

THE HIGH COURT

BANKRUPTCY

[2022] IEHC 406

Record No. 2021/5338

IN THE MATTER OF A PETITION BY A DEBTOR TO BE ADJUDICATED

BANKRUPT

Between:

OÜ BEST IDEA

APPLICANT

-and-

OLIVER KRUUDA

RESPONDENT

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 6th day of July 2022

1. This is an application by an Estonian company, OÜ Best Idea (“Best Idea”) for an order setting aside or, in the alternative, staying an order of adjudication against Mr. Oliver Kruuda

made by the High Court (Mr. Justice Humphreys) on 28th June 2021, and for a number of ancillary orders.

2. The grounds stated in the Notice of Motion for the application are as follows:

“(a) Grounds of material non-disclosure; and/or

(b) Grounds that this Honourable Court was precluded from making an order of adjudication (being the opening of main proceedings for the purposes of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) ('the Recast Regulation')) by reason of the prior opening of main insolvency proceedings by the Courts of Estonia on 7 June 2021 by means of the appointment by the Tartu County Court of an interim trustee; and/or

(c) On the basis that (pursuant to, inter alia, Regulation 19 of the Recast Regulation) the Irish courts were and are bound to recognise and give effect to the judgment of the Tartu County Court (and any other decision handed down in respect of the bankruptcy proceedings in Estonia).”

3. Having heard the matter on 2-3 June 2022, I considered it necessary to give an *ex tempore* judgment prior to the first anniversary of the bankruptcy adjudication rather than a written judgment in due course. Section 135 of the Bankruptcy Act provides: “[t]he Court may review, rescind or vary an order made by it in the course of a bankruptcy matter other than an order of discharge or annulment”. Mr. Kruuda was adjudicated bankrupt on 28th June 2021 by order of the High Court. According to Section 85(1) of the Act: “...every bankruptcy shall, on the 1st anniversary of the date of the making of the adjudication order in respect of

that bankruptcy, unless prior to that date the bankruptcy has been discharged or annulled, stand discharged”.

4. Counsel for the Applicant expressed the concern that if this Court did not give a decision prior to the first anniversary of the adjudication, it might be prohibited from making the order of discharge sought by the Applicant by the terms of Section 135. Mr. Kruuda very fairly, through counsel, offered not to accept a discharge for a defined period so that the Court could have the opportunity of delivering a reasoned written judgment given the complexity of the issues.

5. However, having considered the matter, it seems to me that the discharge to which Section 85(1) applies is automatic and applies by operation of law. It is not dependent on acceptance by the bankrupt. In order to ensure, therefore, that if I considered a discharge of the adjudication appropriate, I would not be precluded from making an order by the automatic discharge on 28th June 2022 and the terms of Section 135 which provides that an order of discharge may not be reviewed, rescinded or varied, I decided to ensure that my decision was given before that date. Accordingly, I delivered an *ex tempore* judgment on 27th June, 2022 - which was essentially in the same terms as the present judgment - which set out the reasons for my decision, and I indicated that I would deliver a formal written judgment at a later date.

The Present Application

6. The present motion issued on 5th October 2021. According to a grounding affidavit from Judith Riordan, a solicitor acting on behalf of Best Idea, that entity became aware of the adjudication on 2nd July 2021. It corresponded with the personal insolvency practitioner (“PIP”) Mr. Anthony Joyce who had advised the bankrupt on certain aspects of his

application, and who on 14th July 2021 indicated that he had been instructed to decline to supply Best Idea with the documentation which supported the application for adjudication. Having been unable to obtain the documentation from the Insolvency Service of Ireland or the Examiner's Office, the matter was mentioned to Humphreys J. who gave Best Idea access to the Court file. This resulted ultimately in the present application being made.

7. In her affidavit, Ms. Riordan at paragraph 11 of her affidavit sets out the primary contentions of Best Idea as follows:

“(i) As at 28 June 2021, when the application for adjudication came before Humphreys J., the courts of Ireland were precluded from seeking to open main proceedings in respect of Mr. Kruuda by reason of the prior opening of main proceedings in Estonia. In that regard, I am instructed by TGS Baltic that a judgment opening main proceedings for the purposes of Article 3 of the Recast Regulation was made and handed down by the Estonian court (being the Tartu County Court) on [7] June 2021.

(ii) The Estonian judgment was challenged by lawyers on behalf of Mr. Kruuda by way of application of 14 June 2021 which application was pending before the Estonian Courts as at 28 June. This application is still pending before the Estonian courts as described in the affidavit of Mr. Viirsalu.

(iii) In such circumstances, it is contended that if Humphreys J. had been informed of these matters (as it is contended he should have been) he would not and could not have made an adjudication order pending resolution of the question of Mr. Kruuda's COMI and/or the propriety of the opening of the main insolvency proceedings in June 2021 in Estonia by the Estonian courts.”

8. Ms. Riordan goes on to set out the basis for the orders sought at paragraph 14 of her affidavit as follows:

“(i) The adjudication was procured by a wholly improper failure by Mr. Kruuda to bring before the court all relevant information concerning his COMI and concerning the exercise of the Estonian court's interruption jurisdiction over him.

(ii) In circumstances where the Estonian court opened main insolvency proceedings against Mr. Kruuda on 7 June 2021 (and where such opening is being challenged by Mr Kruuda through his application of 14 June 2021) it is respectfully submitted that this court should await the resolution of those proceedings.

(iii) While it is considered that questions of COMI should be determined by the Estonian court, it is submitted that as at 28 June 2021, Mr. Kruuda's COMI was in fact in, and remains in, Estonia. To the extent that this Court directs a hearing then the question of COMI, Best Idea will seek directions regarding the filing of full evidence in that regard.”

9. A further affidavit of Peeter Viirsalu, a lawyer acting on behalf of Best Idea in support of the application, sets out the background to the bankrupt's indebtedness. By a judgment of 30th April 2020, Best Idea got a judgment of approximately €15,000,000 against Mr. Kruuda and a company controlled by him. It is averred that the Estonian Supreme Court rejected appeals in relation to this judgment, which came into force on 21st September 2021. Mr. Viirsalu refers to a number of circumstances which he asserts suggests that Mr. Kruuda was evading service of what is termed a ‘bankruptcy caution’, a precursor in Estonian law to an application to have a debtor adjudicated bankrupt.

10. On 14th May 2021 a bankruptcy petition by Best Idea against Mr. Kruuda was filed with the Tartu County Court in Estonia. This was accepted by the Court and sent to Mr. Kruuda's address as stated in the population register. On 7th June 2021, Tartu County Court appointed an interim trustee to Mr. Kruuda and prohibited him from disposing of assets without the consent of the interim trustee. Mr. Viirsalu at paragraph 28 of his affidavit makes the point that the County Court did not address the question of Mr. Kruuda's centre of main interests or "COMI" because there was no indication in the petition or from Mr. Kruuda that his COMI was not in Estonia.

11. On 14th June 2021, Estonian lawyers acting on behalf of Mr. Kruuda notified the Court that Mr. Kruuda wished the petition to be heard in court session and would be opposing the application. On 22nd June 2021 those lawyers, in response to a request for information from the interim trustee, indicated that Mr. Kruuda had been resident in Dublin since October 2020.

12. The interim trustee's report was filed on 30th June 2021. There was no indication in the communications of 14th and 22nd June from Mr. Kruuda's lawyers that he was applying to be declared bankrupt in Ireland. The fact of his adjudication in Ireland on 28th June 2021 was communicated by a representative of Mr. Kruuda on 1st July 2021.

13. At paragraphs 48 and 49 of Mr. Viirsalu's affidavit he states as follows:

"48. I believe it is apparent that the Irish adjudication order has been procured by intentional non-disclosure on the part of Mr. Kruuda of matters which are material to the proper consideration by the Irish court of its international jurisdiction to enter into an application for the opening of main insolvency proceedings with regard to Mr. Kruuda.

49. If this Honourable Court had been informed of the matters above, I believe (as a matter of European law) that it would have no option but to defer or stay its consideration until the question of Mr. Kruuda's COMI had been definitively determined by the Estonian court (in the context of Mr. Kruuda's own challenge in that regard which predated the filing of Irish papers)."

