship of mutual trust between the respective Member States and the court must in every case satisfy itself by way of examination whether it has jurisdiction to open main proceedings(**Re: Eurofood**).

(iv) COMI must be identified by reference to criteria which is both objective and ascertainable by third parties. (**Interedil Srl v Fallimento Interedil Srl and Another [2011] BPIR 1639.** A debtor may not hide or conceal his COMI. (**IBRC -v-Sean Quinn [2012] NICH 1)**)

(v) An individual's COMI is, in the case of professionals, deemed to be the place of professional domicile and for natural persons in general, deemed to be the place of their habitual residence, unless there is proof to the contrary. (**Re Staubitz-Schreiber at [62] &[64]**).

(vi) The presumptions of COMI may be rebutted. The factors to be taken into account by the court include, in particular, all the places in which the debtor pursues economic activities and all those in which it holds assets, insofar as those places are ascertainable by third parties. (**Eurofood**)

(vii) The administration of the debtor's interests on a regular basis means that the court must look for the place where the debtor conducts the management, organisation and control of his interests. The court

must also look at whether there is a “quality of presence”, “a degree of continuity” a “stable link with the forum” and a “degree of permanence”.
(Stojevic -v-Official Receiver [2007] BPIR 141)

(viii) The concept of habitual residence must not be confused with ordinary residence. “A man’s habitual residence is his settled, permanent, home, the place where he lives with his wife and family, [...] the place to which he returns from business trips elsewhere or abroad.”**(Stojevic -v-Official Receiver)**

(ix) A director cannot confuse his COMI as an individual with that of his limited company: the two are separate legal entities with separate COMIs.
(Stojevic)

(x) A person’s COMI must be readily 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. And it is important, also, to have regard to the need, if the centre of main interests is to be ascertainable by third parties, for an element of permanence. The court should be slow to accept that an established centre of main interests has been changed by activities which may turn out to be temporary or transitory. **(Shierson -v-Vlieland-Boddy [2005] EWCA 974)**

(xi) A debtor may move his COMI even at a time when insolvency threatens. However, where there are grounds to suspect that a debtor has deliberately sought to change his COMI in order to alter the insolvency rules which will apply to him in respect of existing debts, the court must scrutinise the facts and decide whether the change in COMI is based on substance as opposed to illusion; and that that change has the necessary element of permanence.
(Shierson -v-Vlieland-Boddy)

(xii) A change in a debtor's personal circumstances may not necessarily amount to a change in the debtor's COMI. (**Shierson -v-Vlieland-Boddy**)

(xiii) The consideration of an individual's COMI is fact-sensitive. The facts which the court will take into consideration will include historical facts leading to the individual's position as at that date as this may be significant to the credibility of the debtor's claim that COMI has moved. Therefore the issue of COMI will vary from individual to individual and situation to situation. (**Shierson -v-Vlieland-Boddy**)

(xiv) A debtor's expression of intention to live (or work) permanently in a jurisdiction does not necessarily indicate a change of COMI that would be ascertainable to third parties. Similarly, private arrangements as to future plans would not be apparent to third parties. (**O'Donnell-v-Bank of Ireland [2012] EWHC 3749 (Ch)**)

(xv) Any logical analysis of centre of main interest must include a global account of the interaction of a debtor with creditors and how the debtor has behaved in running up the debt. (**O'Donnell-v-Bank of Ireland ([2013] IEHC 395)**)

(xvi) The burden of demonstrating the location of his COMI rests with the debtor and where a debtor invokes the insolvency process by self-petition, he comes under a duty of full and frank disclosure to the court of all relevant matters. (**IBRC -v-Sean Quinn and ACC Bank Plc -v-McCann 2013 NIMaster 1**)

(xvii) There is a legitimate public (and press) interest in cases of Irish citizens moving to the UK with a view to taking advantage of the liberal bankruptcy regime there, and the desirability of scrutinising the decision to make bankruptcy orders. (**Times Newspapers Limited and Michael McNamara [2013] ALL ER (D) 121**)

The evidence

[18] In arriving at a decision on the issue of Mr Browne's COMI I have taken into account Mr Browne's affidavits, his petition and statement of affairs, his oral evidence at the hearing on 16th September and the parties' submissions. However I have found it difficult not to conclude from his evidence that Mr Browne was not a wholly truthful witness. I found that he chose to put evidence before the court which was partial, contradictory and inaccurate. I also found that some of the documents produced were incomplete and lacking in substance. This included copy documents on which Mr Browne had made handwritten notes in support of his case, copy draft documents on which he had done likewise, and miscellaneous receipts for insignificant purchases in Sheffield and Northern Ireland which I thought were curious documents to retain.

