THE HIGH COURT

[2013 No. 90 COS]

IN THE MATTER OF THE HARLEY MEDICAL GROUP (IRELAND) LIMITED

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2012

Judgment of Ms. Justice Laffoy delivered on 16th day of May, 2013.

The petition

1. The petition the subject of this judgment seeking to wind up the Harley Medical Group (Ireland) Limited (the Company) disclosed the facts set out below, which were amplified by other documents put before the Court:

(a) On 26th February, 2013 the Company presented the petition to the Court. The Company was incorporated in the British Virgin Islands under the name The Harley Medical Group (Overseas) Limited on 28th February, 1995 and it changed its name to its present name on 2nd July, 1999.

(b) On 13th October, 1999 the Company was registered in the Companies Registration Office (CRO) in this jurisdiction as an external company with a branch established in the State pursuant to the European Communities (Branch Disclosure) Regulations 1993. A CRO search exhibited in the verifying affidavit referred to later discloses that the registered office is 5, Herbert Place, Dublin, which is identified as the address of the branch in the form F13 lodged in the CRO on 13th October, 1999. The type designation is "external company". It is clear from the CRO search, and this fact has been averred to in the verifying affidavit, that the relevant annual returns for an external company (Form 7) have been filed in the CRO between 2003 and 2012.

(c) The registered office of the Company is in the British Virgin Islands and its principal place of business is 5, Herbert Place, Dublin, 2.

(d) The Company is a private company limited by shares. Only one share has been issued. It is held by Praxis Trustees Limited (the Sole Shareholder), a company registered in Guernsey.

(e) The directors of the Company are Pierre Guillot, Louise Braham and Melvin Braham. The secretary of the Company is Goodbody Secretarial Limited, with an address in Dublin, which provides company secretarial services to the Company.

(f) The principal activity of the Company is the provision of cosmetic surgery services and associated non-surgical cosmetic services.

(g) The Company is insolvent and unable to pay its debts. The balance sheet of the Company as of 31st January, 2013 shows that the liabilities of the Company exceed its assets by €456,531, although the corresponding figure in the verifying affidavit is €560,435. Whichever figure is correct, the assertion that the Company is insolvent is supported. In addition, the Company has significant contingent liabilities.

(h) On 21st February, 2013, the Sole Shareholder passed a written resolution resolving that by reason of its insolvency the Company should be wound up by the Irish High Court. The resolution authorised the board of the Company to take all necessary steps for that purpose.

(i) The Company is unable to pay its debts. It is in the interests of the creditors of the Company and it is just and equitable that the Company be wound up.

(j) The "principal office" of the Company is located in the State and the Company "is administered from its principal office and all the activities of the Company are carried out exclusively in the State". The Company is "amenable" to being wound up in the State.

It was asserted in the petition that Council Regulation (EC) No. 1346/2000 (the Insolvency Regulation) does not apply to the Company.

2. As is clear from the foregoing, the primary basis on which the Company seeks a winding up order is that it is unable to pay its debts, although the just and equitable ground is also relied on. The relief sought by the Company is that the Company be wound up under the provisions of the Companies Acts 1963 to 2012.

3. The affidavit verifying the petition was sworn by one of the directors, Mr. Guillot, on 27th February, 2013. There is exhibited in the verifying affidavit a "Certificate of Good Standing" issued by the Registrar of Corporate Affairs of the British Virgin Islands, which proves that up to the date thereof, 13th February, 2013, the Company was still on the Register of Companies in the British Virgin Islands, that it was not in voluntary liquidation, and that no strike off proceedings had been instituted.

4. In the verifying affidavit it was disclosed that the Sole Shareholder holds the entire issued share capital of each of two companies registered as private limited companies in England and Wales: the Harley Medical Centre Limited (Centre) and Brava UK Distributors Limited. Both Mr. Guillot and Mr. Braham are directors of each of those companies.

5. The significant contingent liabilities were identified in the verifying affidavit as arising from claims against the Company by one hundred and fifty eight former patients of the plaintiff who have claims against the Company in respect of cosmetic treatment they received from the Company. At least one hundred and forty of those claims arise from breast implant operations conducted by the plaintiff using breast implants from PIP, a French registered company. Mr. Guillot has averred that the Company has been informed by its insurers that its insurance cover does not extend to product liability claims for products sourced from a third party. He has further averred that, while it is impossible to quantify the claims of those claimants, they could potentially increase the Company's liability by several million Euro.

