

**THE HIGH COURT**

**[Insolvency Proceedings 538 P]**

**IN THE MATTER OF A PETITION FOR ADJUDICATION OF BANKRUPTCY BY EMO OIL LIMITED**

**PETITIONER**

**AND**

**EAMON MULLIGAN**

**DEBTOR**

**JUDGMENT of Ms. Justice Dunne delivered the 29th day of November 2010**

The petitioner herein filed its petition for an adjudication of bankruptcy against Eamon Mulligan in respect of a debt in the sum of €235,001.68. The debt arose on foot of a judgment of the High Court dated the 10th February, 2009, in proceedings bearing the Record No. 2008/33S, Between Emo Oil Ltd, plaintiff and Eamon Mulligan trading as Mulligan Oils, defendant. In addition to the sum of €235,001.68, the petitioner was awarded costs, to be taxed and ascertained.

The petitioner relied on the failure of the debtor to pay the said sum on foot of a bankruptcy summons issued on the 18th May, 2009. The summons was served on the debtor on the 30th July, 2009. An affidavit of service of the summons was filed on the 15th October, 2009 and the petition to have the debtor adjudicated bankrupt was filed on the 21st October, 2009.

The petition was first listed before the court on the 16th November, 2009, and on that date and on the 14th December, 2009, new return dates were granted. The matter came back before the court on the 8th February, 2010. The matter was adjourned by consent on that date and again on the 12th April, 2010. A notice of appointment of solicitor was furnished to the Examiners office by McDonough and Breen solicitors, Distillery House, Main, Dundalk, Co. Louth on the 5th February, 2010.

Following the service of the petition on the debtor, the matter was listed before the court on the 8th February, 2010, the 1st April, 2010, the 10th May, 2010 and the 14th June, 2010. Ms. Elizabeth Deegan, the credit controller of the petitioner, in an affidavit sworn herein on the 28th September, 2010, has averred that on each occasion the matter was adjourned before the court, the request for an adjournment was made by or on behalf of Mr. Mulligan, "albeit with consent from the petitioner on some occasions". It appears that when the matter was adjourned on the 10th May, 2010, the debtor had offered a monthly payment of €2,000 to the petitioner and the matter was adjourned to allow the debtor to put forward a better offer. On the 14th June, 2010, the debtor informed the court that he had made an offer of monthly payments in respect of his liability in the sum of €3,000 but that this had been refused. He also indicated that he was attempting to refinance and that he hoped to be in a position to clear or settle the liability. In those circumstances the matter was adjourned by the court on the basis that Mr. Mulligan would have a further opportunity to refinance his borrowings and to discharge his debts. For that reason an adjournment was granted until the 26th July, 2010. Prior to that date, a fax was received from solicitors for the debtor dated the 22nd July, 2010, which stated:-

"We refer to the above and we understand that it is again in the bankruptcy list on Monday next. We are now instructed that our client was adjudicated bankrupt in Northern Ireland on the 7th July, 2010."

In those circumstances an application was made by counsel on behalf of the petitioner to adjourn the matter until the 18th October, 2010, for the purpose of considering their position. On that date they sought to proceed with the application for bankruptcy on the basis that the debtor's centre of main interest is in Ireland. The matter was put back for the purpose of allowing the parties to furnish legal submissions to the court. Another of the reasons for that adjournment was to enable the debtor to file an affidavit in response to the affidavit of Ms. Deegan.

It would be helpful to refer to two paragraphs in the affidavit of Ms. Deegan. At paras. 12 and 13 of the affidavit she states as follows:-

"I say that the petitioner does not understand how the plaintiff could have established that his centre of main interest was in Northern Ireland. I say that at no time during any correspondence between Mr. Mulligan and the petitioner, (including the furnishing of various financial information by Mr. Mulligan) was it ever indicated that Mr. Mulligan had any interest in any assets in Northern Ireland or that Mr. Mulligan resided there or had any material, personal or business interests in Northern Ireland. In this regard it beg to refer to the copy letters on the 16th September, 2009 and 22nd September, 2009, attached hereto and marked with the letters "ED3" upon which I have signed my name prior to the swearing hereof detailing assets owned by Mr. Mulligan and in particular his interest in the property at 31 Marian Park, Dundalk, Co. Louth and Tateera, Newtownbalregan, Co. Louth and as well as enclosing yearly accounts and tax returns filed with Revenue in the Republic of Ireland.

I say that O'Donovan Baker, Solicitors for the petitioner, wrote to Mr. Mulligan's solicitors on the 20th August, 2010, outlining their intention to proceed with the within bankruptcy petition and also calling on Mr. Mulligan to outline how he is claiming his centre of main interest to be in Northern Ireland and furnishing details of the matters which he claims could justify such an assertion ...."