14. Mr. Kruuda swore a replying affidavit on 26th October 2021 and presented a stout defence of his position. He made the point that he does not have to notify anyone when is moving residence. He stated that he did not accept that the appointment of an interim trustee is the opening of main proceedings in Estonia. He acknowledged the decision of the Tartu County Court which was given on 19th October 2021 adjudicating him bankrupt and said that he would be appealing it. He took issue with a number of points made by Ms. Riordan and Mr. Viirsalu in their affidavits. There ensued an exchange of affidavits between Mr. Viirsalu and Mr. Kruuda.

15. The adjudication order by the Tartu County Court of 19th October 2021 was appealed to the Tartu Circuit Court which gave its decision on 27th January 2022, in which it dismissed the appeal. A petition to the Supreme Court of Estonia was lodged by Mr. Kruuda on 4th February 2022 to appeal the Circuit Court decision. By a ruling of 18th April 2022, the Supreme Court refused to accept the appeal and rejected the petition.

The Bankruptcy Proceedings

16. A petition for bankruptcy issued on 11th June 2021 and paragraphs 2 and 3 read as follows:

“2. Regulation (Eu) 2015/848 applies to the proceedings. Your petitioner’s centre of main interests (determined in accordance with Article 3(1) of Regulation (Eu) 2015/848 of The European Parliament and of The Council because the petitioner conducts administration of his business interests from Ireland, at Ropemaker Place, Hanover Street East, Dublin 2, Ireland. The petitioner does not have any place of establishment elsewhere in the European Union.

3. Your petitioner therefore requests that your petitioner may be adjudged bankrupt in main proceedings, (in accordance with Article 3(1) of Regulation (Eu) 2015/848 of The European Parliament and of The Council).”

17. Paragraph 2 appears to be incomplete. It does not follow the template of Form 13 in Appendix O to Order 76, Rules of the Superior Courts which sets out the format which the debtor’s petition is to adopt.

18. The grounding affidavit of Mr. Kruuda exhibits what is colloquially known as a “Section 15 letter”. This is a letter to address the requirements of Section 15(2) of the Bankruptcy Act. That subsection is as follows:

“(2) Before making an order under subsection (1), the Court shall consider the nature and value of the assets available to the debtor, the extent of his liabilities, and whether the debtor's inability to meet his engagements could, having regard to those matters and the contents of the debtor's statement of affairs filed with the Court, be more appropriately dealt with by means of-

(a) a Debt Settlement Arrangement, or

(b) *a Personal Insolvency Arrangement,*

and where the Court forms such an opinion the court may adjourn the hearing of the petition to allow the debtor an opportunity to enter into such of those arrangements as is specified by the Court in adjourning the hearing.”

19. The Section 15 letter is from Mr. Anthony Joyce of “AJ Debt Solutions” and is dated 2nd June 2021. Mr. Joyce is a solicitor who is registered as a personal insolvency practitioner, or “PIP”. He is a specialist in personal insolvency matters and is very experienced in that area.

20. In his letter Mr. Joyce sets out some background details in relation to Mr. Kruuda by which he acknowledges that the indebtedness of Mr. Kruuda is at least €40,000,000. He deals with the various insolvency solutions available under personal insolvency legislation and concludes that each of those is inappropriate to Mr. Kruuda's circumstances. He then expresses a view on Mr. Kruuda's COMI. He says as follows:

“Council Regulation EC 1346/2000 (Insolvency Regulation) provides that insolvency proceedings must be issued within the Member State of the Debtor's centre of main of interest (COMI). Since October 2020, Mr. Kruuda has been conducting all of his affairs from his rented home in Dublin. Mr Kruuda [sic]. Oliver currently has no other place of establishment within the European Union. It is therefore my position that Mr. Kruuda's centre of main interest (as determined in accordance with Article 3(1) of Regulation (EU) 2015/848 of The European Parliament and of The Council) is within Ireland and that therefore this is the most appropriate forum for his bankruptcy.”

21. As regards the statutory requirements for the debtor's petition, they are contained in Section 15 of the Bankruptcy Act 1988 (as amended) and Rules 26 to 27 of Order 76 of the

Rules of the Superior Courts. It is important to note that, while Section 14(1) suggests that where a creditor petition complies with the requirements of Section 11(1) of the Act the Court “shall” adjudicate the debtor bankrupt, this is not the position in relation to a debtor's petition. Section 15(1) of the Personal Insolvency Act says:

“Subject to subsection (2), where the petition for adjudication is presented by the debtor the Court may, where it considers it appropriate to do so, and where it is satisfied that the debtor is unable to meet his engagements with his creditors and that the requirements of section 11(4) and (5) have been complied with, by order adjudicate the debtor a bankrupt.”

It is clear, therefore, that the power of the Court to adjudicate on foot of a debtor's petition of bankruptcy is discretionary.

22. Order 76 Rule 26 requires at (1)(d) that:

“[W]here the Insolvency Regulation applies to the proceedings, [a debtor’s petition shall] contain a statement that, to the debtor's knowledge, no insolvency proceedings have been opened in respect of the debtor in any Member State or Member States (other than the State), or that such insolvency proceedings have been opened and if so, whether those insolvency proceedings are main proceedings, secondary proceedings or territorial proceedings.”

23. The debtor's petition is required to contain this statement. However, in Mr. Kruuda’s application there was no such statement on the petition, the verifying affidavit, or Mr. Joyce’s letter. As the Insolvency Regulation, as acknowledged by the petition, applied to the proceedings, there should have been a statement by Mr. Kruuda that to his knowledge no

insolvency proceedings had been opened in respect of him in any Member State. It may be that this omission was not deliberate; indeed, the paragraph in the petition quoted at para. 16 above is somewhat garbled and lacking in coherence. However, if the statement had been made, Mr. Kruuda would have had to consider, at least from 14th June 2021, when he was undoubtedly aware of the appointment of the interim trustee, whether such a statement was still accurate and whether the Court should be apprised of the Estonian proceedings and order of 7th June 2021.

24. Petitions for self-adjudication by a debtor are heard by the High Court in the Monday Bankruptcy list. They are checked by court officials prior to the hearing for compliance with the requirements of the Act, and if they are deemed to comply with those requirements, orders of adjudication are usually made without argument or controversy. The debtor is not obliged to advertise the petition in advance of its being heard, although he must undertake to advertise notice of the adjudication as directed by the Court. The listings of the debtor's petition in the Legal Diary are anonymised. Creditors are therefore not usually aware that a debtor is proposing to apply to court for an adjudication.

Evidence as to Estonian Law

25. Affidavits were sworn by a number of witnesses in relation to bankruptcy procedure in Estonia generally and as to the legal effect of the various orders of the Estonian courts, in particular the appointment of the interim trustee on 7th June 2021, and the effect of those orders in terms of the applicability of the Insolvency Regulation, that is to say the so-called “Recast Regulation” number 2015/848 of the European Parliament and of the Council.

26. The witnesses were all practising Estonian lawyers and no issue was raised by either side at the hearing in relation to their expertise or their ability to express views or give evidence in relation to topics under discussion. These witnesses were Dr. Mari Agarmaa who gave evidence on behalf of Best Idea; Mr. Veiko Vaske and Mr. Indrek Niklus, who gave evidence jointly both on affidavit and in person on behalf of Mr. Kruuda, and Mr. Madis Saar who gave evidence on behalf of Mr. Kruuda. All of these witnesses were examined by videolink on their affidavits at the hearing with the exception of Mr. Saar, who attended at the hearing and was examined in person before the Court.

27. At the heart of the dispute between the various Estonian lawyers was the central issue as to whether the appointment of an interim trustee by Tartu County Court on 7th June 2021 was a judgment opening main insolvency proceedings in accordance with Article 3 of the Insolvency Regulation. The experts expressed their views on affidavit and to the Court in this regard, the significance being that if, as Best Idea contends, the appointment of the interim trustee constituted a judgment opening insolvency proceedings, jurisdiction would reside with the Estonian courts. If it did not, the Irish adjudication would be first in time, occurring before the decision of the County Court in Estonia on 19th October 2021, and thus the Irish courts would have jurisdiction.