6. While there is further detail in the verifying affidavit in relation to the claims arising from the use of the PIP implants both by the Company and by Centre, the detail is not of relevance to the issues the Court has to determine, which are whether the Court has jurisdiction to wind up the Company and whether it should make a winding up order. However, it is disclosed in the verifying affidavit that Centre was placed in administration in the United Kingdom on 9th November, 2012. The business and assets of Centre were subsequently acquired by a private equity firm, Aesthetic and Cosmetic Surgery Limited (ACS), from the administrators. The relevance of those facts is that, as Mr. Guillot has averred, the Company was totally reliant on Centre for financial support and funding from January 2011 onwards. Since ACS acquired the debt owed by the Company to Centre (being €527,744 at 31st January, 2013), ACS has indicated its willingness, in the event of the liquidation of the Company, to provide a limited aftercare programme to patients who have not been able to complete their treatment or who require post-operative attention, which programme would be operated on a case by case basis. The Court was informed that the Company ceased to trade on 9th November, 2012.

Service/advertisement of petition
7. On 4th March, 2013, the Court (Laffoy J.), on the application of the Company made *ex parte*, made the following orders:

> (a) that the Petitioner be at liberty to effect advertisement of the petition pursuant to Order 74, rule 10 of the Rules of the Superior Courts 1986, as amended (the Rules) by advertisement in Iris Oifigiúil, the Irish Examiner and the Irish Daily Star, the Island Sun (a weekly newspaper with circulation in the British Virgin Islands) and the Virgin Islands Official Gazette;
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> (b) that the Petitioner be at liberty to serve the petition pursuant to Order 74, rule 11 on –
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> > (i) Barclays Bank Plc, in whose favour a charge is registered over the Company's assets, as disclosed on the CRO search;
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> > (ii) the Revenue Commissioners;
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> > (iii) the administrators of Centre;
> >
> > (iv) named firms of solicitors who are on record for certain plaintiffs in proceedings instituted against the Company, including McGarr Solicitors; and
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> > (v) the landlord of the premises occupied by the Company at 5, Herbert Place, Dublin, 2 under a lease the term of which is due to run until July 2019.

8. I am satisfied on the evidence before the Court that advertising and service was effected in accordance with that order.

The hearing of the petition
9. While on the return date for the petition, 8th April, 2013, there were appearances on behalf of a number of firms of solicitors who were acting for former patient claimants in proceedings against the Company, when the petition came on for hearing the only opposition to the making of a winding up order was from six claimants (the Opposing Creditors) for whom McGarr, Solicitors, act. There had been filed two affidavits sworn by Edward McGarr (Mr. McGarr) of McGarr, Solicitors. The first was sworn on 8th April, 2013 and sought that the Court's decision on the petition be deferred until information sought by the claimants, primarily in relation to insurance cover, was forthcoming. The second was sworn on 19th April, 2013 and disclosed that the Opposing Creditors opposed the making of a winding up order for reasons outlined in the affidavit.

10. The primary ground of opposition advanced by counsel for the Opposing Creditors was that the Court does not have jurisdiction to make the winding up order, because the Insolvency Regulation applies to the Company and its centre of main interests is not in this jurisdiction. Counsel for the Company characterised the submissions made on behalf of the Opposing Creditors as having been made in a "closely reasoned" manner. I would go further; those submissions put this Court on the right path.

Jurisdiction issue
11. The core issue which has arisen on the petition as a result of the opposition of the Opposing Creditors is whether the Court has jurisdiction to make a winding up order as sought by the Company.

Legislation relied on by the Company
12. The Company's case is that the petition is brought pursuant to s. 345 of the Companies Act 1963 (the Act of 1963). That provision is to be found in Part X, entitled "Winding up of Unregistered Companies", of the Act of 1963. The first provision in Part X is s. 343A, which was introduced as a result of the Insolvency Regulation. It provides that Part X is subject to Chapter 1 (general provisions) and Chapter III (secondary insolvency proceedings) of the Insolvency Regulation.

13. The meaning of "unregistered company", for the purposes of Part X, is contained in s. 344. The expression includes "any company", with two exceptions, one being a company defined in s. 2, that is to say, a company formed and registered under the Act of 1963, or a company formed and registered in a register kept in the State under the legislation in force before the Act of 1963. In the annotation on s. 344 contained in MacCann & Courtney *Companies Acts 1963 – 2012,* examples are given of unregistered companies including –

> "a foreign company incorporated and having its 'centre of main interests' in a country which is not subject to the provisions of the Insolvency Regulation."

In broad terms, a country which is not subject to the provisions of the Insolvency Regulation is a non-EU country.