[19] More importantly, one of the conclusions I have reached from my consideration of the evidence is that Mr Browne was inviting the court to believe that he had moved his habitual residence from the Republic of Ireland to Northern Ireland and that this was the intended basis for his petition to the High Court in Belfast. However, I think it is important to record at this stage that in the course of the proceedings it became clear (despite what I consider to be a clear inference to the contrary in his affidavit) that Mr Browne and his wife are not separated. It is also now clear that at all material times Mr Browne's habitual residence was the family home in Johnstown, Castledermot, County Kildare. Taking all matters into consideration, and I will expand upon them in due course, the view I have formed is that at the hearing of his petition Mr Browne altered his COMI argument following disclosures regarding his habitual residence. The credibility issues which have now arisen are sufficient to cast doubt on Mr Browne's evidence in general, but this is perhaps best demonstrated by setting out the evidence he gave regarding his COMI from October 2012 to the date he presented his petition to this court, and what the scrutiny of that evidence actually revealed.

Mr Browne's COMI October 2012 to April 2014

1. Centre of main interests: October 2012: Carnbane Business Centre, Newry.

[20] Mr Browne contends in paragraph 2 of his affidavit that he moved his centre of economic interest to the United Kingdom in October 2012 when he rented □commercial business premises in Carnbane Business Centre in Newry. The evidence before me in support of that contention consists of the averment in paragraph 2 and two exhibits. The first exhibit is a copy rental agreement for a dedicated desk in Carnbane Business Centre in Newry owned (or run) by MJM Marine Ltd, and the second exhibit is a copy cheque for the rental of said desk. For present purposes, I have to say that I do not regard the rental of a dedicated desk in a business centre to be commercial business premises. In my judgment, the two are

not comparable. The latter to me indicates a place where consistent business activity occurs, which could be objectively and readily ascertained by third parties, whereas the former does not.

[21] There is then the question of what business, if any, Mr Browne as an individual conducted in the Carnbane Business Centre; or why he contends that he moved his interests there in the first place, as he alleges. There is no evidence before me that would answer either question. Equally, there is no evidence of sole trader activities: no financial records were produced, nor evidence of tax arrangements, business banking arrangements, insurances, accountants or turnover. Nor did he produce evidence that he conducted the organisation, management or control of his Republic of Ireland interests on a regular basis from the Carnbane Business Centre, or how his COMI could be ascertainable to third parties there. There being no evidence of independent professional activity at this time, or from this location, it seems to me that Mr Browne's main economic interests at that time were as follows:

- his family;
- he was being sued by NAMA in the High Court in Dublin (Ref No: 2012/44265) ;
- he was being sued in the High Court in Dublin by Bank of Ireland;
- he was involved in arbitration proceedings with Mr Mavroudas in the High Court in Dublin;
- his partnerships: the Snoddy Browne Partnership and the JPC Partnership.

All these interests were located in the Republic of Ireland but there is no evidence that they were being conducted from the Carnbane Business Centre. Nor is there evidence that Mr Browne made his creditors aware of any move of his COMI from the Republic of Ireland to Northern Ireland. Indeed, paragraph 9 of his affidavit affirms that he did not.

[22] There is then the question of the documentary evidence produced. The relevant copy rental agreement is not with Mr Browne personally, but with Onyx Management Services Ltd - a Republic of Ireland company of which Mr Browne is a director. But Mr Browne cannot as a director confuse his COMI as an individual with that of his limited company: the two are separate legal entities and as such have separate COMIs. Nor would it assist Mr Browne's case to argue otherwise: the COMI of Onyx Management Services Ltd is deemed to be its registered office at 28 Carlow Gateway Business Centre, Carlow; and, according to the records held in the Companies Registration Office in Carlow, the company's compliant status demonstrates that Mr Browne is discharging his duties as a director there. Taking all those matters into account, I can find no evidence to support Mr Browne's contention that he moved his centre of main interests in October 2012 from the Republic of Ireland to Northern Ireland. I therefore reject that particular contention.