28. The debate between the experts centred around the following provisions of the Insolvency Regulation:

- Various of the Recitals;
- Article 1 dealing with the scope of the Regulation;
- Article 2, which deals with definitions of the terms in the Regulation;

- Article 2(5) as to what constitutes an “insolvency practitioner”;
- Article 2(7) which concerns the term “judgment opening insolvency proceedings”,
- Article 19 which deals with recognition of insolvency proceedings by Member States;
- Annex A to the Regulation which lists the insolvency proceedings for each Member State in accordance with Article 2. In the case of Estonia, the process of “*pankrotimenetus*” is listed. The experts agree that this means “bankruptcy proceedings”;
- Annex B which lists insolvency practitioners recognised for the purpose of Article 2(5). In the case of Estonia there is reference to “*pankrotihaldur*” which means “bankruptcy trustee”; and “*ajutine pankrotihaldur*” which means “interim trustee”.

29. Dr. Agarmaa gave her conclusions at paragraph 11.9 of her affidavit in the matter as follows:

“For the reasons set out in this report, the appointment of an interim trustee by the court order dated 7 June 2021 qualifies as the opening of interim bankruptcy proceedings for the purposes of Article 1(1)(a) of the Regulation and, in accordance with Article 2(7) of the Regulation, qualifies as a judgment opening insolvency proceedings as well as a decision to open main insolvency proceedings under Article 3(1) of the Regulation; under Article 2(8) of the Regulation, the time of the opening of proceedings is the time of the entry of the court order into force, i.e. 7 June 2021. Therefore, regarding Mr Kruuda, it can be concluded that the main insolvency proceedings within the

meaning of the Regulation were opened in Estonia on 7 June 2021. The given conclusion is further confirmed by Recital 15 of the Regulation.”

30. Mr. Vaske and Mr. Niklus submitted a detailed report refuting the analysis of Dr. Agarmaa. In response to paragraph 11.9, Mr. Vaske and Mr. Niklus stated as follows:

“The conclusion presented in subsection 11.9 of the Opinion of 19 November 2021 [of Dr. Agarmaa] is incorrect, because the court did not open bankruptcy proceedings specified in Annex A to EU Regulation 2015/848 by the ruling made by Tartu County Court on 7 June 2021 but performed merely a procedural act to appoint an interim trustee. Upon making the ruling of 7 June 2021 to appoint an interim trustee, Tartu County Court did not analyse whether it had jurisdiction to open main proceedings pursuant to Article 3(1) of EU Regulation 2015/848. Doing that was, indeed, not necessary, as it was not a judgment opening insolvency proceedings. Mrs M. Agarmaa’s interpretations are not in conformity with the provisions of the Estonian Bankruptcy Act or EU Regulation 2015/848.”

31. Mr. Saar, in an equally detailed opinion, agreed with Mr. Vaske and Mr. Niklus. He concluded as follows at paragraph 6.71 *et seq.* of his report:

“6.71 ...The decision of the first court to open proceedings should be recognised in other Member States without those Member States having the power to scrutinise that court’s decision (recital 65 of the Regulation). With that in mind, the purpose of Annex A of the Regulation is to state as clearly as possible what is to be considered ‘insolvency proceedings’ and thus the opening of insolvency proceedings in different Member

States. This conclusion should be as simple and automatic as possible, which is why a grammatical approach is to be favoured.

6.72. Therefore, if Annex A lists 'bankruptcy proceedings' for Estonia and Estonian law (BA) stipulates unambiguously that 'bankruptcy commence by the declaration of bankruptcy' there should be no need for further interpretation.

6.73. Moreover, in light of recital 65 and article 19 of the Regulation, the issue of whether the insolvency proceedings have been opened cannot depend on an interpretation and circumstances of a specific situation. Because the restraint on disposition of debtor's assets depend on the discretion of the court and is not an automatic outcome of appointing an interim bankruptcy trustee, the appointment of interim bankruptcy trustee cannot constitute the opening of insolvency proceedings within the meaning of the Regulation.

6.74. My conclusion is that the appointment of interim bankruptcy trustee does not constitute the opening of insolvency proceedings within the meaning of the Regulation is also supported by the analysis of the differences between the purpose and obligations of the interim bankruptcy trustee and the bankruptcy trustee and the differences between the consequences of appointing an interim bankruptcy trustee and declaring bankruptcy."

32. Dr. Agarmaa submitted a second affidavit in response to the reports of Mr. Kruuda's experts defending her views and her overall position. By the time her affidavit had been sworn in February 2022 both the County Court and the Circuit Court had ruled on the bankruptcy petition. Dr. Agarmaa commented as follows in her subsequent report:

“46. Under the decisions of the County Court and the Circuit Court, both courts have established that the centre of O. Kruuda’s main interest is situated in Estonia. This is an important conclusion in determining international jurisdiction.

47. My conclusions have been consistent with the positions of the County Court (on 19 October 2021), the Circuit Court (on 27 January 2022) and The Supreme Court... [as expressed in a previous case to which Dr. Agarmaa referred]. The positions of Mr. Saar, V. Vaske and I. Niklus are in direct conflict with the positions following from court decisions from all three tiers of the Estonian court system, that have entered into force.”

The Orders of the Estonian Courts

33. It is appropriate to say something about the substance of the orders of the Estonian courts. I should say that the excerpts from those orders quoted below are translations from the Estonian original; no exception was taken by any of the experts – all of whom, with the exception of Mr. Niklus, spoke fluent English – to their accuracy.

34. There was a judgment in favour of Best Idea against Mr. Kruuda on 30th April 2020 for just under €15,000,000. A bankruptcy petition by Best Idea against Mr. Kruuda was submitted on 14th May 2021. The order of Judge Ülle Raag of Tartu County Court of 25th May 2021 accepted the petition and ordered the Applicant to pay certain costs and expenses of the interim trustee.

35. On 7th June 2022 Judge Raag appointed an interim trustee. The Court stated *inter alia* as follows:

“...The court finds that an interim trustee has to be appointed in this matter. The bankruptcy petition does not specify any circumstances and other compelling reasons to refuse to appoint an interim trustee...”

An interim trustee must fulfil the tasks provided for in Section 22(2) of the Bankruptcy Act. An interim trustee shall prepare a report and submit a report and conduct other acts required for preliminary proceedings. The court asks the interim trustee to indicate in the report whether she deems it necessary to hear the bankruptcy petition at a court session. To date the Creditor has notified of their wish to hear the bankruptcy petition at a court session...

According to Section 17(3) of the Bankruptcy Act, the court shall suspend, upon the appointment of an interim trustee, any potential compulsory enforcement with respect to the Debtor's property, and shall apply a restraint of disposition based on subsections 20(1), (2), (3) of the Bankruptcy Act.”

36. As we have seen, Mr. Kaspar Lind - an attorney practising in Estonia - wrote to the Tartu County Court seeking to organise a court session to hear the bankruptcy petition. On 22nd June 2021 Mr. Lind wrote to the interim trustee regarding her request for information. Mr. Lind made clear in his opening paragraph of this letter that:

“...The client believes that responding to the request for information is not appropriate and reasonable because the court has wrongly accepted the bankruptcy petition of OÜ Best Idea. The court has no jurisdiction to hear the bankruptcy petition due to lack of jurisdiction.”

The Tartu County Court Decision

37. The interim trustee submitted her report on 30th June 2021. The Court, after hearing submissions from both parties, gave its decision on 19th October 2021 on Mr. Kruuda's petition for inadmissibility of the bankruptcy petition.