14. There are two requirements in the example from MacCann & Courtney quoted above: one relating to the jurisdiction of incorporation; and the other relating to the location of the "centre of main interests". In relation to the second requirement, the editors cite a decision of the High Court of England and Wales (*Re Sovereign Marine & General Insurance Co. Ltd.* [2007] 1 BCLC 228) as authority. That case is not directly in point because it concerned a scheme of arrangement under the UK statutory equivalent of s. 201 of the Act of 1963 in relation to, inter alia, solvent companies which were incorporated and regulated in, respectively, France and Ireland. Warren J. stated (at para. 62), albeit in the context of consideration of the effect of EU legislation "on the jurisdiction to wind up an EU/EEA company", that the Insolvency Regulation was not of relevance in that "it contains nothing which could apply to schemes" of arrangement. Warren J. did hypothesise earlier (at para. 41) that, if some law – be it an Act of Parliament or an overriding piece of EU legislation – were passed which provided expressly that an English court should not have jurisdiction to wind up

a particular class of unregistered company, it could no longer be said that a company within that class was "liable to be wound up under this Act". More in point, however, are the two commentaries referred to below.

15. First, in Sealy & Milman *Annotated Guide to Insolvency Legislation* (7th Ed., 2004), in commenting generally on the Insolvency Regulation, the editors state (at p. 602):

> "As noted above, the Regulation has effect as primary legislation in its own right, and thus automatically repeals any existing legislation and supersedes any rule of law that is inconsistent with its provisions. The main area where this is likely to be seen is in relation to the wide jurisdiction which our courts have traditionally asserted over foreign nationals and companies to make bankruptcy and winding-up orders: from now on, in any case where the 'centre of main interests' of the individual or company concerned is in another Member State, this jurisdiction will be curtailed. In contrast, in some respects our courts are given wider powers under the Regulation than they have under the domestic legislation, e.g. to make administration orders in respect of foreign companies and other bodies which have their centre of main interests within the UK . . .."

Later, in their note on Article 3 of the Insolvency Regulation the editors state (at p. 614):

> "Note that it is not necessary that the debtor should be domiciled (or, if a company, incorporated) within the EU. In *Re BRAC* . . . an administration order was made in respect of a company incorporated in Delaware, on the basis of a finding that its centre of main interests was within the UK."

The decision in the *Brac* case is considered later.

16. Secondly, in the context of outlining the jurisdiction of the High Court to wind up companies, the position in relation to companies formed and registered in other jurisdictions, is commented on as follows in Lynch Fannon & Murphy on *Corporate Insolvency and Rescue* (2nd Ed.) (at para. 2.05):

> "While the Insolvency Regulation limits the jurisdiction of the High Court to open main insolvency proceedings to cases where the company has its centre of main interests in Ireland, which may or may not correspond with the location of its registered office, the Regulation has the potential, simultaneously, to extend the jurisdiction of the High Court to open proceedings in a case where the company does not have its registered office in Ireland, but, for example, conducts all or most of its business in Ireland. The High Court also has jurisdiction to open secondary proceedings where main insolvency proceedings have been opened in another Member State and the company has an establishment in Ireland, even if it is not registered in Ireland. In some cases, 'territorial proceedings' may be opened in a Member State where a company has an establishment where main proceedings have not yet been opened in the Member State of the company's centre of main interests. It would appear that a company could be subject to the Regulation even if it is not registered in an EU Member State as long as it conducts its business in an EU Member State."

The authors cite the *Brac* case, which is considered later, as authority for the last sentence in that passage.

17. Turning to the statutory provision relied on by the Company, section 345, which deals with winding up of unregistered companies, it provides in subs. (1):

> "Subject to the provisions of this Part, any unregistered company may be wound up under this Act, and all the provisions of this Act relating to winding up shall apply to an unregistered company, with the exceptions and additions mentioned in this section."

The section does not permit an unregistered company to be voluntarily wound up; it must be compulsorily wound up by the Court. The circumstances in which an unregistered company may be wound up are set out in subs. (4) and include, at para. (b), "if the company is unable to pay its debts". Sub-section (5) provides that an unregistered company shall be deemed unable to pay its debts if it satisfies one of the four requirements set out. The requirement at (d) is "if it is otherwise proved to the satisfaction of the court that the company is unable to pay its debts". Sub-section (4)(b) mirrors s. 213(e) and subs. (5)(d) mirrors s. 214(c), which are contained in Part VI of the Act of 1963 and deal with winding up generally.