Ms. Deegan went on to exhibit a copy of that letter in her affidavit. Mr. Mulligan in his replying affidavit deals with these matters in the affidavit sworn by him on the 28th October, 2010. He stated as follows:-

"Ms. Deegan avers that the petitioner was never told that I had assets in Northern Ireland (I do not), that I resided in Northern Ireland (I do) or that I had any personal or business interest in Northern Ireland (I hold a taxi licence). I am not sure whether or not I told the petitioner that I resided in Northern Ireland, but then I am not sure I ever had cause to. It is certainly the case that the business address from which I operated was situated at Tateera, Newtownbalregan in Dundalk and it may be that the petitioner thereby assumed I resided in the jurisdiction or assumed that if I worked here that I also lived here. In short the petitioner was wrong to make any assumption or assumptions."

He went on to say that he has resided in Northern Ireland since 2002. He went on to assert that it is on the basis of his residency in Northern Ireland that the courts in that jurisdiction made an order adjudging him bankrupt on the 7th July, 2010. He added:-

"In terms of proving that I was and had for some considerable time being resident in Northern Ireland the court there

required that I produce documentation that proved residency. In that respect I provided a taxi driver's licence issued by the DVL NI in May 2003, a letter from the electoral office for Northern Ireland dated 15th October, 2010, a document dated 15th August, 2008, described as a "basic disclosure certificate" and a polling card for elections in November, 2003.... I say that the court in Northern Ireland accepted that this documentation was sufficient to prove that I reside in Northern Ireland and I say that this documentation is in fact proof of same."

He added that his fuel distribution business at Tateetra, Newtownbalegan in Dundalk ceased to operate in 2010.

The question that now arises in these proceedings is whether or not the petitioner can proceed with the bankruptcy petition in this jurisdiction. To that extent Council Regulation (EC) No. 1346/2000 of the 29th May, 2000, ("the Regulation") on Insolvency Proceedings is of considerable importance. I now want to look at the provisions of the Regulation in some detail. The recital of the Regulation states at para. 6:-

"In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle." Recital 8 states:-

"In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States."

Regulation 4 is also of interest. It provides:-

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

Recital 12 and 16 are also of relevance. Recital 12 provides:-

"12. This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

16. The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings...."

Having set out in the recitals the objective of the Regulations, the Regulations then set out a number of matters which govern insolvency proceedings in the European Union. The first thing to note is that the definition of "insolvency proceedings" includes bankruptcy. Article 2 contains a number of definitions including a definition of "the time of the opening of proceedings" which is defined as meaning "the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not." A crucial question that arises for consideration in this case is whether or not the bankruptcy proceedings had been "opened" in this jurisdiction within the meaning of the Regulation.

Counsel on behalf of the petitioner urged on the court that the various steps that have been taken in this case to date amount to the opening of the proceedings in this jurisdiction. In support of his submissions reference was made to the decision in the case of *In Re. Eurofoods IFSC Limited* [2004] I.E.S.C. 45. That was a winding up case in relation to a company but, as pointed out above, the Regulation includes bankruptcy proceedings. The case has an interesting history; it was dealt with in the High Court by Kelly J. and was appealed to the Supreme Court who referred the matter ultimately to the European Court of Justice. Kelly J. in the High Court (Unreported, High Court, 23rd March, 2004) decided that the Civil and Criminal court at Parma did not have jurisdiction to open insolvency proceedings in respect of the company, since, as he held, such proceedings had already been opened in this jurisdiction. He also held that the centre of main interest of the company was in Ireland and not in Italy. Accordingly, he held that the court should not give recognition to the judgment of the Parma court. The Supreme Court agreed with the conclusions of Kelly J. that the decision of the Parma court should not be recognised, but nonetheless referred the matter to the European Court of Justice. That court ruled as follows. (*In Re. Eurofoods IFSC Limited* (case C341/04) [2006] ECR I-03813) at p. 525:-

"where a petition is presented to a court of competent jurisdiction in Ireland for the winding up of an insolvent company and that court makes an order, pending the making of an order for winding up, appointing a provisional liquidator with powers to take possession of the assets of the company, manage its affairs, open a bank account and appoint a solicitor with the effect in law of depriving the directors of the company of power to act, that order combined with the presentation of the petition constitutes a judgment opening insolvency proceedings for the purposes of Article 16 of the Regulation."

Another important issue in that particular case was the interpretation of the phrase "centre of main interest." The decision of the European Court of Justice on this issue referred to "the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary" as provided for in the Regulation.