2. Centre of main interests: Sheffield: April 2013

[23] This then leads us to paragraphs 3 and 9 of Mr Browne's affidavit. Leaving the issue of residence aside for the moment, Mr Browne's contention that he moved his COMI to the UK in April 2013 is predicated on his securing employment as an in-house financial controller with MyJobGroup Ltd in Sheffield (a subsidiary of a ROI company). The evidence of this is a copy of the contract of employment exhibited to Mr Browne's affidavit. But there is still no evidence that at this time Mr Browne was engaged in any independent business or professional activity. On the contrary, the evidence put forward by him regarding this employment indicates that it was dependent employment. For example, the contract of employment denotes that it is employer/employee in nature and Mr Browne's affidavits describe it likewise. If that is indeed correct then Mr Browne had dependent employment in one State and his habitual residence in another, in which case the latter is considered to be his centre of main interests. If that is not correct, then Mr Browne has not given full disclosure regarding the circumstances surrounding that employment.

[24] In any event the contract with MyJobGroup Ltd was for a fixed period of 10 weeks terminating on 28th June 2013. In other words it was a temporary position. Thus, even if Mr Browne had moved the entire organisation, management and control of his economic interests to the UK in April 2013 - and there is no evidence that he did - it lacked, among other things, the necessary element of permanence. That is not to say that Mr Browne's COMI could not have moved to Sheffield on other grounds - such as habitual residence. But, as I have already said, Mr Browne never moved his habitual residence from Johnstown, Castledermot, County Kildare. This is a very important fact and Mr Browne failed to disclose it. It also undermines the veracity of the evidence he gave in paragraphs 3 and 9 of his affidavit.

[25] The disclosure of Mr Browne's true habitual residence emerged from the court's own enquiry into a clause in Mr Browne's contract with MyJobGroup. Clause 1.1 of the contract provides for, among other things, the payment of weekly flights to Dublin for the duration of the ten week contract. At the final review of the case on 4th July 2014 I requested further clarification of the relevance of this clause. I say "further clarification" as I had already requested an explanation of the clause in my directions. The response received to that particular direction was simply to describe the flights as an "additional benefit". This to me implied that this clause did not relate to the performance of Mr Browne's employment. In the circumstances, and given that Mr Browne was present at that review, I expressly enquired as to whether the flights were for the purpose of him returning home to his family at weekends. He confirmed that they were. He further confirmed, again following my express enquiry, that he was not separated and that he was at all times in the habit of returning home to his family at weekends.

[26] The main significance of this disclosure is that the first sentence of paragraph 3 of Mr Browne's affidavit did not represent the full picture regarding his residence. While it may be true that he has lived in the United Kingdom since April 2013, it is equally true that he lived with his wife and family in the Republic of Ireland. Within the context of these proceedings, while this evidence may not have been wholly untruthful it was not wholly truthful either. However, Mr Browne owed a strict duty to the court to make full, frank and honest disclosure of all the facts relevant to his case and in order to be wholly truthful it is necessary for those facts to be expressed in clear and unambiguous terms.

[27] Non-disclosure aside, Mr Browne's admissions that he (a), was not separated and (b), was in the habit of returning home to his family at weekends in Kildare mean that wherever his wife and family live then that is his habitual residence - even if his work takes him away from that residence for periods of time. Following on from that, and against the background of his returning to his family at weekends, at that final review hearing on 4th July 2014 I specifically drew Mr Browne's attention to the case of **Stojevic** in which it was held that the concept of habitual residence is measured in terms of quality of presence rather than quantity of presence. At [59] Mr Registrar Jaques stated:

"The two concepts, habitual residence and ordinary residence, are very different and must not be confused. The difference is easier to ascertain, than it is to explain. Essentially, however, a man's habitual residence is his settled, permanent home, the place where he lives with his wife and family, until, in the case of the younger members of the family, they grow up and leave home, the place to which he returns from business trips elsewhere or abroad. A man's ordinary residence is a place where he lives, which is not his settled, permanent home, the place where he lives, when away from home on business or on holiday with his wife and family. Depending on the nature of his work, a man may well live away from his settled, permanent home for a greater number of days in any given year than he spends there with his wife and family."