Jurisprudence cited in relation to s. 345

18. Leaving aside the impact of the Insolvency Regulation, I am satisfied that the two authorities relied on by counsel for the Petitioner, which were both decisions of the High Court of England and Wales (Chancery Division), do establish, in principle, that this Court has jurisdiction to wind up a foreign company as an unregistered company subject to compliance with certain requirements.

19. The authorities relied on by counsel for the Petitioner were:

> (a) *International WestminsterBank v. Okeanos* [1987] BCLC 450; and
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> (b) *Re A Company, ex parte Nyckeln Finance Company Limited* [1991] BCLC 539.

As is outlined in the commentary in Courtney on The *Law of Companies* (3rd Ed.) at paragraph 23.036, more recently, the position has been considered by the Court of Appeal of England and Wales. Courtney summarises the current position as follows:

> "In *Stocznia Gdanska SA v. Latreefers Inc.* [(No. 2) [2000] TLR 182; [2001] 2 BCLC 116] the English Court of Appeal endorsed the finding of Lloyd J. that, as the law has evolved, there are three core requirements before a court will exercise its discretion to order the winding up of an unregistered company:
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> '(1) there must be a sufficient connection with England and Wales which may, but does not necessarily have to, consist of assets within the jurisdiction;
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> (2) there must be a reasonable possibility, if a winding up order is made, of benefit to those applying for the winding up order;
>
> (3) one or more persons interested in the distribution of the assets of the company must be persons over whom the court can exercise jurisdiction'."

As is pointed out by Courtney in a footnote, Lloyd J., at first instance, referred to a number of earlier authorities, including the Okeanos case.

20. Of particular significance, however, is that the judgment of the Court of Appeal in the *Stocznia Gdanska* case was delivered on 9th February, 2000, so that it predated the Insolvency Regulation.

The Insolvency Regulation
21. Paragraph (1) of Article 3 of the Insolvency Regulation provides:

> "The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of main interests in the absence of proof to the contrary."

Paragraph (2) provides that where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against the debtor only if he possesses an establishment within the territory of that other Member State and the effect of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State. Paragraph (3) provides that where proceedings have been opened under paragraph (1), that is to say, main proceedings, any proceedings opened subsequently under paragraph (2) shall be secondary proceedings and must be winding up proceedings.

22. The recitals in the Insolvency Regulation, although not mentioned in s. 343A of the Act of 1963, are undoubtedly relevant in the application of the provisions of Chapter I and Chapter III to Part X. Recital (13) provides that the "centre of main interests" –

> "should correspond to the place where the debtor conducts the administration of his interest on a regular basis and is therefore ascertainable by third parties."

Recital (14) provides that the Insolvency Regulation applies only to proceedings where the centre of the debtor's main interest is located in the European Union.

Jurisprudence cited in relation to the Insolvency Regulation
23. The U.K. authorities relied on by counsel for the Company (the *Okeanos* decision and the *Nyckeln* decision) pre-dated the introduction of the Insolvency Regulation, as did, as has been noted, the *Stocznia Gdanska* case referred to earlier. Counsel for the Opposing Creditors referred to one authority from the United Kingdom, which post-dated the introduction of the Insolvency Regulation, which is cited by Sealy and Milman and also by Lynch Fannon and Murphy, and is of relevance: the decision of the Chancery Division of the High Court In *re Brac Rent-A-Car International Inc* [2003] 1 WLR 1421.

24. The *Brac* case concerned a petition by the company, which was incorporated in Delaware and had its registered address in the United States, for an administration order on the grounds of insolvency. It had never traded in the United States and its operations were conducted almost entirely in the United Kingdom. It had for a long time been registered under the Companies Acts in the United Kingdom as an overseas company. The petition was opposed by judgment creditors who had the benefit of an Italian arbitration award in Italy, which had been registered as a judgment in England, and had the benefit of an interim charging order over property of the company. The issue was whether the English court had jurisdiction to make the order sought. It was held that it had. Having considered, *inter alia*, recitals (13) and (14) of the Insolvency Regulation and Article 3, Lloyd J. stated (at para. 24):

> "In my judgment, [counsel for the company] is correct in her submission that the Regulation gives jurisdiction to the courts of a member state to open insolvency proceedings in relation to a company incorporated outside the Community, if the centre of the company's main interests is in that member state. As a matter of textual interpretation, it seems to me that this is the effect of the Regulation. It defines the scope of its application only in terms of the location of the centre of the debtor's main interests . . ."