38. The Court addressed, at length, the adequacy of service of the bankruptcy documentation prior to the appointment of the interim trustee on 7th June. The Court had this to say about Mr. Kruuda's state of knowledge of the proceedings on page 5 of the judgment:

“On 14.06.2021, the court received an application from the representative of Oliver Kruuda, sworn advocate Kaspar Lind, who announced that [his firm] had entered into a client agreement with Oliver Kruuda to represent him in this civil matter. On 01.07.2021 the representative submitted to the court the position of Oliver Kruuda in this bankruptcy matter, to which, among other things, documents in English with a translation into Estonian had been appended. The appended translation (Annex 2) includes the translator's confirmation together with the date, which shows that the translation into Estonian of the document prepared on 2 June 2021 in Ireland had been digitally executed on 4 June 2021 in Tartu. It follows from this fact that the person named in the document - Oliver Kruuda - has sent the document after its preparation (it took place on 2 June in Ireland) to Estonia where the document was translated on June 4 in Tartu. In this situation, there is no reason to doubt that already on 1 June 2021, Oliver Kruuda was aware and had received the documents of the bankruptcy proceedings prepared with respect to him in Estonia (in the Tartu County Court). Kaspar Lind, sworn Advocate representing Oliver Kruuda, submitted a relevant application to the Court on 14.06.2021, incl. a requested determination of a court

session. The debtor's views in the bankruptcy matter were submitted to the Court on 01.07.2021. The bankruptcy proceedings have not taken place in absentia, and... [he] has participated in the proceedings through his representative.... It was not obligatory to respond to the Court's letter of 25.05.2021."

39. The Court addressed the issue of Mr. Kruuda's COMI at length and concluded that Mr. Kruuda's COMI was in Estonia. The Court considered the issue of which judicial act - Estonian or Irish - constituted the opening of main insolvency proceedings within the meaning of Article 3 and Article 19 of the Insolvency Regulation. At page 11 of the order it concluded as follows:

"In a situation where according to Article 2(7)(ii) and clause 5 of Regulation number 2015/848, the appointment of an interim trustee in accordance with Estonian law by order of 07.06.2021 must be considered initiating of the main insolvency proceedings, then in the present case the court must proceed from the fact that there were no other decisions on initiation of insolvency by that time and the Tartu County Court had to decide whether or not to declare the debtor bankrupt."

40. The Court ordered that Mr. Kruuda's petition for inadmissibility of the bankruptcy petition be dismissed, declared Mr. Kruuda bankrupt and appointed the interim trustee as Mr. Kruuda's trustee in bankruptcy. The Court also made a number of ancillary orders.

The Tartu Circuit Court Decision

41. Mr. Kruuda appealed to the Tartu Circuit Court. After detailed written submissions, that court gave its decision on 27th January 2022. The Court considered the issue of the appropriate interpretation of the Insolvency Regulation and, in particular, what constituted the

opening of main proceedings. It pointed out at paragraph 15 of its order that the debtor had, since 7th June 2021 “..lost the right to dispose of his property without the consent of the interim trustee and since 7 June 2021 the debtor’s assets and affairs are under the court’s control and supervision through the interim trustee appointed by the County Court”.

42. The Court considered Article 19 of the Insolvency Regulation and stated as follows at paragraph 16/17:

“...[T]he first subparagraph of Article 16(1) of the previous insolvency proceedings Regulation (Council Regulation (EC) No 1346/2000 of 29 May 2000) must be interpreted as meaning that a decision made by a competent court of a member state on the basis of a debtor's insolvency following an application for the opening of proceedings listed in Annex A to the EU Regulation, if it deprives the debtor the right of disposition and the liquidator listed in Annex C is appointed, constitutes a decision to open insolvency proceedings within the meaning of that provision.... The same view can be reached on the basis of Article 19(1) of the current EU Regulation and Annex B of the Regulation.

17. The debtor's position that the order of 7 June 2021 cannot be regarded as a decision to open insolvency proceedings within the meaning of Article 3(1) of the EU Regulation due to the absence of a procedure for the appointment of an interim trustee in Annex A of the EU Regulation is erroneous. The Circuit Court points out that the interim trustee was appointed by the County Court on the basis of the creditor's bankruptcy petition, which the creditor petitioned for the bankruptcy of the debtor, i.e., to conduct bankruptcy proceedings which are proceedings in Annex A of the EU Regulation. Pursuant to Subsection 15(1) of the Bankruptcy Act, a Court is required to appoint an

interim trustee upon acceptance of a creditor's bankruptcy petition if the exclusions specified in Subsection 15(3) of the Bankruptcy Act do not exist.”

43. The Court also addressed the submission on behalf of Mr. Kruuda that the County Court had failed to review jurisdiction on 7th June 2021 as required by Article 4 of the Insolvency Regulation. At paragraph 18 it stated:

“The debtor’s claim that the County Court failed to review jurisdiction in appointing an interim trustee in breach of Article 4 of the EU Regulation is incorrect. On 7th June 2021, the County Court appointed an interim trustee on the basis of Section 15 of the Bankruptcy Act based on the debtor's residence data known to the County Court at the time. The debtor did not wish to communicate with the creditors nor the County Court before the appointment of an interim trustee or to express his views, so the County Court did not have information at the time of the appointment of the interim trustee that the debtor had left Estonia and considered Ireland his place of residence. Therefore, the County Court did not have to refer to the EU Regulation when appointing an interim trustee.

Article 4(2) of the EU Regulation provides for the possibility to further review the jurisdiction of the court, even after the commencement of insolvency proceedings, and the County Court has verified the international jurisdiction in accordance with the Regulation when issuing the bankruptcy ruling.”

44. The Court addressed the question of COMI and found as follows at paragraph 20:

“The Circuit Court finds that the County Court correctly established that the debtor's centre of main interest is located in Estonia and that the Põlva courthouse of Tartu County Court has jurisdiction to conduct the debtor's main insolvency proceedings.

In the County Court proceedings the debtor only relied on the claim that he had been away from Estonia for more than 6 months. The debtor did not put forward any other factors which would have led to believe that the centre of the debtor's main interest is in Ireland. The debtor has not explained the circumstances of his move to Ireland or explained why in Estonia he hid the fact of moving to Ireland from the court and the creditors, and in the Ireland the fact that he had been appointed an interim trustee in Estonia.”

45. The Court goes on at paragraph 24 to refer to a range of circumstances relevant to the debtor's COMI and concludes as follows:

“The above confirms that the debtor continues to be related to Estonia both via family and economic ties, as well as by being a member of the management board of various bodies, also because of real estate. The need to participate in court disputes, including in the bankruptcy proceedings of AS Rubla (bankrupt), as well as in criminal proceedings, cannot be ignored. In the opinion of the Circuit Court, in determining the centre of the debtor's main interests in the present case, it must be taken into account that the debtor is a natural person, but a person whose obligations have arisen from long-term business activities in Estonia. After the obligations arose, he did not try to find solutions, the debtor avoided negotiations with creditors and moreover he hid his location with the desire to entirely evade the obligations. In a situation where the debtor

left Estonia for Ireland in order to evade obligations, the Circuit Court cannot take the position that the centre of the debtor's main interests is not in Estonia."

46. Mr. Kruuda appealed the decision of the Circuit Court on 4th February 2022. The Supreme Court refused "to accept Oliver Kruuda's appeal on the grounds that there is no right to appeal and returns the appeal to the appellant without hearing the appeal".

Expert Evidence at the Hearing

47. On cross-examination, the experts giving evidence on behalf of Mr. Kruuda made it clear that they felt that the Estonian courts had fallen into error, particularly in terms of their decision that the appointment of the interim trustee on 7th June 2021 constituted the opening of main proceedings. Mr. Vaske was questioned by counsel for Best Idea about the Court rulings:

"MR. VASKE: ...I would say that the Courts' decisions, in our opinion, do not give the whole picture or the full analysis, full assessment of these legal questions.

Q. Is it too simplistic to say that your position is that these decisions are wrong?

MR. VASKE: I would say that I see certain grounds to counter the statements of reasons of the courts that concerns the conclusions of the decisions which are according to Estonian procedural law they are only part of the Court decision which has binding legal effect. I would say that in the conclusions the Courts have actually not solved the legal questions which, I understand, are the main question discussed at the moment.

Q. You are asking, it seems to me, an Irish Judge to accept that what a first instance Judge has said, a Court of Appeal has said and a Supreme Court who has declined to

hear a further appeal are wrong and do not represent Estonian law? Is that too simplistic?

