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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

RE: IAN RODERICK GIBSON - BANKRUPT

BETWEEN:

The Official Receiver

Applicant:

and

Ian Roderick Gibson

Respondent:

MASTER KELLY

INTRODUCTION

[1] This is an application by the official receiver for a Bankruptcy Restrictions Order ("BRO") to be made against Mr Gibson under Article 255A and Schedule 2A of the Insolvency (Northern Ireland) Order 1989, as amended by the Insolvency (Northern Ireland) Order 2005. In his application the official receiver contends that Mr Gibson was guilty of culpable misconduct in or about the conduct of his financial affairs alleging specifically that he "was unreasonably extravagant and that this materially contributed to his Bankruptcy".

[2] Mr Gibson was adjudicated bankrupt on 30th June 2011 on foot of his own petition. Ordinarily, by virtue of the relevant statutory provisions, he was due to receive a statutory discharge from bankruptcy on 30th June 2012 thereby releasing him from the various disabilities and restrictions of bankruptcy. That statutory discharge is however subject to a right on the part of the official receiver to seek

either a suspension of the statutory discharge from the court or a BRO. Both forms of relief arise where there is misconduct on the part of the bankrupt. An order by the court in either scenario means that the bankrupt remains subject to the restrictions of bankruptcy after the one year period.

[3] On 26th June 2012, a few days prior to the statutory discharge date, the official receiver applied for an interim BRO and a BRO. The application was accompanied by a report of the official receiver of the same date under Rule 6.234 of the Insolvency Rules (NI) 1991 (as amended) containing details of alleged misconduct. In reliance of the allegations of misconduct, the official receiver's report exhibited a copy of Mr Gibson's statement of affairs. It is from the disclosures Mr Gibson made in this that the allegation of misconduct with which we are concerned finds its origin.

Background to the official receiver's application

[4] In support of his debtor's petition Mr Gibson's filed a statement of affairs sworn on 20th June 2011. This discloses that he owed around £77,000 to 7 credit card providers as at that date. It also discloses that Mr Gibson accepts that he accumulated this debt over many years by transferring card balances from one company to another and running up more and more debt.

[5] On or about 24th July 2009 Mr Gibson received the sum of £23,176.60 from the sale of his only asset. He disclosed this in section 9 of his statement of affairs. But none of this money went to his creditors. It is this particular issue which lies at the heart of the case.

[6] In section 11.1 of his statement of affairs, under the section entitled "Causes of Bankruptcy" Mr Gibson admits experiencing difficulty paying his debts for some 10-15 years prior to the date of presentation of his petition (i.e. 22nd June 2011). Section 11.2 of the statement of affairs asks: "What do you think are the reasons for you not having enough money to pay your debts? You should provide reasons to support your answer." Mr Gibson answered that question:

> "I was using one credit card to pay off another for a long time with the debt increasing all the time. I'm afraid I felt a bit sorry for myself when I was diagnosed with cancer in 2007 and couldn't get the film "The Bucket list" out of my mind, so I spent money from the sale of my house rather foolishly I think. I also suffer from depression which I've had for many years. Unfortunately I had a heart attack last September which has not helped at all. I think I need a new start."

[7] In view of Mr Gibson's imminent discharge from bankruptcy, I made an interim BRO under the provisions of paragraph 5 of Article 255A. That order has been in place since 29th June 2012, and extended from time to time while Mr Gibson initially pursued a legal aid application and thereafter set about obtaining evidence in

defence of the application. Because of the time it took to obtain legal aid and the time it took to obtain historic credit card statements upon which Mr Gibson wished to rely, the hearing of this application was significantly delayed.

[8] The application eventually came on for hearing on 13th January 2015. The official receiver was represented by Mr McGuiness and Mr Gibson by Mr Coyle. No oral evidence was given at the hearing. While the parties do not disagree that a BRO is appropriate in the circumstances of this case, they do disagree on what the appropriate period of restriction should be.

[9] In the course of both the administration of the bankruptcy and these proceedings Mr Gibson gave further evidence which expanded upon those issues to which I have already referred in [6] above. I will return to that in due course; but for now I should say that the following material facts are not in dispute.