Having conducted a purposive interpretation of the Insolvency Regulation (in para. 27), which I find persuasive, Lloyd J. concluded (at para. 31):

> "Thus, according to the literal reading of the Regulation, the only test for the application of the Regulation in relation to a given debtor is whether the centre of the debtor's main interests is in a relevant member state, and not where a debtor which is a legal person is incorporated. This is supported by the purposive interpretation. For those reasons, I held that the Regulation does give the courts of a member state jurisdiction to open insolvency proceedings in relation to a corporate debtor incorporated in Delaware, such as the company, if the centre of the debtor's main interests is within that member state, as is the case in this instance."

25. Counsel for the Opposing Creditors also referred to the judgment of the Court of Justice of the European Union in the case of *Interedil Srl in Liquidation* (Case C – 396/09, in which judgment was delivered by the First Chamber on 20th October, 2011). That judgment was delivered on a reference by an Italian court, the Tribunale di Bari. The context of the judgment was that a creditor of Interedil, a company which was incorporated in Italy and which originally had its registered office in Italy, filed a petition for the opening of bankruptcy proceedings against Interedil with the Tribunale di Bari. Interedil challenged the jurisdiction of that court, on the ground that, as a result of the transfer over two years earlier of its registered office to the United Kingdom, only the courts of the United Kingdom had jurisdiction to open insolvency proceedings. The passages from the judgment relied on by counsel for the Opposing Creditors addressed the meaning of "centre of debtor's main interests" in Article 3(1) of the Regulation.

26. The Court of Justice in the *Interedil* case held that the term "centre of debtor's main interests" must be interpreted by reference to European Union law (para. 44). It also addressed questions which it interpreted as asking, in essence, at para. 45 –

"how the second sentence of Article 3(1) of the Regulation must be interpreted for the purposes of determining the centre of a debtor company's main interests".

In addressing the relevant criteria for determining the centre of the debtor's main interests, the Court of Justice, having noted that the Insolvency Regulation does not provide a definition of the term "centre of a debtor's main interests", referred to its judgment in *Eurofood IFSC*, stating that guidance as to the scope of that term is to be found in recitals 13 in the preamble to the Regulation. In answering the question the Court stated (at para. 59):

> ". . . for the purposes of determining a debtor company's main centre of interests, the second sentence of Article 3(1) of

the Regulation must be interpreted as follows:

– a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties. Where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in that provision cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State;

> – where a debtor company's registered office is transferred before a request to open insolvency proceedings is lodged, the company's centre of main activities is presumed to be the place of its new registered office."

27. For the purpose of the application of the foregoing principles, it is apposite, at this juncture, to consider the evidence before the Court as to where the activities, the assets and the management and supervision of the Company have been located since it was registered in the CRO as an external company, which occurred more than thirteen years ago.

Evidence of location of activities, assets and management of the Company

28. In the verifying affidavit, Mr. Guillot has averred to the following facts:

> (a) The Company has never traded in any jurisdiction other than Ireland.
>
> (b) Since 1999 the Company has traded exclusively in Ireland.
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> (c) In relation to the manner in which the Company had traded in this jurisdiction, Mr. Guillot averred that, since the Company commenced operations, all surgical treatments had been carried out in St. Francis Private Hospital, Mullingar, County Westmeath under an agreement with the hospital, the operations having been performed by surgeons (registered with the Irish Medical Council and on the specialist register as plastic surgeons) engaged on a consultancy basis by the Company to carry out operations and provide pre- and post-operative care. The non-surgical solutions had been carried out by registered nurses (registered with An Bord Altranais) and therapists employed directly by the Company or by doctors engaged on a consultancy basis.
>
> (d) As has been recorded, on 13th October, 1999, the Company was registered as a branch in the State and subsequently filed all of the statutory returns as was required by law.
>
> (e) All of the employees of the Company are located in this jurisdiction. It was averred that, at the height of its activities, the Company employed eight people, which has been reduced to four, comprising three nursing staff and an administrator/receptionist following implementation of a cost cutting programme.
>
> (f) The Company's only place of business is at 5, Herbert Place, Dublin, 2, which is held under a lease dated 4th August, 1999 made between Radan Properties Limited, as landlord, the Company, as tenant, and Centre, as guarantor, for a term of twenty years from 26th July, 1999. Mr. Guillot averred that the annual rent currently payable under the lease is €70,800, but that rent has been outstanding for the period commencing on 1st December, 2012 to date.
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> (g) The Company's address for correspondence has at all times been located in the State.
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> (h) The Company is registered with the Irish Revenue Commissioners for VAT, PRSI and PAYE.
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> (i) The Company is not tax resident in any other jurisdiction.
>
> (j) The Company's treasury is located in the State and the Company operates a bank account at the Upper Baggot Street branch of Allied Irish Banks. The Company does not operate any other bank account in any other jurisdiction.
>
> (k) On 19th December, 2006 the Company granted security over its undertaking, property and assets to Barclays Bank Plc, who provide a credit card service to the Company, which the CRO search indicates is registered in the CRO. As of 10th February, 2013, Barclays Bank was withholding credit card payments of €25,207 due and payable to the Company. An averment by Mr. McGarr in his second affidavit that the Company's bankers "are Barclays Bank Plc, a UK bank" is incorrect.
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> (l) The Company board meetings typically took place in Guernsey. However, in the last fourteen months, they have taken place either in London or in Dublin.