The **Stojevic** scenario is very much the scenario that Mr Browne found himself in during his time in Sheffield. He had not moved there at all. He was, for a short time, simply working there during the week and returning home at the weekend. But more than that, the facts and the law in this case bear out the presumption that Mr Browne's habitual residence is located in the Republic of Ireland and I find so accordingly.

[28] The questions which then arise are: what were Mr Browne's main interests as at April 2013? Where was he conducting the administration of those interests? Was he reasonably ascertainable to third parties? His affidavits indicate that his main economic interests as at April 2013 were, insofar as I have been able to ascertain them, as follows:

- (i) His monthly income of £6,000 from MyJobGroup Sheffield from which £5,000 (approx.) was forwarded to his wife in the Republic of Ireland each month;
- (ii) His litigation with NAMA in the High Court in Dublin;
- (iii) His litigation with Bank of Ireland in the High Court in Dublin;
- (iv) His prosecution and defence of litigation with Mr Mavroudas in Dublin;
- (v) His family and domestic economic interests;
- (vi) His partnership interests.

In other words his main economic interests were the economics of family life, his business partnerships and his litigation with creditors in the High Court in Dublin. All of these are located in the Republic of Ireland. But I am unable to accept that Mr Browne was conducting the administration of these interests from his employer's premises during his employment there.

[29] Moreover, contrary to the assertion made in paragraphs 3 and 9 of his affidavit, there is no evidence that anyone other than NAMA and its legal representatives even knew about Mr Browne's employment in Sheffield. That includes Mr Mavroudas, Mr Browne's other creditors, and their respective legal representatives. But the fact that NAMA and its solicitors knew of Mr Browne's employment in Sheffield and were communicating with him there does not mean that these parties were made aware of any move in Mr Browne's COMI. In any case, Mr Browne did not "move" to the UK. He had simply secured temporary employment there which (it is assumed) required him to be there Monday to Friday. It is not therefore surprising that Mr Browne did not make his creditors aware of this change in his personal circumstances. But he should not in the circumstances have made the averments in paragraphs 3 and 9: he had neither moved his COMI to Sheffield nor was he ascertainable to his creditors there. Finally, I should add that although NAMA and its agents were aware of Mr Browne's job in Sheffield, his evidence shows that they (and Bank of Ireland) continued to issue formal statements to him at his home address of Johnstown, Castledermot, County Kildare up to 2014.

3. Centre of main interests: MJM Marine Ltd: July 2013 to February 2014

[30] This takes us to July 2013 when Mr Browne was employed as Personal Assistant to the Chairman of MJM Marine Ltd in Newry. The contract produced in evidence denotes that it is a consultancy contract. Again, there is no evidence that this undertaking arose from any sole trader or independent professional activity. The contract produced is for a fixed period of 25th July 2013 to 17th October 2013. No other contract has been produced to cover the period 17th October 2013 to February 2014. However Mr Browne's bank statements show that he was continuing to receive a substantial monthly salary from MJM Marine beyond that date and I am prepared to accept his evidence that this consultancy agreement continued to February 2014. There is, however, no evidence to suggest that this particular consultancy role was permanent.

[31] The consultancy contract was entered into by Mr Browne as "Authorised Signatory for Paul Browne Onyx Management Services." The use of the word "authorised" to me implies that Mr Browne entered into the contract with MJM Marine Ltd on behalf of a third party. I see no reason why, if he was a sole trader or engaged in independent professional activity, Mr Browne would need to sign the contract other than in his own personal capacity. But he does not disclose any such business in his statement of affairs. In any event, I do not think that the role of Personal Assistant to the Chairman of MJM Marine would have the features of a consistent business or professional activity such as that envisioned by the Regulation. Even if I have erred on that, it is clear that Mr Browne ceased this activity before he presented his petition. If the contract was in truth with Mr Browne as director of Onyx Management Services Ltd - the same limited company involved in the desk rental agreement with MJM Marine Ltd in October 2012 in Carnbane, Newry- it is irrelevant in terms of Mr Browne's COMI as an individual for the reasons already stated. For completeness, I should add that Mr Browne produced no evidence as to how or where this employment was performed.