> (1)Mr Gibson presented a bankruptcy petition on 22nd June 2011 but had difficulty in paying his debts as they fell due from 1996 at the earliest and 2001 at the latest (i.e. for 10-15 years beforehand);
> (2)Mr Gibson had been unemployed and without income since 2006;
> (3) From (27th March) 2006 to sometime in 2010 Mr Gibson transferred outstanding debt balances that he had no reasonable prospect of being able to repay from one credit card provider to another and then proceeded to avail of additional credit facilities thus increasing indebtedness to new creditors when he had no reasonable prospect of being able to repay them.
> (4) Mr Gibson dissipated the entire £23,176.60 net proceeds of 90 Omeath Street, Belfast in July 2009 on himself in pursuance of his "Bucket list" when those funds could have been used to address his indebtedness to his creditors.

The legal framework

[10] The court's jurisdiction to make a BRO is to be found in Article 255A and Schedule 2A of the Insolvency (Northern Ireland) Order 1989 ("the 1989 Order"), as inserted by Article 13 of the Insolvency (Northern Ireland) Order 2005 (SI 2005 No.1455 (NI.10))("the 2005 Order"), and also Article 6 of the Insolvency (2005 Order) (Transitional Provisions and Savings) Order (NI) 2006 (SR2006/22). All came into operation on 27th March 2006. By virtue of Article 6 of the Insolvency (2005 Order) (Transitional Provisions and Savings) Order (NI) 2006 the court cannot take into account conduct prior to that date.

[11] The introduction of the 2005 Order and the accompanying subordinate legislation brought Northern Ireland into line with England and Wales in effecting radical changes to personal insolvency. The most radical of these changes was the reduction in the period of bankruptcy discharge from (mostly) 3 years to one year. But that one year discharge period is, as I have said earlier, subject to certain powers conferred on the court to suspend discharge and now, under the new regime, permit discharge subject to certain continuing bankruptcy restrictions. Those changes were introduced in England and Wales on 1st April 2004 by the enactment of the Enterprise Act 2002.

[12] The over-arching theme of the new UK bankruptcy regime was a move away from a 'one-size-fits-all' regime – hence the introduction of the bankruptcy restrictions regime. I will turn to that new regime shortly, but for now I would like to quote from Paragraph [57] of Randhawa –v- Official Receiver [2007] 1 All ER 755, wherein Launcelot Henderson QC, sitting as a deputy judge of the High Court explained the rationale behind the bankruptcy restrictions regime. At paragraph [57] the learned judge stated that the new bankruptcy proposals were:

> "' based on the recognition that honest failure is an inevitable part of a dynamic market economy. Our radical liberalisation of the bankruptcy regime will mean a fresh start for many, backed by a very tough regime for those whose conduct of their financial affairs is irresponsible or reckless.'"

The nature of the bankruptcy restrictions under the 2005 Order

[13] Paragraphs 1-5 of Schedule 6 to the 2005 Order impose the following restrictions on a bankrupt – namely that a bankrupt:

> (1) is disqualified from acting as a receiver or manager of the property of a company on behalf of debenture holders without the leave of the High court; (an offence under Schedule 6 of the 2005 Order and Article 41 of the 1989 Order);
>
> (2) is prohibited from obtaining credit in excess of prescribed amounts (currently £500 or more) or carrying on in a business under a name other than that under which he was made bankrupt without disclosing his bankruptcy status (offences under Article 321 of the 1989 Order in Chapter VI Part IX of the 1989 Order now extended to bankrupts subject to a BRO);
>
> (3) is disqualified from acting as an insolvency practitioner;
>
> (4) is prohibited from acting as a company director or being concerned in the management of a limited company

> without the leave of the High court (an offence under also article 15 (1) of the Company Directors Disqualification (Northern Ireland) Order 2002 as inserted by paragraph 5 of Schedule 6).

[14] If an individual subject to a BRO breaches any of the above restrictions he may be liable to criminal sanction.

[15] There are also restrictions and prohibitions on holding certain public and local offices, as well as acting as a trustee of a charity or pension fund. And, because the conduct giving rise to a BRO (particularly that set out in paragraph 2(2) of Article 255A below) necessarily involves some form of financial irresponsibility, dishonesty or lack of probity on the part of the bankrupt, the consequences of a BRO may extend to other statutory or regulatory jurisdictions. Moreover, the effect of a BRO may not be limited to the jurisdiction in which the order was made: a BRO made in Northern Ireland, for example, will be recognised in other parts of the UK and possibly elsewhere.