### **The Time of the Opening of Proceedings**

A definition is given as referred to above for the time of opening of proceedings in the Regulation. As mentioned before it states "the time of the opening of proceedings shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not". In this case a petition was presented to the court on the 8th February, 2010. On that occasion and subsequently the matter was adjourned at the request of Mr. Mulligan. Section 14(1) of the Bankruptcy Act 1988 provides:-

"Where the petition is presented by a creditor, the Court shall, if satisfied that the requirements of s. 11(1) have been complied with, by order adjudicate the debtor bankrupt."

There is no question in this case but that the petitioning creditor came within the criteria set out in s. 11(1) of the 1988 Act. It is a common occurrence that on the return date for the hearing of the petition the debtor seeks a final opportunity to the petitioning creditor is discharged, there may be other creditors who are in a position to take over the petition. Thus, it is not unusual, as in this case, that on the return date for the petition an adjournment of the petition will be granted. As previously indicated the adjournments in this case were on the basis that negotiations were taking place between the creditor and the debtor in relation to coming to an arrangement for the discharge of the indebtedness. It is clear that a number of offers relating to payments by way of instalments were made to the creditor.

Unlike the proceedings in respect of insolvent companies, there is no interim stage between the presentation of a petition and an adjudication of bankruptcy. The role of the court is limited to either adjudicating the person concerned bankrupt or affording time to the debtor. It is important to note that in order to come within the definition of the time of the opening of proceedings, one does not have to make a final decision or judgment. It is also relevant to note that the word "judgment" in the Regulation is defined as including "the decision of any court empowered to open such proceedings or to appoint a liquidator".

The judgement of the Court (Grand Chamber) in the Eurofoods case, ECR I- 3813, commented at para. 51 and 54 as follows:

"The conditions and formalities required for opening insolvency proceedings are a matter for national law, and vary considerably from one Member State to another. In some Member States proceedings are opened very shortly after the submission of the application, the necessary verifications being carried out later. In other Member States, certain essential findings, which may be quite time consuming, must be made before proceedings are opened. Under the national law of certain Member States, the proceedings a "decision to open insolvency proceedings" for the purposes of the Regulation must be regarded as including not only a decision which is formally described by the legislation of the Member State of the Court that handed it down , but also a decision handed down following an application, based on the debtor's insolvency, seeking the opening of the proceedings referred to in Annex A to the Regulation, where that decision involves divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment involves the debtor losing the powers of management which he has over his assets. In such a case, the two characteristic consequences of insolvency proceedings, namely the appointment of a liquidator and the divestment of the debtor, have taken effect, and thus all the elements constituting the definition of such proceedings, given in Article 1 (1) of the Regulation, are present."

I have given this matter careful consideration. The procedure in Bankruptcy is somewhat different to that which applies to insolvent companies. In the Eurofoods case referred to above, a provisional Liquidator had been appointed in this jurisdiction. The appointment of a provisional liquidator had the effect of partial divestment of the company's assets. A winding up order made subsequent to the appointment of a provisional liquidator dates back to the date of presentation of the petition. In the case of an application for the adjudication of an individual as a Bankrupt, s. 14 of the Bankruptcy Act to which I have already referred applies. On adjudication, the Bankrupt's property vests in the Official Assignee. Vesting in the official Assignee does not commence at any date prior to the adjudication as per s. 44 (2). Thus, there is no divestment of the debtor's property, partial or otherwise, until the date of adjudication.

It is understandable that the ordinary meaning of the phrase "opening of the proceedings" would encompass an application to adjourn proceedings. However, that term has a particular meaning as defined in the Regulation and interpreted by the Court of Justice in the Eurofoods case referred to above. Having given the matter careful consideration, I have come to the conclusion that the decisions of the Court to adjourn the adjudication from time to time to allow the debtor to attempt to come to terms with the Petitioner did not come within the definition of the opening of the proceedings as provided in the Regulation given that there was no divestment, partial or otherwise of the assets of the debtor.

### **Centre of Main Interest.**

The other issue that has arisen in this particular case relates to where the debtor had his centre of main interest, ("C.O.M.I."). In that regard it has been asserted in the affidavit of Ms. Deegan as follows:-

"I say that the petitioner does not understand how the plaintiff could have established that a centre of main interest was in Northern Ireland. I say that at no time during any correspondence between Mr. Mulligan and the petitioner, (including the furnishing of various financial information by Mr. Mulligan) was it ever indicated that Mr. Mulligan had any interest in any assets in Northern Ireland or that Mr. Mulligan resided there or had any material, personal or business interest in Northern Ireland. In this regard I beg to refer to the copy letters of the 16th September, 2009, and 22nd September, 2009, attached hereto and marked with the letters "ED3" upon which I have signed my name prior to the swearing hereof detailing assets owned by Mr. Mulligan and in particular his interest in the property at 31 Marian Park, Dundalk, Co. Louth and Tateetra, Newtownbalregan, Co. Louth and as well as enclosing yearly accounts and tax returns filed with Revenue in the Republic of Ireland."