MR. VASKE: *Yes, I would say it is a bit simplistic but, as I said, we should draw a line between the conclusions of the Courts' decisions and the reasoning of the Courts' decisions. Based on the conclusions of the Courts' decisions, the binding power of the decisions I actually don't see that our opinion has been, how can I say, proven wrong."*

[Transcript, Day 1, p. 98, line 27 to p. 99, line 23]

48. Mr. Saar was even more blunt in his assessment of the rulings of the Estonian courts:

"Q. Accordingly, there was a very net legal issue: does the 7th June decision represent, in Estonian terms, in compliance with EU law, the opening of main proceedings?"

A. Yes.

Q. That was found on 19th October is that not so?

A. Sorry, I didn't?

Q. That was found on the decision of 19th October?

A. Yes, that is the decision of the Estonian Courts.

Q. And that was confirmed on appeal on the 27th January?

A. It is my understanding, yes.

Q. Is it your understanding also, as Dr. Agarmaa says, that in coming to that decision reliance was based upon the Supreme Court decision, which you sought to explain moments ago to the Judge?

A. I believe the judgment was referred, yes.

Q. Yes. You will have seen my line of questioning to your Estonian colleagues in Nove, Mr. Vaske and Mr. Niklus, in which I said this represents Estonian law in this case, namely that an Estonian Court confirmed on appeal, has said that this particular decision represented for the purpose of Estonian law, the opening of main proceedings?

A. It is my opinion that it represents the view of Estonian Courts on the Estonian law but it does not mean that this is the actual content of Estonian law.

In my view, the law was applied wrongly.

Q. Okay. But as a matter of fact, the organs of Estonian law have decided that this was main proceedings?

A. That is correct.

Q. You disagree with that?

A. I disagree.

Q. But you recognise that this was a reasoned decision confirmed on appeal?

A. I agree that it was a reasoned but not well-reasoned decision of Estonian Court.”

[Transcript, Day 2, p. 31, line 9 to p. 32, line 15]

49. Dr. Agarmaa was cross-examined, and gave evidence in accordance with the affidavits she swore. In essence her position is, as I have noted above, that her conclusions are correct and are consistent with the decisions of the various Estonian courts concerned in the matter.

The Material Non-Disclosure Issue

50. I am of the view that the application of Best Idea to set aside the adjudication order of 28th June 2021 on the grounds of alleged material non-disclosure should be addressed first, in that the necessity for a detailed consideration of whether this Court was precluded from making the order of adjudication by reason of the prior decision of Tartu County Court of 7th June 2021 only falls to be considered if the application on the grounds of material non-disclosure is unsuccessful.

51. The first issue to be considered is whether this Court has jurisdiction to entertain such an application. Detailed written submissions were made on behalf of Mr. Kruuda which suggested that the Court has no such jurisdiction.

52. Section 16 of the Bankruptcy Act 1988 (as amended) provides a procedure whereby a debtor who has been adjudicated bankrupt on foot of a creditor's petition can apply to court to show cause against the validity of the adjudication. The Act does not make any provision for a formal review by the Court of a self-adjudication by a debtor.

53. On the other hand, Article 4 of the Insolvency Regulation requires the Court seised of a request to open insolvency proceedings to examine of its own motion whether it has jurisdiction pursuant to Article 3 and to specify, in its judgment, the grounds on which jurisdiction is based. Article 5 of the Insolvency Regulation provides that a debtor or creditor can challenge the decision opening insolvency proceedings “on grounds of international jurisdiction”.

54. Section 85B of the Bankruptcy Act provides at subsection (1) as follows:

“(1) A person shall be entitled to an annulment of his adjudication-

(a) where he has shown cause pursuant to section 16, or

(b) in any other case where, in the opinion of the Court, he ought not to have been adjudicated bankrupt.”

I accept the submission on behalf of Mr. Kruuda that this section applies only to an application by the bankrupt and cannot be invoked by a creditor.

55. Section 135 of the Act in the “Miscellaneous Provisions” part of the Act simply states that: “[t]he Court may review, rescind or vary an order made by it in the course of a bankruptcy matter other than an order of discharge or annulment”. The section is very general and is devoid of context. There have been no reported decisions of which I am aware which explore the ambit of this section. In any event, no such authorities were cited to me.

56. There is, however, an established jurisdiction in the Court to review orders on the grounds of material non-disclosure. The *locus classicus* for this principle is the decision of Clarke J. (as he then was) in *Bambrick v Cobley* [2006] 1 IRLM 81. In that case the High Court made various orders on foot of an application by the Plaintiff for an interim Mareva injunction. At the hearing of the interlocutory injunction the Defendant claimed that the Plaintiff had failed to disclose, when applying for the interim order, the fact that the Plaintiff and the Defendant had had detailed discussions concerning the terms on which monies might be retained by the Defendant to meet the claim and, in particular, a proposed undertaking of the Defendant in this regard.

57. Clarke J. found that, in the context of an application for an injunction, the Court has a discretion, in cases where a failure to disclose has been established, to refuse an interlocutory

injunction and discharge the interim injunction. In discussing the criteria for exercising this discretion, he said as follows:

“...Clearly the court should have regard to all the circumstances of the case. However, the following factors appear to me to be the ones most likely to weigh heavily with the Court in such circumstances:

- 1. The materiality of the facts not disclosed.*
- 2. The extent to which it may be said the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the Plaintiff was, nonetheless, significantly culpable in failing to disclose.*
- 3. The overall circumstances of the case which lead to the application in the first place. Applying those criteria to the facts of this case it does seem to me that the non-disclosed facts were of significant materiality. For the reasons set out above there is a very real possibility that the court will either have made no order or potentially required short service and considered an order only in respect of the significantly lesser sum had it been apprised of the full facts.”*

58. There is ample authority for the proposition that the discretion to discharge orders due to established non-disclosure extends beyond injunctions and there are instances in the sphere of insolvency in which that discretion has been invoked. In *re James Nugent (a debtor)* [2016] IEHC 127, an application was made to the High Court for an order setting aside an extension

of a protective certificate granted *ex parte* on the grounds that the *ex parte* application by the PIP was made with a lack of candour. The application was made pursuant to the inherent jurisdiction of the Court and/or Section 97 of the Personal Insolvency Acts 2012-2015 and/or Order 76A, rule 19 of the Rules of the Superior Courts.

59. Baker J. considered the nature and scope of the Court's jurisdiction to make such an order and stated as follows:

“14. Thus the scheme of the legislation and the Rules of the Superior Courts provide for the making of an application ex parte for the extension of a protective certificate. Practice and procedure in the High Court makes provision for the granting of relief ex parte in various types of applications, and it cannot be said that the form of application for extension of the period of a protective certificate under s. 95 (6) of the Act of 2012 arises by virtue of a unique statutory provision, or is a unique jurisdiction of the court.

15. The court, in making an order for the extension of a protective certificate, is continuing the umbrella of protection afforded to a debtor by virtue of the certificate such that his/her creditors may not proceed to seek judgment or enforce any judgment or take any other action on foot of a debt. The period of protection is a matter of significant benefit to a debtor, and the extension of the period accordingly also offers a measure of advantage in the same way. The statutory requirement that application be made to the court for the extension of a protective certificate, and the fact that the legislature did not provide for an automatic once-only, or further, extension, imports a requirement that the court be satisfied that the extension is merited, not merely on account of the way in which the debtor has engaged with the insolvency process during the period of the original certificate, but whether the extension of the period is likely to

prove beneficial to the process as a whole. This is apparent from the express language of s. 95(6)...

16. The extension of the protective certificate affects the rights and interests of creditors. Given that all creditors are impacted to the same extent in that none of them may seek enforcement or judgement during the period, there is no question of the loss of priority during the period of protection. However, there may be many reasons why a delay in obtaining or recovering judgment is prejudicial to a creditor.