[16] For present purposes the relevant provisions of Article 255A of the 2005 Order are as follows:

Paragraph 1(1) of the 1989 Order provides:

> "1.-(1) A bankruptcy restrictions order may be made by the High Court."

Paragraph 1(2) provides:

> " (2)An order may be made only on the application of –
>
> (a) The Department, or
>
> (b) the official receiver acting on a direction of the Department."

Paragraph 2(1) of Schedule 2A provides:

> "(1) The court shall grant an application for a bankruptcy restrictions order if it thinks it appropriate having regard to the conduct of the bankrupt (whether before or after the making of the bankruptcy order)."

Paragraph 2(2) sets out the kinds of behaviour on the part of the bankrupt of which the court must take particular account. Paragraph 2(2) provides:

> "(2) The Court shall, in particular, take into account any of the following kinds of behaviour on the part of the bankrupt-

(a) failing to keep records which account for a loss of property by the bankrupt, or by a business carried on by him, where the loss occurred in the period beginning 2 years immediately preceding petition and ending with the date of the application;

(b) failing to produce records of that kind on demand by the official receiver or the trustee;

(c) entering into a transaction at an undervalue;

(d) giving a preference;

(e) making an excessive pension contribution;

(f) a failure to supply goods or services which were wholly or partly paid for which gave rise to a claim provable in the bankruptcy;

(g) trading at a time before commencement of the bankruptcy when the bankrupt knew or ought to have known that he was unable to pay his debts;

(h) incurring, before commencement of the bankruptcy, a debt which the bankrupt had no reasonable expectation of being able to pay;

(i) failing to account satisfactorily to the Court, the official receiver or the trustee for a loss of property or for an insufficiency or property to meet bankruptcy debts;

(j) carrying on any gambling, rash and hazardous speculation or unreasonable extravagance which may have materially contributed to or increased the extent of the bankruptcy or which took place between presentation of the petition and commencement of the bankruptcy;

(k) neglect of business affairs of a kind which may have materially contributed to or increased the extent of the bankruptcy;

(l) fraud or fraudulent breach of trust;

(m) failing to cooperate with the official receiver or the trustee."

In this case, the official receiver only relies on ground (j), although on the facts of the case, to which I will turn in due course, I will also have to have regard to ground (h).

Paragraph 2 (3) provides that:

> "The Court shall also, in particular, consider whether the bankrupt was an undischarged bankrupt at some time during the period of 6 years ending with the date of the bankruptcy to which the application relates."

Paragraph 3 deals with time limits. It provides:

> "3. - (1) An application for a bankruptcy restrictions order in respect of a bankrupt must be made –
>
> (a) before the end of the period of one year beginning with the date on which the bankruptcy commences, or
>
> (b) with the permission of the High Court.

Paragraph 4 deals with duration and provides:

> "4.- (1) A bankruptcy restrictions order-
>
> (a) shall come into force when it is made, and
>
> (b) shall cease to have effect at the end of a date specified in the order.
>
> (2) The date specified in a bankruptcy restrictions order under sub-paragraph (1)(b) must not be-
>
> (a) before the end of the period of 2 years beginning with the date on which the order is made, or
>
> (b) after the end of the period of 15 years beginning with that date."

Paragraph 5 then deals with interim bankruptcy restrictions orders. Paragraph 5 provides:

> " 5.- (1) This paragraph applies at any time between-
>
> (a) the institution of an application for a bankruptcy restrictions order, and
>
> (b) the determination of the application.

> (2) The High Court may make an interim bankruptcy restrictions order if the Court thinks that-
>
> (a) there are prima facie grounds to suggest that the application for the bankruptcy restrictions order will be successful, and
>
> (b) it is in the public interest to make an interim order."

Paragraph 5(4) provides that an interim bankruptcy restriction order shall have the same effect as a bankruptcy restriction order, and that it shall come into force when it is made.

Finally, paragraph 12 provides that:

> "12.-The Department shall maintain a register of-
>
> (a) bankruptcy restrictions orders.
> (b) interim bankruptcy restrictions orders, and
> (c) bankruptcy restrictions undertakings."