29. In his second affidavit, Mr. McGarr set out to demonstrate that the Company has "more connection with the UK than it does with Ireland" to support the contention that "the jurisdiction of the UK courts is more relevant for the Company's application", given that Centre is under administration in the United Kingdom. The following matters were deposed to by Mr. McGarr:

> (a) The Company has been administered by its director, Mr. Braham, that is to say, Melvin Braham, from the London offices of Centre and Mr. Braham was also a director of Centre.
>
> (b) The Company and Centre "carried on surgical business at 5, Herbert Place Dublin, apparently as a joint venture".
>
> (c) Patient creditors signed a contract with Centre. A document headed "Patient Costing – Advanced Booking Scheme" signed by one of the Opposing Creditors has been exhibited. The Court was referred to the reference to "The Harley Medical Group" at the top of the document and the introductory clause to the terms and conditions, which referred to the supply of services by Centre "trading as The Harley Medical Group", with a London address, and also to Clause 13 of the terms, which stated that the services provided by "The Group" would be governed by the laws of England and Wales whose courts would have exclusive jurisdiction. Mr. McGarr also exhibited a UK Company's House search against Centre, which was incorporated in the United Kingdom on 2nd June, 1983, with a registered office in London.

(d) "The Harley Medical Group" is a UK registered trademark.

(e) A booklet on "Breast Augmentation" furnished by the Harley Medical Group to one of his clients was exhibited. Mr. McGarr pointed to the fact that it contained the following statement:

> "The Harley Medical Group's clinics in the UK are registered with The Health Care Commission . . .. The Harley Medical Group also applies the same Health Care Commission standards in Ireland."

(f) The Harley Group website in 2012 recorded that it had been committed to providing cosmetic surgery clinics in the UK and Ireland for over twenty two years, that in 1983 it had opened its first specialist clinic for cosmetic surgery in London, and by 2012 had eleven plastic surgery clinics across the UK and Ireland, that it had a surgery in Ireland, setting out the freephone number for Ireland.

(g) The Harley Group was represented as having an address at 5, Herbert Place, Dublin 2, which Mr. McGarr demonstrated on the basis of letter heading used in 2008 and signs, such as a name plate, physically located on or at the premises.

(h) A report in The Guardian was exhibited, in relation to an alleged connection between Mr. Melvin Braham and The Memphis Company Limited, a company registered in the British Virgin Islands. Mr. McGarr averred that the Company, which is also registered in the British Virgin Islands, was similar to the Memphis Company Limited administered by Mr. Braham from an address in London.

30. Counsel for the Opposing Creditors pointed to certain aspects of the documentation exhibited in the verifying affidavit and in a subsequent affidavit by Mr. Guillot, as indicating a connection with the United Kingdom, for example, the fact that UK based accountants audited some of the Financial Statements of the Company which have been exhibited.

31. While no evidence was adduced on behalf of the Company to refute the averments contained in Mr. McGarr's affidavits, I have come to the conclusion that it was not necessary to do so.

32. The averments in Mr. McGarr's affidavit, in my view, do suggest that, in conducting its business from its premises at 5, Herbert Place, Dublin, 2, the Company was representing that it was part of an organisation known as "The Harley Medical Group" and that it was associated with Centre. It is important to bear in mind, however, that the Company and Centre were two separate legal entities. In this connection, the observations of Fennelly J., with whom the other Judges of the Supreme Court agreed, in *Re Eurofood IFSC Limited* [2004] 4 I.R. 370 (at p. 410) are of particular significance. In addressing the arguments advanced on behalf of the extraordinary administrator of Eurofood appointed in Italy, that Eurofood's centre of main interests was in Italy where its parent company, Parmalat S.p.A., was incorporated, having referred to the submissions made on behalf of the extraordinary administrator, which are summarised in para. 59, as being "of a very far reaching character so far as the fundamentals of company law are concerned", Fennelly J. continued (at para. 60):

"It is perfectly normal and to be expected that subsidiary companies in a group will pursue and give effect to group policy. Parent companies form subsidiaries either in their own states of incorporation or in other states for a wide variety of business, commercial and tax reasons. Those subsidiaries are required to respect the now very complex legal, financial and regulatory regimes of their states of incorporation. It seems to this court to be deeply inimical to the need for respect for corporate identity and respect for the rules of law (including Community law rules) relating to companies that the separate existence of such companies should be ignored."