[32] Given my finding that Mr Browne did not move his centre of main economic interests from the Republic of Ireland to Carnbane Business Centre in October 2012, and that he did not move his centre of main interests from the Republic of Ireland to Sheffield in April 2013, and that he did not move his habitual residence from the family home in Johnstown, County Kildare at any stage, it follows that on the balance of probabilities, I find that Mr Browne did not move his COMI out of the Republic of Ireland and into the UK between October 2012 and 16th September 2013 when he allegedly entered into the sub-letting agreement for the granny flat at 32 Lurganare Cross, Newry. It is this address which in his petition and affidavits Mr Browne now contends is the centre of his main interests.

[33] But Mr Browne cannot claim that the granny flat or annexe at residential property at 32 Lurganare Cross, Newry is his habitual residence. Nor can he claim that it is a place of business: he contends that that is the business centre in Carnbane.

Even assuming that Mr Browne performed his duties at MJM Marine Ltd solely from that company's premises, I see no reason for Mr Browne to have need of this flat. Johnstown, Kildare is within commuting distance of Newry and Mr Browne is married with 4 young children. His main economic interests at this time had not changed and there is no additional evidence to suggest that he was conducting them from anywhere in Northern Ireland, or why he would need to. In fact Mr Browne's own evidence indicates that his main creditors believed his COMI to be his home in the Republic of Ireland, and that that was where he was ascertainable to them.

[34] Only one material fact had changed since Mr Browne's time in Sheffield. On 19th June 2013 the High Court in Dublin dismissed Mr Browne's challenge to the arbitration award obtained by Mr Mavroudas as unmeritorious; and on 1st July 2013 the same court granted judgment in favour of Mr Mavroudas in the sum of €250k plus costs and interest and Mr Mavroudas was now actively enforcing that judgment. On or about 16th September 2013 Mr Browne allegedly began sub-letting the annexe of the property in Lurganare for £240.00 per month from a work colleague (presumably a colleague from MJM Marine Ltd). That these two events were unconnected seems to me to be unlikely. Contrary to his affidavit evidence and despite the two being involved in litigation and cross-litigation in the Republic of Ireland, there is no evidence that Mr Browne made Mr Mavroudas aware of any move out of the Republic of Ireland, and this is evidenced by letters he wrote on 19th November 2013. These letters, both dated 19th November 2013, and exhibited to Mr Browne's affidavit, concern Mr Mavroudas' judgment - now the subject of enforcement by the Sherriff in the circuit court in Naas, County Kildare. These letters are significant. In the letter to the Sherriff Mr Browne makes reference to:

□ "my former address at Castledermot, County Kildare; where I no longer reside, or have any interest"

and, in a letter of the same date to Mr Mavroudas:

□ "my former address.....kindly note my current address."

In these letters, Mr Browne gave his address as the annexe to the property at 32 Lurganare Cross, Newry. He concludes these letters as follows:

□ "I would be obliged if you would kindly acknowledge receipt of this letter and address all correspondence to my Lurganare home address as above."

[35] But as we now know, Mr Browne's habitual residence was and is Johnstown, Castledermot, County Kildare. Therefore, the denial of residence in the Republic of Ireland in these letters is serious. Regardless of whether Mr Browne has any legal title to the property at Johnstown, Co Kildare, it is clear that he has an 'interest' in it. It is the marital and family home. Yet up until 4th July 2014 Mr Browne denied his residence in the Republic of Ireland. Even after the court review on 4th July 2014, Mr

Browne made no attempt to address the serious inaccuracies in his evidence. He simply changed his argument for the purposes of the hearing of 16th September 2014 to an argument of COMI based on professional domicile.