[17] Returning to the Randhawa case, the court held at [64]:

> "First, para 1(1) simply confers jurisdiction on the court to make a BRO. The use of the word 'may' does not in my judgment carry any implication that the jurisdiction is a discretionary one. It is an enabling provision, and no more.

At [65] the learned judge continues:

> "Secondly, para 2(1) provides in mandatory terms that the court shall grant an application for a BRO 'if it thinks it appropriate having regard to the conduct of the bankrupt'. The words 'if it thinks it appropriate' clearly require the court to form a judgment, but the exercise that has to be carried out is not in my view properly characterised as the exercise of a discretion. The question whether it is appropriate to make a BRO is not at large, but has to be answered 'having regard to the conduct of the bankrupt'. It therefore requires the court to examine and evaluate the bankrupt's conduct and to form a view whether that conduct merits the making of a

> BRO. If the court concludes that it does, the court then has no choice in the matter and is obliged to make a BRO for at least the minimum period of two years."

[18] Therefore the statutory regime is clear: if the court finds that the conduct of the bankrupt is such as to make it appropriate to make a BRO, then the court must make a BRO for a period of not less than 2 years and no more than 15 years.

[19] It will be noted from the aforementioned periods of restriction that the bankruptcy restriction regime is broadly analogous to the Directors' Disqualification regime (see again Official Receiver –v- Randhawa). Accordingly, the court will have regard to the principles for periods of disqualification set out by Dillon L.J. in Re Sevenoaks Stationers Retail Ltd [1991] 1Ch 164 which apply in Disqualification cases. These are:

> "(i) The top bracket of disqualification for periods over 10 years should be reserved for particularly serious cases. These may include cases where a director who has already had one period of disqualification imposed falls to be disqualified yet again.
> (ii) The minimum bracket of two to five years' disqualification should be applied where though disqualification is mandatory the case is relatively not very serious.
> (iii) The middle bracket of disqualification of six to ten years should apply to serious cases which do not merit the top bracket."

Amendments to the principal Rules

[20] Article 92 of the Insolvency (Amendment) Rules (NI) 2006 (SR 2006/47) ("the 2006 Rules") inserted new Chapters 27, 28 and 29 into Part 6 of the Insolvency Rules (Northern Ireland) 1991 ("the principal Rules") to govern the procedure governing the Bankruptcy Restriction regime. The relevant rules are Rules 6.234 to 6.244.

[21] Rule 6.234(1) provides that where an application is made under Article 255A the application must be supported by a report from the Department (or the official receiver acting on the direction of the Department) which must include (Rule 6.234 (2)):

> "(a) a statement of the conduct by reference to which it is alleged that it is appropriate for a bankruptcy restrictions order to be made; and (b) the evidence on which the Department relies in support of the application."

The corresponding Rules in relation to interim BROs are Rules 6.238 - 6.241.

[22] In considering whether to impose a BRO the court will view the conduct cumulatively and, taking into account extenuating or mitigating circumstances, decide whether the conduct has fallen below the standards of probity and competence appropriate in the conduct of an individual's financial affairs (Randhawa –v- Official Receiver paragraphs [66] –[69] and Hoffman LJ in Secretary of State for Trade and Industry v Gray [1995] 1 BCLC 276, [1995] Ch 241 at 253).)

[23] Thus, essentially there are 3 questions that the court must consider. The first question is whether the allegations of misconduct are made out. If the court considers that they are made out then the second question is whether the court considers that the conduct merits the imposition of a BRO. If the court concludes that the bankrupt's conduct merits a BRO, then the final question is what appropriate period of restriction is to be applied.

[24] Having already set out the background to the official receiver's application, I will now expand upon the relevant facts.

[25] According to section 6.1 of the statement of affairs Mr Gibson last worked as a self-employed taxi driver in 2006. Since then he has been unemployed and in receipt of benefits.