*17. I consider, accordingly, that the making of an order extending the period of the protective certificate is a matter which engages the constitutional guarantee of fair procedures. This arises by virtue of the presumption of constitutionality afforded to post 1937 statutes as identified by the Supreme Court in *East Donegal Co-operative v. Attorney General* [1970] I.R. 317, and has resulted in an approach to statutory interpretation which has guided the approach of the court in considering exercise of statutory powers.*

*18. Whether the court had an inherent jurisdiction to set aside an order made ex parte has been considered by McCracken J. in *Voluntary purchasing groups Inc. v. Insurco International Limited & Anor* [1995] 2 ILRM 145 in the context of the old O. 39 which dealt with procedures under the *Foreign Tribunals Evidence Act 1856*. He took the view that the court had an inherent jurisdiction to set aside an order made ex parte for reasons explained as follows:*

'In my view however quite apart from the provisions of any rules or statute, there is an inherent jurisdiction in the Court in the absence of an express statutory

provision to the contrary, to set aside an Order made ex parte on the application of any party affected by that Order. An ex parte Order is made by a judge who has only heard one party to the proceedings. He may not have not have had the full facts before him or may even have been misled, although I should make it clear that is not suggested in the present case. However, in the interests of justice it is essential that an ex parte Order may be reviewed and an opportunity given to the parties affected by it to present their side of the case or to correct errors in the original evidence for submissions before the Court. It would be quite unjust that an Order could be made against a party in its absence and without notice to it which could not be reviewed in the application of the party affected.'

19. *The recent and authoritative judgment of Hogan J. in Re Belohn Limited and Merrow Limited [2013] IEHC 157 provides a helpful summary of the principles, and a guide as to how those principles impact upon the approach of a court to an application to set aside an ex parte order. Hogan J. held that there is to be imported an implied right in any party affected by an order made ex parte which affects the interests and rights of a party to apply to set aside or vary such order. In para. 13 of his judgment Hogan J., having considered the judgment of the Supreme Court in East Donegal Co-operative v. Attorney General and Dellway Investments Limited v. National Asset Management Agency [2011] IESC 14, [2011] 4 I.R. 1, said the following:*

'Applying these principles, it is plain that any interim order made ex parte interferes with the contractual rights of secured creditors, even if the examinership procedure does not present the reputational issues which were

also in view in both Dellway Investments and Custom House Capital. The mere fact that the order interferes with a constitutionally protected right - whether as a property right (such as a contractual right of that kind) or a right to fair procedures - does not in and of itself make this process unconstitutional, for as Costello J. put it in Daly v. Revenue Commissioners [1995] 3 I.R. 1, 11, 'legislative interference in property rights occurs every day of the week and no constitutional impropriety is involved.' But all of this does mean that any interim order made in examinership process is of a necessity a provisional one, precisely because the court could not constitutionally be given the power by means of a final order to override such due process and property rights prior to at least hearing the affected parties and for all the reasons given by the Supreme Court in D.K. and applied by that Court in Dellway Investments.'

20. I adopt that statement of principle and practice of Hogan J. in Re Belohn Limited and Merrow Limited, and consider that it has the effect in the present case that the order made by me on 10th February, 2016 must be seen as one in respect of which application to set aside may be made. I consider therefore that the High Court does have a power to set aside an order extending the period of a protective certificate and this is a concrete realisation of the constitutional imperative of fair procedure and arises from the presumption that the Act of 2012 is constitutional in its impact and effect."

60. Baker J. goes on to say at paragraph 25:

"Hogan J. in Re Belohn Limited and Merrow Limited, having determined that the application before him was permissible, did not expressly deal with the question of whether the statutory provisions allowing for the appointment of an interim examiner

would be determinative of his approach to the application to set aside. I consider however that there is implicit in his finding in that case, where he did set aside the appointment of an interim examiner on the grounds of non disclosure, that the order to set aside was ‘essentially restitutionary in nature’ as it involved the setting aside of an order which was tainted by non disclosure. His judgment it seems to me is a strong authority for the proposition that the application to set aside is determined by the court on broad principles of fairness and the solemnity of the court and its process. The decision of Hogan J. guides my approach to the question in the present case, and I consider that my jurisdiction is not constrained by the statutory provisions contained in s. 97, and must be seen in the broader context of the requirement of candour and disclosure in *ex parte* applications, and because the operation of a constitutionally complete *ex parte* procedure must involve a degree of respect for the court by those who make such application.”

61. The Court endorsed the principles set out by Clarke J. in *Bambrick v. Cobley* and examined the circumstances in which the PIP’s application had been made in light of the application by the creditor to set the extension order aside. The Court concluded as follows:

“48. I consider that the PIP failed to make appropriate disclosure and that some of the matters are matters which might have affected my mind in hearing the application for the extension of the protective certificate. In particular, I consider that the PIP has failed to identify with any clarity whatsoever the precise basis on which Mr. Nugent claimed to be close to achieving a substantial amount to meet a personal insolvency arrangement. The information furnished is at best incomplete, it is to a large extent so unclear as to be difficult to understand, and it is based on a number of assumptions,

including assumptions made more than two years ago, that have not yet come to fruition. Furthermore the documentation contradicts that presented to the hearings in the bankruptcy court. That is a factor that might have influenced my approach to an extension of the protective certificate, as I was aware that the debtor wished to avail of a personal insolvency arrangement to avoid bankruptcy.”

62. At paragraph 51 *et seq.* Baker J. says:

“It is not necessary for the purposes of this application that I should take a view as to whether the PIP, or the debtor, deliberately sought to present the matter to me in a way that points to a lack of bona fides. As a matter of law the test before me is whether there was a significant and material failure to disclose matters which should have been disclosed and the test is an objective one as to what could have influenced me in the exercise of my jurisdiction in making the order ex parte. I am satisfied that the test is met.

52. *It is clear from the judgment of Clarke J. in Bambrick v. Cobley that the court has a discretion, in cases where failure to disclose has been established, as to what order it will therefore make. The extent to which an applicant is culpable in respect of a failure to disclose is one factor and as he put it:*

‘a deliberate misleading of the Court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission.’

Clarke J. identified that there could be intermediate cases, and one factor was the extent of materiality.

53. I regard the non-disclosure in this case as being of matters which were material in the sense in which I have explained above. I also regard the failure of full and frank disclosure to be culpable, but in that I take my guidance from the judgment of Hogan J. in Re Belohn Limited and Merrow Limited where he accepted that the non-disclosure had come about as a result of a bona fide error and oversight and that no personal blame should attach to the petitioners or their advisors, but regarded the ‘objective relevance and materiality’ of the matters not disclosed as being such that it would be unjust to allow the order to stand. Blameworthiness, then, does not have to be established as personal blameworthiness, and it is to be tested objectively in the light of the materiality of the matters not disclosed.”

63. Counsel for Best Idea in the present case also relies on dicta of Costello J. (as he then was) in *re Wogan’s (Drogheda) Limited* (unreported) delivered on 9th February 1993 in which the Court recognised that a petitioner has a duty to act in good faith throughout the presentation and hearing of a petition for examinership. At page 6 of the judgment Mr. Justice Costello said as follows:

“When an application is made by a company for a protection order under the 1990 Act it seems to me that the Directors and all those associated with the application (including their professional advisers) are obliged to exercise the utmost good faith and that the statutory duty exists not just on an ex-parte basis application to appoint an interim examiner but also on the application itself. This is because (a) of necessity the Court must depend to a considerable extent on the truth of what it is told by the company and (b) because of the potential injustice involved in the making of a protection order when the proper course is to wind up the company. This duty involves an obligation to

disclose all relevant facts material to the exercise by the Court of its discretion. A fortiori, it involves a duty not to deliberately mislead the Court by false evidence.

Not every breach of duty to exercise good faith will amount to an abuse of the court's processes. But where an application for a protection order is made on evidence which is known to be false this amounts to an abuse of the process. When an application is made for an improper reason, this also amounts to an abuse of the processes of the Court."

64. Counsel describes this principle as a "close analogy"; it should be noted that the case predated the subsequent statutory recognition of a duty of good faith in the prosecution of examinership proceedings. It is submitted that a similar duty applies to a debtor making an *ex parte* application for adjudication as a bankrupt.

65. The procedure under the Bankruptcy Act and the Rules of the Superior Courts whereby a debtor applies for an order adjudicating him or her a bankrupt is relatively uncomplicated. The debtor must lodge a petition and verifying affidavit in a format set out in Appendix O to Order 76. He must provide certain undertakings. He must make a statement in relation to the applicability of the Insolvency Regulation and if, as in the present case, he maintains that his COMI is in the State, he must set out the facts and grounds supporting those statements.