[36] I do not accept Mr Browne's claim that he was residing in the Newry flat at all. It cannot be his habitual residence. Equally there is no evidence of any economic expenditure consistent with occupation of those premises even as occasional lodgings. Nor did Mr Browne have need of the flat as business premises: there is no evidence that he was engaged in any sole trader business activity (I do not in any case accept that the granny flat could be regarded as business premises). Even if Mr Browne had been required to work solely from the premises of MJM Marine Ltd – and there is no evidence that he was – Newry and Johnstown, Kildare are, as I have said, within commuting distance of each other and in all probability that is what I think Mr Browne did during his period of employment there. The granny flat therefore served no purpose: it was an empty vessel. In all the circumstances, I find that up to the end of February 2014 Mr Browne's centre of main interests was in all probability still located at his habitual residence at Johnstown, County Kildare; that that was where he conducted the administration of his interests on a regular basis and was ascertainable to third parties. But I also find that his non-disclosure denial of residence in the Republic of Ireland in these letters to Mr Mavroudas and to the Sherriff, not to mention the affidavit evidence accompanying his petition, cannot be excused.

4. Centre of main interests: 8th April 2014 : Solar NI Ltd Newry

[37] If, as I have concluded, Mr Browne's COMI was in the Republic of Ireland up until the end of February 2014, the question now remaining is whether Mr Browne's COMI moved from his habitual residence to Northern Ireland in the few weeks between the cessation of his role at MJM Marine Ltd (end of February 2014) and 8th April 2014 when he presented his petition to the court. As at this date, Mr Browne contends that he was employed by Solar NI LTD (a company specialising in the installation of solar panels) as a sales and marketing agent.

[38] Returning to the matter of Mr Browne's affidavits: the first affidavit was sworn on 3rd April 2014 in support of his petition. The second was sworn on 28th May 2014. Both affidavits exhibit his agreement with Solar NI Ltd. According to Clause 2 of the marketing agreement with Solar NI Ltd, Mr Browne had a contract for services as a self-employed marketing/selling agent to work "as and when requirements allow". Clause 3 provides that his principal duty to this company is (at his own expense) to solicit potential orders and customers for Solar NI Ltd. For this he is paid a retainer of £300 per week and expected to attend 10 pre-determined appointments per week (3pm and 7pm). This employment does not seem to me to have the characteristics of sole trader or business activity.

[39] The agreement further provides that Mr Browne is not required to work from, or even attend, the business premises of Solar NI Ltd in Newry unless “reasonably required to do so by the Company” (Clause 3.4.2). Therefore, although Solar NI Ltd is based in Newry, Mr Browne does not actually work there. Nor is he required to. Equally, there is no requirement for him to have an office or business premises in Northern Ireland; or, even to be present in Northern Ireland apart from attending 10 pre-determined weekly appointments with potential customers, the earliest of which, it is noted, is 3pm. Mr Browne could in fact work from anywhere, including his home in Kildare. All he needs is a car, a phone and laptop; and he has all three.

The hearing on 16th September 2014

[40] Despite the evidence in his affidavits of 3rd April 2014 and 28th May 2014 wherein he contends that he is a sales and marketing agent for Solar NI Ltd, at the hearing of the petition on 16th September 2014, Mr Browne produced a business card on which he is described as a Sales and Finance Director for Paul O’Brien, Roofing, and Building & Solar Specialists in Lurgan. Mr Browne then proceeded to give evidence that he had secured this employment at the end of May 2014; that he was actively involved in expanding that business; and, that he was hopeful of negotiating an equity share in the business. This is without doubt a very different proposition from the original case Mr Browne submitted to the court, and which he maintained up to and including the court’s final review of the proceedings on 4th July 2014. At that review, Mr Browne was (as always) present, but no mention was made of such a significant change in his employment circumstances. I’m afraid I am unable to find that change of events plausible.

[41] If there is a connection between Solar NI Ltd and this other business then Mr Browne has not explained it. If he has acquired some new position within either business there is no evidence of it. No new terms of employment were produced. No evidence that he terminated his marketing agent’s agreement in accordance with clause 10 by the giving of a month’s notice was produced. Yet he would contractually have had to have done so by 28th May 2014 when he swore his second affidavit. It seems to me that if Mr Browne had genuinely taken up this employment he would have informed his solicitor, who undoubtedly, would have ensured that it was disclosed on affidavit, and in particular his second affidavit. To this I would add that I also find the idea of Mr Browne being in the process of acquiring an interest in another person’s business at a time when he is petitioning for his own bankruptcy to be incredible.

[42] I am unable to find any evidence that could point to Mr Browne’s COMI moving to the UK on the grounds of professional domicile for the following reasons:

- (i) There is no evidence that Mr Browne moved the trade, profession or business at the root of the insolvency into this jurisdiction; nor is there any link

between the jurisdiction of his business assets (if any) and the jurisdiction of these proceedings.