In the letters referred to in that paragraph, the solicitors for Mr. Mulligan set out a number of matters. First of all reference was made to trading, profit and loss accounts for years ending 2004, 2005, 2006, 2007, 2008. It was then stated:-

"Eamon and Anne Mulligan are the registered owners of 31 Marian Park, Dundalk which is valued in the region of €90,000 to €100,000 and they have a First Active mortgage registered thereon. Elizabeth O'Connor (Anne Mulligan's mother) resides in the property with her son Thomas and his daughter.

Eamon and Anne Mulligan are the registered owners of a dwelling house at Tateetra, Newtownbalregan, Co. Louth, which is their family home and has a value in the region of €375,000 with a mortgage of €360,000 registered thereon. Our client is married with two children aged 17 and 13 years."

That letter was furnished by the solicitors for Mr. Mulligan as previously stated. The information in that letter can only have been provided by Mr. Mulligan. Mr. Mulligan in the course of the submissions herein argued that the issue of the centre of main interest was now irrelevant given that he had been adjudicated bankrupt in Northern Ireland. I disagree. Article 3(1) of the Regulation provides:-

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

In the affidavit of Mr. Mulligan sworn on the 28th October, 2010, he has averred that:-

"Ms. Deegan avers that the petitioner was never told I had assets in Northern Ireland (I do not), that I resided in Northern Ireland (I do) or that I had any personal or business interests in Northern Ireland (I hold a taxi licence). I am not sure whether or not I told the petitioner that I resided in Northern Ireland, but then I am not sure I ever had cause to. It is certainly the case that the business address from which I operated was situated at Tateetra, Newtownbalregan in Dundalk and it may be that the petitioner thereby assumed I resided in the jurisdiction or assumed that if I worked here that I also lived here. In short the petitioner was wrong to make any such assumption or assumptions."

It is very difficult to reconcile that averment with the letter from the solicitors for Mr. Mulligan to which I have already referred and which refers to the fact that he and his wife are the registered owners of a dwelling house at Tateetra, Newtownbalregan, Co. Louth, which is "their family home". It is also interesting to note that the trading and profit and loss accounts referred to Mr. Mulligan as being "Mr. Eamon Mulligan, Tateetra, Newtownbalregan, Dundalk and further that the tax returns which are also provided by the solicitors for Mr. Mulligan gives his address as Tateetra, Newtownbalregan, Dundalk, Co. Louth. It is true to say that one of the tax assessments gives an address, care of his accountant. However, it is hard, as I have said, to reconcile that letter from McDonough and Breen, written presumably on the instructions of Mr. Mulligan with the averment that he has resided since 2002 in Northern Ireland at 164 Longfield Road, Forkhill, Newry, Do. Down.

Forde and Simms in Bankruptcy Law at p. 195 outline a number of relevant considerations in ascertaining a debtor's centre of main interests including "where he is deemed to be "resident" for tax and for some other purposes. Ascertaining where the C. O.M.I. is located is a question of fact and degree. Among the matters that are considered for this purpose are the place from where the business is managed and where significant contracts with it are concluded; the location of any of authorities that regulate its activities; where its managers' meetings are held; where its accounts are prepared and audited; where its lenders and customers are located."

An important consideration in determining the centre of main interest derives from Recital 13 of the Regulation which provides:

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

I think that having regard to the facts and circumstances of this case a third party looking at this issue would have concluded that in July of 2010 when the Bankruptcy Order was made in Northern Ireland the debtor's centre of main interests was in this jurisdiction bearing in mind all of the information referred to in the Affidavit of Ms. Deegan and the information supplied by Mr. Mulligan himself through his Solicitors. Accordingly, I have come to the conclusion that this is not an appropriate case in which to recognise the adjudication by the courts of Northern Ireland. I do so on the basis of my view that the centre of main interests of Mr. Mulligan was in this jurisdiction at the time of making the Bankruptcy Order. I might add that I am less than impressed with the averments contained in the Affidavit of Mr. Mulligan.

In those circumstances, I will hear the parties further on the steps that should be taken at this stage in these proceedings.