66. The debtor is not required to advertise the petition. No creditors are placed on notice of it. The petition is scrutinised by court officials for basic compliance with the Act and Rules and is then listed before the Court. If the order is made, certain consequences flow from the order as a matter of law. Most notably:

- The bankrupt's property vests in the Official Assignee for the benefit of the creditors (Section 44(1));
- Creditors cease to have any remedy against the bankrupt, apart from their rights under the Act, and no proceedings may be commenced against the bankrupt save with leave of the Court (Section 136);
- No distress can be levied on the goods of a bankrupt after adjudication (Section 139);
- The bankrupt obtains an automatic discharge on the first anniversary of his adjudication, save in certain circumstances (Section 85(1));
- The order of adjudication is a judgment opening main proceedings for the purpose of Article 2(7) of the Insolvency Regulation. On the making of such an order, the jurisdiction of Ireland in the matter must be recognised in all of the Member States.

67. As we have seen, Section 15(1) makes it clear that the Court has a discretion whether or not to make the order. It is not a “tick-the-box” exercise. The Court, in exercising its discretion, is entirely reliant on information supplied by the debtor. Notwithstanding that the creditors are fundamentally affected by the Adjudication Order, the Court does not have the benefit of input from any creditor as to how it should exercise its discretion.

68. Also, while bankruptcy as a status is generally seen by the public as something to be avoided at all costs, for someone who is deeply insolvent and who is not in a position to avail of the procedures under personal insolvency legislation and who perhaps is being subjected to severe pressure by creditors, bankruptcy may be something of a “safe haven” in which these

pressures are relieved and an orderly work-out of one's affairs may be obtained with the prospect of discharge in a year's time.

69. The bankruptcy regime in Ireland has developed, in a relatively short period of time, from one of the most punitive and long-lasting in Europe to one of the most benign from the point of view of debtors. There are many instances of foreign debtors looking to establish COMI in this jurisdiction in order to avail of the Irish system, as a perusal of the weekly bankruptcy list would show. In principle, there is absolutely nothing wrong with a debtor doing this.

70. I am satisfied, however, that the *Bambrick v Cogley* principles apply to *ex parte* applications in bankruptcy and in particular to applications by debtors for an order of adjudication. The reasoning set out by Baker J. in *re Nugent* in relation to personal insolvency applications by a PIP, in my view, applies *a fortiori* to Section 15 applications by debtors. The Court is required by Article 4 of the Insolvency Regulation to examine whether it has jurisdiction pursuant to Article 3; in doing so, it is entirely reliant on information supplied by the bankrupt. Any factors to which the Court would be likely to have regard in coming to its decision as to its jurisdiction are significantly material to that decision and must be disclosed.

71. In this regard, I note the decision of the Chancery Division of the High Court of England and Wales in *Miller v McFeely* [2012] EWHC 4409 in which Mrs. Justice Proudman, commenting on her rescission of a bankruptcy order, stated at para. 7 that:

"One of the principal reasons for my decision was the fact that Mr. McFeely's bankruptcy petition was in the nature of an ex parte application and he was, therefore, under a duty of full disclosure to inform the Court of all relevant matters."

72. The *Bambrick* principles require a consideration of “the overall circumstances of the case which led to the application in the first place”. While these are set out above, the following circumstances are of particular relevance:

- While the County Court was of the view that Mr. Kruuda was aware of the Estonian bankruptcy proceedings as early as 1st June 2021, Mr. Kruuda was certainly aware of those proceedings no later than 14th June 2021 when his Estonian lawyer communicated with the Tartu County Court on his behalf;
- The Estonian lawyer acting for Mr. Kruuda wrote to the interim trustee on 22nd June 2021 in the terms which I have set out above. The letter submitted that Mr. Kruuda’s COMI was in Dublin and set out the legal basis for this contention;
- No reference to the Estonian bankruptcy proceedings was made in Mr. Joyce's Section 15 letter of 2nd June 2021. It expressed the view that Mr. Kruuda's COMI was in Ireland;
- Mr. Kruuda did not apprise the High Court, on or before 28th June 2021, that bankruptcy proceedings had been initiated against him in Estonia on 14th May 2021; that the bankruptcy petition had been accepted by Tartu County Court on 25th May 2021; that an interim trustee had been appointed by Tartu County Court to his estate on 7th June 2021; that the Court had prohibited him from disposing of any assets, without the consent of the interim trustee; or that an Estonian lawyer acting on his behalf had communicated with the Court and the interim trustee to contest the jurisdiction of the Tartu County Court.

73. Mr. Kruuda was cross-examined closely on his motivation and state of knowledge regarding the Estonian and Irish proceedings. He denied the propositions put to him by counsel for Best Idea that he knew that the Irish court would have wanted to know about the appointment of the interim trustee or that he knew that it would upset his plan to become bankrupt in Ireland if the Irish court learned of the appointment.

74. He said that while Mr. Joyce assisted in preparing the Irish application, he had no contact with Mr. Joyce between 14th and 28th June. He said that he was advised by his Estonian lawyer, Mr. Lind, that the Estonian situation was “not a problem” as regards the Irish application. He denied the suggestions by counsel that the Estonian situation would “at the very least be relevant to an Irish court” or that “he consciously decided not to tell the Irish court”.

75. In my view the matters relating to the Estonian proceedings which were not divulged to the High Court were highly material to the exercise of its discretion. The High Court is obliged to examine its jurisdiction of its own motion with respect to the Insolvency Regulation. In the case of a foreign national with very significant debts, and who was asserting that his COMI was in Ireland on the basis of approximately eight months' residence, it was particularly important that the Court could rely on the veracity and completeness of the assertions and information regarding COMI presented to it.

76. The facts that bankruptcy proceedings had been initiated in another Member State, an interim trustee appointed and a lawyer instructed on behalf of the debtor to contest jurisdiction were all matters of high relevance to the Court's deliberation. If the Court had been apprised of these factors, being conscious of its Article 4 obligation, it would have been very likely to either adjourn the Irish petition until the Estonian proceedings had resolved the issue of

jurisdiction, or at the very least would have adjourned the petition to allow Best Idea to appear before the Court and express its views as to the appropriate course.

77. The impression was given in the Irish petition that the issue of COMI was straightforward when it most certainly was not. To the certain knowledge of Mr. Kruuda, a creditor to whom he owed €15,000,000 was of the view that Estonia was the appropriate jurisdiction. The decision of Mr. Kruuda not to apprise the Irish court of the Estonian proceedings deprived it of information essential to an informed exercise of its discretion.

78. Mr. Kruuda denies any culpability for this state of affairs. He says that he was assured by Mr. Lind that the Estonian proceedings were “not a problem” (see Day 2 of the transcript page 74, lines 14 to 16) and that he asked Mr. Lind, when he found out about the Estonian proceedings, what he should do and Mr. Lind said “do nothing”. In this regard see Day 2, page 77 lines 3 to 16. His position is that on this basis he did not consider that he should apprise the Court of the Estonian proceedings. Significantly, he did not contact Mr. Joyce, who had prepared the Section 15 letter and submitted the bankruptcy documentation on 11th June, for advice on this issue.

79. *Bambrick* suggests that the Court must take into account “the extent to which it may be said that the Plaintiff is culpable in respect of a failure to disclose”. Mr. Kruuda is an experienced businessman who had amassed considerable debts and had been facing bankruptcy for some time. He is well used to taking appropriate advice from lawyers. He moved to Ireland to avail of our relatively benign bankruptcy regime. On any view, he must have known that the initiation of bankruptcy proceedings against him in Estonia and the appointment of an interim trustee was potentially relevant to the establishment of his COMI

before the Irish court. Indeed, it is clear that he did know, as by his own evidence he sought reassurance from Mr. Lind in this regard.