(ii) Liability to pay up on personal guarantees (relevant in this case) does not have the character of a consistent business or business type of activity (**Re: Office Metro Ltd [2012]EWHC 1191(Ch)**).

(iii) The insolvency proceedings brought by him in this jurisdiction do not result from the exercise of any trade, business or profession conducted by him in this jurisdiction.

(iv) There is no connection whatsoever between whatever trade/business Mr Browne is engaged in here (if any) and the debts giving rise to the bankruptcy.

(v) Within the context of professional domicile, I am unable to accept that a period of a matter of weeks prior to presentation of the petition could amount to conducting the administration of his interests on a regular basis such as to be ascertainable by third parties, or that Mr Browne is in possession of any business premises in Northern Ireland;

(vi) As Clause 10 of the marketing agent's agreement entitles Solar NI Ltd to immediately terminate the agreement in the event of any form of insolvency, Mr Browne could not be said to have a stable link with the forum.

(vii) Mr Browne produced no evidence of general economic expenditure consistent with any regular occupation of the establishment in Newry, or quality of presence in Northern Ireland.

[43] In the circumstances, and for the reasons given, I find that Mr Browne's main interests as an individual as at the date he presented his bankruptcy petition to this court were still the economics of family life, his partnership interests and his litigation with Mr Mavroudas. I find no objective evidence that he was conducting the administration of those interests from Northern Ireland or anywhere else in the UK, or that if he was, that this could have been ascertainable to third parties, in particular creditors. In fact, Mr Browne's own evidence demonstrates that even during the 10 week period of his job in Sheffield, his creditors had no knowledge of

any change in his COMI. In the circumstances I find that as at the date he presented his bankruptcy petition Mr Browne was in all probability conducting the administration of his main interests from his home in Johnstown Castledermot County Kildare; and that is where he was ascertainable to third parties. As to proof to the contrary, the following factors in my view would indicate that there is none. Factors which point to Mr Browne's COMI being in Northern Ireland would seem to be:

- (i) He is in receipt of a salary here;
- (ii) He sub-lets an establishment in Newry;
- (iii) He operates a bank account here;
- (iv) He has a UK National Insurance Number;
- (v) He is registered with a NHS doctor here;
- (v) He is on the Electoral Roll here.

The following factors in my view would indicate that Mr Browne's COMI remains in the Republic of Ireland:

- (i) He has joint ownership of 7b Kiltennel Demesne Ballymoney, Gorey, County Wexford;
- (ii) He has an interest in 19 and 23 Killerig Lodge, County Carlow;
- (iii) He operates his main Bank account there;
- (iv) He maintains home insurance there;
- (v) He maintains family health insurance there;
- (vi) He maintains life insurance there;
- (vii) He maintains a car there;
- (viii) He maintains car insurance there;
- (ix) He is a member of two business partnerships there: the Snoddy Browne Partnership and the JPC partnership and subject to all of the attendant financial, economic and statutory obligations in relation to those;
- (x) He expends most of his income there;
- (xi) He is engaged in litigation and arbitration with Mr Mavroudas there;
- (xii) He is engaged in litigation with the Bank of Ireland there;
- (xiii) He retains legal representation there;
- (xiv) He maintains a computer there;
- (xv) His wife, children and the family home is there;
- (xvi) He is employed by his limited company there.

[44] It is clear from the interests pursued by Mr Browne in the Republic that they are of much greater quality and significance than those pursued by him in Northern Ireland. In simple terms, it is the interests pursued by Mr Browne in the Republic which bear the necessary hallmarks of quality of presence, a stable link with the forum and a degree of permanence, whereas the interests pursued by him in this jurisdiction are weak in comparison. In conclusion, therefore, I do not consider the presumption of COMI in the Republic of Ireland to be rebutted. Accordingly, I find that Mr Browne's COMI does not lie in the jurisdiction of this court and I refuse to make the bankruptcy order.