[26] On 3rd August 2011 Mr Gibson's examiner wrote to him requesting a detailed explanation as to how the sale proceeds of Omeath Street were dispersed. Mr Gibson responded by (undated) letter which is exhibited to the application in both handwritten and transcribed form. Simply put, Mr Gibson admitted that he had dissipated the funds on himself. At paragraph 2 of his letter he said:

> " I was diagnosed with cancer in 2007……….When I received this money {from the sale proceeds of Omeath Street} and with the depression I had felt for a year, further compounded with my current debt situation, I felt a little financial relief from my life even further (sic). My spending habits became even more irresponsible and I became a bit like Jack Nicholson's character in "The Bucket List" film, when, confronted with a very uncertain future I made a very haphazard list of things I wanted to do before I too "kicked the bucket". This very jumbled list included a lot of travelling to UK mainland and Ireland, eating and drinking way too much, which compounded my health problems and probably lead to my heart attack in September 2010 and subsequent heart problems."

He continued:

> "I was also spending far too much on food, some of which became past it and had to be thrown out. I also spend (sic) money on health gadgets and pills in an effort to help

> myself. I was also attracted to silly gimmicky things and clothes.
>
> I spent money on many 'business opportunity' ideas all of which came to nothing"

[27] Now, the first question I must decide is whether the official receiver's allegation of misconduct is made out. I am satisfied that it is. There is no doubt that Mr Gibson dissipated his sole asset of £23,176.60 on himself in the extravagant manner he described, and that he did so at a time when he had debts that he knew, or ought to have known, that he had no reasonable prospect of being able to repay. Just exactly how much was owed to creditors at the time he began dissipating the asset is impossible to ascertain because of the added problem of the continuous and regular transferring of debt balances from one creditor to another. But what is clear is that Mr Gibson's creditors were deprived of his sole asset, and that this materially contributed to his bankruptcy. Moreover, the pattern of spending the additional credit obtained with the balance transfers in the knowledge of insolvency, also materially contributed to his bankruptcy. I will return to that particular issue shortly.

[28] Next there is the question of whether the conduct I have referred to merits the imposition of a BRO. It is clear from the statutory provisions that the fundamental purpose of the BRO is to protect the public. But it is also clear from cases such as Randhawa that the regime was intended to have a deterrent effect - not only for the bankrupt, but for others. I remind myself of the dicta of Rimer J in Re: Jenkins –v-the Official Receiver [2007] EWHC 1402 (Ch):

> "the purpose of such an order is to protect the public in three senses, namely by (1) keeping bankrupts whose conduct has merited such an order 'off the road'; (ii) by deterring them from repeating such conduct; and (iii) by deterring others."

[29] It is clear on the facts of this case that the consequences of Mr Gibson's profligacy were to (a) increase existing indebtedness that he had no reasonable prospect of being able to repay and (b) deprive his creditors of a share in his sole asset being the £23K.

[30] Mr Gibson only really makes two points in defence of the application. The first point relates to a claim made by the official receiver in his second report wherein at "1." he refers to Mr Gibson having "incurred a further £44,497 of debt since 2009." Mr Gibson objected to the inference that a "*further* £44,497" of debt had been incurred since that date. He provided a supplementary affidavit and an amended statement of affairs to correct any misunderstanding that might have caused the official receiver to perceive this. The official receiver has accepted Mr Gibson's explanation so that is no longer an issue.

[31] The second point is that according to his evidence Mr Gibson is by implication attributing his conduct to illness - particularly his cancer diagnosis in 2007. Mr Coyle argues that the court should consider this within the context of extenuating circumstances.

[32] There are in my view two important issues which arise at this point concerning extenuating circumstances. The first issue is that in my judgment any extenuating circumstances must be relevant. The second issue is more discrete as it involves the question of what weight is to be attached to extenuating circumstances. In Official Receiver v Bathurst [2008] EWHC 1724 (Ch), Sir Andrew Morritt Ch. said at para.31:

> "In my view, the protection that bankruptcy restrictions orders afford to the public should not be underestimated, nor their deterrent effect undermined by too readily finding extenuating circumstances for conduct identified by Parliament as worthy of criticism when enacting {section 2A}"

Thus, when considering the question of extenuating circumstances the court should proceed with caution, and be astute as to the appropriate weight to be given to those particular circumstances within the context of the proceedings.

[33] I have observed that Mr Gibson has referred to his illness on several occasions throughout the bankruptcy process: first in his statement of affairs; secondly, in correspondence with the official receiver and thirdly, in paragraph 3 of his affidavit:

> "I became very aware of death and I felt little financial relief from my dire predicament. I felt like I was losing control of my life. During this period my spending habits became very irresponsible. I became obsessed with the idea of a 'bucket list' and of doing the things I wanted to do before I died, as I believed I was dying. I had no information to the contrary."