Those observations, in my view, are equally applicable, to the situation such as arises in this case, where two separate and distinct companies, the Company and Centre, shared a common parent, the Sole Shareholder.

Conclusion on jurisdiction issue

33. The response of counsel for the Company to the submission on behalf of the Opposing Creditors that the jurisdiction of the Court to make a winding up order is governed by the Insolvency Regulation and is determined by whether the Company's centre of main interests is within this jurisdiction and that, if the Court is not satisfied that it is, the petition should be dismissed, was that the Company is not relying on the Insolvency Regulation but rather it is relying on the jurisdiction which the Court has to wind up an unregistered company conferred by s. 345 of the Act of 1963. It was submitted that s. 345 was not affected by the Insolvency Regulation and that it was not amended pursuant to the Insolvency Regulation. That proposition is not correct. By virtue of s. 343A, s. 345 is subject to Chapter I and Chapter III of the Insolvency Regulation. Accordingly, although the legislative provisions under consideration in this case are somewhat different to the provisions which were considered in the *Brac* case, in my view, that difference is not material and this Court should be guided by the approach adopted by Lloyd J. in that case.

34. As regards the application of Article 3 of the Insolvency Regulation to the facts of this case, there is a presumption that the centre of main interests of the Company is the British Virgin Islands, because that is the place of its registered office. Accordingly, the question for the Court is whether that presumption is rebutted by the evidence before the Court. Applying the principles laid down by the Court of Justice in *Interedil* case, I am satisfied that the presumption is rebutted in this case. A comprehensive assessment of all the relevant factors does make it possible to establish, in a manner that is ascertainable by third parties, that the Company's actual centre of management and supervision and of the management of its interests is located in this jurisdiction. The facts relied on in Mr. Guillot's verifying affidavit as indicating that the Company is amenable to being wound up in this jurisdiction, albeit without any reference to the Insolvency Regulation, establishes that beyond doubt. All of the Company's activities have been conducted in this jurisdiction since 1999 and the administration of its interests has been continuously conducted in this jurisdiction. That such is the case has been readily ascertainable by third parties by conducting a search in the CRO and an inspection of the documents filed by the Company in the CRO in accordance with the law of this jurisdiction.

35. In relying on the factors outlined earlier, the Opposing Creditors totally ignore the fact that the Company has a separate and distinct legal personality from its parent company and from Centre, which is also a subsidiary of its parent.

36. If it were relevant, and, in my view, it is not, the factors which establish that the Company's centre of main interests is in this jurisdiction also establish that –

(a) there is a sufficient connection between the Company and this jurisdiction,

(b) there is a reasonable possibility, if a winding up order is made, that it will benefit the Company, and

(c) the Court can exercise jurisdiction over one or more persons interested in the distribution of the assets of the Company,

so as to justify making an order under the jurisprudence which developed in the United Kingdom in relation to the statutory provision corresponding to s.345 before the introduction of the Insolvency Regulation. In this case, the Company and its officers are submitting to the jurisdiction of this Court. Its only place of business is in this jurisdiction. Its employees are employed in this jurisdiction. All of the claimants who have contingent claims against the Company, including the Opposing Creditors, reside in this jurisdiction. Such assets as the Company has are located in this jurisdiction.

37. The perceived advantage to the Opposing Creditors of this Court declining jurisdiction to wind up the Company is articulated as follows in Mr. McGarr's second affidavit, where it is averred that –

> ". . . the creditors believe their rights under UK legislation with regard to any relevant policies of insurance indemnifying or intended to indemnify the Company against claims such as those of the creditors will be stronger than under Irish law."

The Court was referred to a UK statute entitled Third Parties (Rights against Insurers) Act 2010. That contention is immaterial to the Court's function on this application and it would be inappropriate for the Court to express any view on it.

38. The jurisdiction of this Court to wind up the Company is governed by the principles outlined earlier. Whether the Court's jurisdiction is derived from s. 345 of the Act of 1963 or the Insolvency Regulation, there is no basis on which this Court can decline jurisdiction and, as was submitted on behalf of the Opposing Creditors, require the Company to petition the English High Court to wind it up.