80. While Mr. Lind is no doubt a skilled and experienced practitioner of Estonian bankruptcy law, there is no evidence before me which would suggest that he has any familiarity or expertise in relation to Irish bankruptcy law or the practice and procedure of the Irish courts. It does not seem to me that Mr. Lind was in a position to advise Mr. Kruuda as to the information which it would be necessary to put before the Irish court. Mr. Joyce would have been in a position to give this advice. To seek his view would have been a particularly appropriate course given that the Section 15 letter of 2nd June written by Mr. Joyce, which expressed his views on Mr. Kruuda's COMI, was put before the Court to assist in deciding that Mr. Kruuda's COMI was in Ireland.

81. However, Mr. Kruuda chose not to consult Mr. Joyce between the 14th and the 28th. As counsel for Mr. Kruuda was keen to establish this fact in evidence (see transcript, Day 2, page 78, lines 9 to 24), presumably it is sought to suggest that there was no advice to him that it would appropriate be apprise the Irish court of the Estonian bankruptcy or the appointment of the interim trustee, and as his evidence is that there was no conscious decision to withhold the information, his culpability in refraining from putting this information before the Court is low or non-existent.

82. I had the benefit of seeing and hearing Mr. Kruuda give evidence in person and was thus in a position to evaluate that evidence. It may be that he did not make a conscious decision as such to withhold information about the Estonian bankruptcy from the Irish court. However, he must have known that the appropriate course would be to consult an Irish lawyer about whether this information should be brought to the attention of the Court. In my view, it is

more likely that Mr. Kruuda's conscious decision was not to seek advice in this regard in case the advice caused problems for his application to the Irish court. While Mr. Kruuda may not have had advice that he should apprise the Irish court of the Estonian proceedings, his failure to do so was not what Clarke J. in *Bambrick* called "an innocent omission".

83. Even if I am incorrect in this inference, I agree with the conclusion expressed by Baker J., following Hogan J. in *Belohn* that what must be considered is the "objective relevance and materiality" of the matters not disclosed. As Baker J. commented at paragraph 53, blameworthiness "does not have to be established as personal blameworthiness, and it is to be tested objectively in the light of the materiality of the matters not disclosed".

84. I have therefore concluded that:

1. The circumstances of the Estonian bankruptcy and appointment of the interim trustee were highly material to the High Court's obligation to satisfy itself that it had jurisdiction and the discretion of the Court as to whether or not to make the order of adjudication;
2. This information should have been disclosed to the High Court when Mr. Kruuda's application came before it;
3. It is probable that the High Court, if apprised of the Estonian bankruptcy and surrounding circumstances, would not have made the adjudication order on 28th June 2021 but would, at minimum, have sought further information and would likely have insisted that Best Idea be informed of the Irish application and be made a notice party to it;

4. Mr. Kruuda is significantly culpable in failing to bring the Estonian bankruptcy and its surrounding circumstances to the Court's attention.

85. In all the circumstances, I consider that I should exercise my discretion to rescind the order of adjudication by this Court of 28th June 2021. I do so pursuant to the inherent jurisdiction of the Court and consider that such order can also be made pursuant to the Court's power under Section 135 of the Act to review or rescind an order made in the course of the bankruptcy. I informed the parties of my decision on the delivery of the *ex tempore* judgment on 27th June 2022, and made the order rescinding the order of adjudication on that date.

The Jurisdiction Issue

86. In view of the finding on material non-disclosure and the order I propose to make, I do not require to express a view on the jurisdiction issue. However, I think it is appropriate, particularly given the time and resources expended on the issue by the parties and the Court, to say something about the Court's approach to the issue.

87. The question of whether the decision of the Tartu County Court constituted the opening of main proceedings has been an issue throughout this application. Mr. Kruuda at paragraph 15 of his first affidavit of 26th October 2021 said that: "...it is not accepted that the appointment of an interim trustee is the opening of main proceedings in Estonia", and at paragraph 19 stated his intention to appeal the ruling of 19th October 2021. Ms. Agarmaa gave her opinion in November 2021 on behalf of Best Idea and we have seen the way the expert evidence progressed after that.

88. Mr. Kruuda submits that this Court should find that the ruling of the Tartu County Court of 7th June 2021 did not constitute the opening of main proceedings and that the High Court

was not precluded from making the order of adjudication three weeks later. As we have seen, Mr. Vaske and Mr. Niklus - and also Mr. Saar - acknowledge the decisions of the Tartu County Court of 19th October 2021 and the Circuit Court decision of 27th January 2022 but disagree with those decisions. Mr. Saar bluntly in cross-examination stated: “In my view the law was applied wrongly”. He accepted that the decision of the Tartu County Court “was a reasoned decision confirmed on appeal” but opined that it was “not well reasoned”.

89. There can be no doubt, on perusal of the orders of 19th October 2021, that the Tartu County Court addressed in detail the issues of the determination of Mr. Kruuda’s COMI and the issue of the Court's jurisdiction in relation to the hearing on 7th June 2021. The Court held that Mr. Kruuda’s COMI was in Estonia and that the appointment of the interim trustee on 7th June 2021 must be considered the initiation of main insolvency proceedings. The findings of Judge Raag on 19th October 2021 were the subject of an appeal to the Tartu Circuit Court. There were exhaustive written submissions to that court on the issues. The Tartu Circuit Court - a court of three judges - gave a detailed judgment in which the case made by Mr. Kruuda was refuted and the decision of 19th October 2021 upheld. As we have seen, the Supreme Court of Estonia refused to accept the appeal.

90. It is in these circumstances that the Court is now asked by Mr. Kruuda to examine the decision of 7th June 2021 and to form its own view as to whether that decision constituted the opening of the main proceedings.

91. The Insolvency Regulation is based on the fundamental principle that the Member State in which main insolvency proceedings are first opened has jurisdiction and that this jurisdiction must be respected by other Member States. Article 5 of the Insolvency Regulation makes clear that a creditor can challenge the decision opening main proceedings “on the

grounds of international jurisdiction”. This must be done in the courts of the country claiming jurisdiction. A person who considers that main proceedings should have been commenced in a different Member State cannot simply move to bankrupt the debtor in that other State. This would be contrary to what the Virgos-Schmit Report – which has long been recognised by Irish courts as an authoritative guide to interpretation of the Insolvency Regulation - referred to as “...the principle of Community trust, according to which once the first court of a Contracting State has adopted a decision, the other States are required to recognize it” (Paragraph 79). This principle is embodied in Recital 65 of the Insolvency Regulation - which was recognised by Mr. Saar in his opinion - and is as follows:

“This Regulation should provide for the immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which fall within its scope, and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the Member State in which the proceedings were opened extend to all other Member States. The recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise that court’s decision.”

92. Whatever about what was the situation when the matter came before Humphreys J. on 28th June 2021, by the time it fell to me to decide the present application, the issue of whether

or not a decision had been made on 7th June 2021 to open main insolvency proceedings had been fully ventilated in the Estonian courts. That process had come to end with the refusal of the Estonian Supreme Court to accept an appeal from the Circuit Court. Having lost in Estonia, Mr. Kruuda now resists the present application by inviting the Court to conduct its own examination of the decision of the Tartu County Court of 7th June 2021 and to come to the opposite conclusion to that reached by the Estonian courts.

93. It seems to me that to do so would be improper and entirely contrary to the principle that the jurisdiction of the Member State of the courts first seised must be respected. An examination of the correctness of the decision of 7th June 2021 has been conducted by the appropriate courts in Estonia. It is not for this Court to second-guess the findings of the Estonian courts. To ignore their findings or to proceed as if these decisions did not exist would be to ignore reality and would be entirely contrary to the system of automatic recognition of jurisdiction provided by the Insolvency Regulation.

94. Likewise, I consider that it would be entirely inappropriate for me to express any opinion on whether the views of the experts for Mr. Kruuda were preferable to those of Dr. Agarmaa. Mr. Kruuda has availed fully of his right to appeal the decision of 7th June 2021 in Estonia. That process came to an end with the decision of the Tartu Circuit Court in February 2022 and the refusal on 18th April 2022 of the Supreme Court of Estonia to accept Mr. Kruuda's appeal of the Circuit Court decision. This Court must respect that process and decline to embark on a further examination of the issues.