Mr Mavroudas' alternative argument as to COMI: Non-disclosure

[45] Although I have found that the court does not have jurisdiction to make the bankruptcy order in the case, it is clear that Mr Browne did not make full disclosure of all facts relevant to his case. Mr Mavroudas argues that this is sufficient grounds for the court to refuse to make a bankruptcy order even if it had jurisdiction to do so. In IBRC -v- Quinn Deeny J held that a debtor is not only under a duty to provide full and frank disclosure to the court of all relevant matters but that he remains under a continuing duty to do so throughout the course of the proceedings. The learned judge further held that providing incomplete or misleading information in a statement of affairs supporting a bankruptcy petition could constitute grounds to annul a bankruptcy order. Mr Mavroudas argues that if a bankruptcy order could be annulled on those grounds, then it could be refused on those grounds. I agree. The making of a bankruptcy order is discretionary relief and the court's discretion in this regard is unfettered. Article 240 (3) of the Insolvency (Northern Ireland) Order provides:

“The High Court may, if it appears to it appropriate to do so on the grounds that there has been a contravention of the rules or for any other reason, dismiss a bankruptcy petition or stay proceedings on such a petition; and, where it stays proceedings on a petition, it may do so on such terms and conditions as it thinks fit.”

[46] There can be no doubt that Mr Browne did not make full and frank disclosure to the court of all facts relevant to his case. While Mr Browne eventually admitted the non-disclosure issues, he only did so when challenged either by Mr Mavroudas in cross-examination or in response to the court's enquiry. Despite having every opportunity to remedy the non-disclosures he chose not to. But the non-disclosure issues in this case related to material facts. The first of these, and the most important, is the issue of Mr Browne's residence in the Republic of Ireland. But, not only did Mr Browne not disclose this, he steadfastly denied it; and he continued to do so until the final review of the petition on 4th July 2014 by which time he had filed two substantial affidavits.

[47] There is then the question of the non-disclosure of a number of companies of which he is a director. Question 1.17 in his Statement of Affairs asks: "Are you, or in the last five years, have you been a director or involved in the management of a company? Mr Browne answered that question: "Larcow Ltd" (a company formed by him in Northern Ireland around 3 weeks before presenting his petition). But as at the date of swearing his statement of affairs Mr Browne retained directorships of some 6 companies in the Republic of Ireland. I note that one of these companies is a management consultancy company and another is an accounting, bookkeeping and auditing company. But there are many others in that jurisdiction in which he would have had involvement in the last 5 years and which he has not disclosed. While on its own that may not justify a refusal of an order, I think in this case it would when viewed against the credibility of Mr Browne's evidence in general. Mr Mavroudas also correctly pointed out that Mr Browne's expenditure as set out in his statement of affairs greatly exceeded his alleged income, thereby suggesting possible non-disclosed income.

[48] However, there is simply no overlooking the fact that Mr Browne's evidence in general demonstrates that he misled his creditors, the Sherriff and this court by failing to disclose material facts about his residence in the Republic of Ireland. Further, the wholly unsatisfactory evidence given to the court by Mr Browne regarding his employment in Northern Ireland also cannot be disregarded. It follows therefore that I find that the court was given a misleading and inaccurate version of the facts when Mr Browne presented his petition. I accept Mr Mavroudas' submission that I am entitled to refuse to make a bankruptcy order on this ground also.

Conclusion

[49] Mr Browne presented a bankruptcy petition to this court in respect of an insolvency the root of which is in the Republic of Ireland. He argued that the High Court in Belfast has international jurisdiction to make a bankruptcy order against him on the basis that his COMI is in Northern Ireland. There is no definition of COMI in the Regulation. There is only the requirement in Recital 13 that an individual's COMI should correspond to the place where he conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. There is no formula that an individual can apply in order to meet this requirement. Only the court can ascertain an individual's COMI, and this involves a question of law and fact in every case. Accordingly, each case turns on its own individual facts (including individual historical facts) and what the court may consider to be a relevant fact, or a fact sensitive, in one case may arouse suspicion in another. However, the court's duty to scrutinise COMI is a strict one and that duty must be discharged rigorously.

[50] On the facts of this case, and for the reasons set out above and elsewhere in this judgment, I find that Mr Browne's COMI does not lie in the jurisdiction of this court on the grounds of either professional domicile or habitual residence. In the circumstances, I refuse to make a bankruptcy order against him and hereby dismiss his petition.