Source of jurisdiction and its application

39. The Company's reliance on s. 345 of the Act of 1963 and the UK authorities which predate the Insolvency Regulation, which has direct effect, is totally misconceived. On the evidence presented by the Company to the Court, the centre of main interests of the Company is, as I have found, undoubtedly in this jurisdiction. Therefore, Article 3 of the Insolvency Regulation governs international jurisdiction. In this case, in my view, paragraph (1) of Article 3 applies. Accordingly, the High Court in this jurisdiction has jurisdiction to open insolvency proceedings, which are main insolvency proceedings, in accordance with paragraph (1).

40. In the absence of any legislative guidance, I am assuming, for the purposes of implementing the direct effect of the Insolvency Regulation, which I have found is the source of the jurisdiction of the High Court to wind up the Company on the facts of this case, that the relevant applicable legislative framework is derived from s. 212 of the Act of 1963, which provides that "the High Court shall have jurisdiction to wind up any company". Therefore, in identifying the grounds on which the Company may be wound up, I am assuming that the relevant applicable section is s. 213. Despite assertions to the contrary on behalf of the Opposing Creditors, I am satisfied, on the evidence before the Court, that the Company is unable to pay its debts. Therefore, I am satisfied that the ground set out in s. 213(e), that the company is unable to pay its debts, has been established.

41. It would appear that this is the first occasion since the Insolvency Regulation took effect on which this Court has been asked to compulsorily wind up a company to which the Insolvency Regulation does not *prima facie* apply because it is incorporated outside the European Union. If, contrary to the assumption I have made above, in order to give effect to Article 3 of the Insolvency Regulation which governs jurisdiction in the case of a company incorporated and registered outside the European Union but with a centre of main interests in the State, the relevant applicable legislative framework is derived from s. 345, and not from s. 212 and the subsequent sections, nonetheless, I am satisfied that the Court has discretion to wind up the Company under s. 345. That is because it has been established that the Company is unable to pay its debts in accordance with subs. (4) of s. 345. Accordingly, if it were applicable to give effect to the Court's jurisdiction under the Insolvency Regulation, I consider that it would be appropriate to make an order to wind up the Company under s. 345.

42. This Court is in the fortunate position in this case that, as recorded earlier, subss. (4) and (5) of s. 345, insofar as they are relevant, mirror s. 213(e) and s. 214(c) of the Act of 1963. More difficult issues as to the application of the effect of the Insolvency Regulation may arise in the future. It would be in the public interest if legislation were introduced to address that issue.

43. It is not intended that in the course of the winding up process any party who has *locus standi* should be precluded from arguing that the assumption made in para. 40 is incorrect.

Compliance with the Rules

44. An issue arose at the hearing as to whether Order 74, rule 7 of the Rules had been complied with in relation to the petition. Rule 7(2) provides that every petition shall contain one or other of three statements, paragraph (a)(iii) stipulating –

> "statements that the Insolvency Regulation does not apply to the proceedings, and the facts and grounds supporting that statement, and in such a case, shall contain a statement of the reasons why the petitioner is entitled to apply for the winding up of the company . . .."

Given that it has been determined earlier that the Insolvency Regulation does apply to these proceedings, the specific argument advanced on behalf of the Opposing Creditors that the rule had not been complied with is irrelevant. However, in view of the determination that the Insolvency Regulation does apply, the petition should have complied with rule 7(2)(a)(i) which requires that the petition shall contain:

> "statements that the Insolvency Regulation applies to the proceedings and that the company's centre of main interests (determined in accordance with the Insolvency Regulation) is situated in the State and the facts and grounds supporting each statement . . ."

Rule 7(2)(b) also requires that, where the Insolvency Regulation applies, a statement be included in the petition that, to the petitioner's knowledge, no insolvency proceedings have been opened in respect of the company in any Member State or Member States (other than the State) or that such insolvency proceedings have been opened in any other Member State, and if so, whether the proceedings have been opened as main proceedings, secondary proceedings or territorial proceedings.

45. I consider that the Company should present an amended petition to the Court in the appropriate form in compliance with Appendix M of the Rules and in compliance with Order 74, rule 7 and file a short affidavit verifying the amendments.

Order

46. Accordingly, subject to the Petitioner presenting an amended petition in compliance with the Rules and filing an affidavit verifying the amendments, there will be an order winding up the Company and appointing Stephen Tennant of Grant Thornton official liquidator for the purpose of the winding up. The winding up order will record the finding made above that the Insolvency Regulation does apply to the proceedings and that the Company's centre of main interests is situated in this State for the reasons outlined in this judgment. Subject to that, the order will be in the usual form.