[34] In each of the above documents, Mr Gibson expresses himself differently. In his statement of affairs he says "I'm afraid I felt a bit sorry for myself". In his correspondence he says he was "confronted with a very uncertain future" and in the paragraph above he refers to his "dire predicament…I believed I was dying…." Exhibited to Mr Gibson's first affidavit is a report from his GP, Dr McCallan, dated 5th March 2013. The report is a short factual account of Mr Gibson's health and it includes the chronology of events leading to his cancer diagnosis in August 2007. While Dr McCallan describes this diagnosis as "significant" and "very stressful" – and no doubt that was the case - the report otherwise suggests that Mr Gibson's illness was diagnosed at an early stage and that it was successfully treated in 2007 (subject to regular review etc.). But, without disrespect to Mr Gibson, there is nothing in the GP's report which would account for his apparent personal belief

about his health and future, particularly as he expressed it in paragraph 3 of his affidavit.

[35] Accordingly, I find that Mr Gibson's illness *per se* does not carry much weight in terms of the nature of the conduct with which we are specifically concerned. Moreover, as Mr McGuiness argues, and rightly in my view, Mr Gibson was by his own admission financially irresponsible prior to his illness. And, more importantly, the extravagant dissipation of the £23k began in July 2009 - two years after his illness. In the circumstances, I am satisfied that the imposition of a BRO is merited. The only question remaining therefore is what period of restriction should be imposed.

[36] As stated at the outset, Mr Coyle argues that Mr Gibson's conduct is relatively not serious and that a period of restriction should be confined to the lower bracket. In support of his argument Mr Coyle cited Scottish authorities wherein bankruptcy restrictions were imposed for 2 years in cases which he contends are similar to the present one. However when exercising this particular statutory jurisdiction the court is required to look cumulatively at the facts relating to the relevant individual's conduct, and therefore each case will turn on its own individual facts. Accordingly, authorities such as those cited must not, I think, be viewed as setting precedents.

[37] There are, as Mr McGuiness pointed out, a number of aggravating factors present in this case. Chief among these is the fact that Mr Gibson's conduct took place in the knowledge of his insolvency. Secondly, his dissipation of the £23k was a deliberate act and the money was used for self-serving purposes. Despite his claim that he spent money on "business opportunity ideas" there is no evidence that he did so. In any case, that particular claim is at odds with the general thrust of his case. The consequences of that conduct were that Mr Gibson's creditors were deprived of a share in his sole asset. Thirdly, while in possession of the £23,176 and spending it on himself 'travelling, eating and drinking', Mr Gibson continued to make use of credit cards that he was not repaying, and running them up to their limit - indeed exceeding the limit - and transferring balances from one card provider to another to avail of further credit. Indeed, the credit card statements he produced show that after he received the £23,176, and as he was spending it, not only did he cease making the (already considerable) minimum payments, but he reduced payments on his credit cards with Egg and Mint to £1 when the balances due were £5,570.20 and £5,714.87 respectively. Therefore, in addition to the dissipation of his sole asset, Mr Gibson appears to have purposely increased his indebtedness to bankruptcy creditors. Finally, he made no attempt to deal with his creditors other than presenting a petition for bankruptcy after the money ran out.

[38] I reject entirely Mr Gibson's suggestion, although rightly not forcefully made, that the bankruptcy creditors were partly to blame by extending him the credit facilities in the first place. I also reject Mr Coyle's submission that the transferring of debts was emblematic of the time. This is immaterial. The court is solely concerned with the nature of the conduct specified by the official receiver and whether it merits the imposition of a BRO.

[39] I also reject Mr Gibson's co-operation with the official receiver throughout his bankruptcy as grounds for mitigation. He is under a statutory obligation to do so and cannot therefore expect his discharge of that duty to be viewed as mitigation.

[40] Accordingly, looking at matters in the round and taking into account all those factors I have referred to, including this being Mr Gibson's first bankruptcy, I consider that Mr Gibson's conduct to be serious. As such, it falls within the middle bracket of Re Sevenoaks. I therefore impose a BRO for a period of 7 years which said period, taking into account the period of the interim BRO, will cease on 29th June 2019.