THE HIGH COURT

BANKRUPTCY

[2010 No. 2335 A.D.]

IN THE MATTER OF A PETITION FOR ARRANGEMENT BY P A. D WITH AN ADDRESS

C/O ... CO. DUBLIN

JUDGMENT of Ms. Justice Dunne delivered the 20th day of January 2012

The petitioner herein, Ms. D, filed a petition for arrangement herein and an order for protection of the petitioner was made on the 24th November, 2010. Ancillary orders were also made on that date.

An affidavit was filed by David McGregor on behalf of Anglo Irish Bank Corporation (International) plc (Anglo) on the 4th February, 2011, in which the entitlement of the petitioner to invoke the jurisdiction of this Court was challenged. Following an exchange of affidavits, ultimately the matter came before me for hearing on the 21st July, 2011.

The principle issue canvassed before me was as to whether the petitioner satisfies the requirements of Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings (The Insolvency Regulation) such that the court has jurisdiction to hear and determine the petition. At the time of the hearing before me, this issue had been distilled down to the question as to whether or not the arrangement before the court was a vesting arrangement or not. I now propose to consider that issue.

The Law

The Insolvency Regulation was given effect in this jurisdiction by SI No. 334/2002. Reference was made to a number of Recitals and Articles in the Insolvency Regulation. Recital 12 provides as follows:-

> "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."

Recital No. 16 provides as follows:-

> "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. In that connection this Regulation should afford different possibilities. On the one hand, the court competent for the main insolvency proceedings should be able also to order provisional protective measures covering assets situated in the territory of other Member States. On the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States."

The definition of insolvency proceedings is contained in Article 2(a) is as follows:-

> "(a) insolvency proceedings' shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A."

Annex A includes the following:-

> "Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution."

Article 3(1) of the Insolvency Regulation describes the international jurisdiction as follows:-

> "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 persons, 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."

It will be seen from Annex A therefore that the Insolvency Regulation only applies to arrangements which involve the vesting of all or part of the property of the debtor in the Official Assignee.

There are certain statutory provisions to which it would also be of assistance to refer. Section 87 of the Bankruptcy Act 1988 provides for the presentation of a petition by any debtor unable to meet his engagements with his creditors and enables the court to grant protection to such debtor. Section 90, sets out the procedure to be followed on the granting of an order for protection. Section 91, provides for the filing of a statement of assets and liabilities by the debtor prior to a private sitting. Section 93 provides as follows:-

> "(1) If the proposal provides for the vesting of all or part of the arranging debtor's property in the Official Assignee either as security for an offer or for realisation and distribution, that property shall vest in the Official Assignee, if he consents, in accordance with the terms of the proposal on the approval of the proposal by the Court.
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> (2) Where all or part of the property is vested in the Official Assignee for realisation and distribution, the Official Assignee shall have for that purpose all such powers in relation to the property as he has in a bankruptcy matter. A proposal under which property is so vested is referred to in this Act as a 'vesting arrangement'."

The Petition for Arrangement
The petition in this case is in the usual form provided for in the Rules of the Superior Courts. In the petition, the petitioner listed three events giving rise to her inability to pay her debts, namely a judgment in the sum of €2,780,722.92, obtained against her by Anglo, a judgment in the sum of €5,637,398, obtained against her by one J D and the collapse in the value of her shares in Anglo which she estimates as being in excess of €9million. These issues were dealt with in more detail in the affidavit sworn by the petitioner herein on the 28th October, 2010. She noted in paras. 13 and 14 of that affidavit as follows:-

> "In respect of the enforcement of the orders of the High Court in the Isle of Man, AIB (IOM) have moved by execution order of the Isle of Man coroner (ie. the Isle of Man Sheriff) over my private dwelling home where I have resided and worked from (sic) over the last 20 years. I have vacated and surrendered the said property in the aftermath of the fixing of the notices of execution on the door of my home at the direction of the AIB (IOM). In all the circumstances, I believe that Anglo Irish plc and/or the directors of the Isle of Man subsidiary bank are determined to bankrupt me and have caused me to vacate and surrender my family home in the belief that I would not then be in a position to proceed against them in this jurisdiction....
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> I ordinarily reside in the Isle of Man but since having been forced to vacate my home in the Isle of Man, I currently reside in Northern Ireland at the will and grace of my aging mother and, by economic necessity, continue to reside there due to the regrettable and unforeseen circumstances I now find myself in."

Proposal for the Composition of her Debts.
It is relevant at this point to refer to the proposal for the composition of her debts made by the petitioner herein on the 4th January, 2011. The proposal related to a total sum of €615,923 being available which after costs would allow for a distribution of €591,286.08 representing a dividend of less than 8c per euro.

Submissions
Mr. Dunleavy on behalf of Anglo, submitted that this was not a vesting arrangement within the meaning of the Bankruptcy Act 1988 and that there was no intention evinced on behalf of the petitioner to have a vesting arrangement as part of her proposal. He noted the provisions of O. 76, r. 90(3) which provide for the making of a lodgement in the case of a vesting arrangement and he pointed out that no such lodgement has been made in this case. Nevertheless he noted that in the last few days before the hearing, it was proposed on behalf of the petitioner that there should now be a vesting arrangement. In that context he referred to a letter of the 11th July, 2011, from the petitioner's solicitors to the Official Assignee which contains the following paragraph:-

> "The petitioner shall vest in you in your capacity as Official Assignee an Irish Government convertible exchequer bond to fund the hereinbefore mentioned proposal and to further enable you to realise and distribute the proceeds of the realisation of the exchequer bond arising from this vesting arrangement."

The proposal contained in that correspondence indicated that the net sum available for distribution was now €331,032, thus providing for a distribution of just over 4c in the Euro.

The solicitors on behalf of Anglo responded to the correspondence in relation to the proposed vesting by letter dated the 20th July, 2011. It was noted in the course of that letter as follows:-

> "The Bank contends that the time that Ms. D is required to meet the jurisdictional requirements of the regulation is the time the application is brought, not nine months later. Put simply, the current proposal seems to the Bank to be little more than an attempt by Ms. D to use the office of the Official Assignee to camouflage the initial want of jurisdiction which attended her original application. The bank - which has a substantial judgment which it was in the process of executing at the time of the application for the protection order- is of the view that Ms. D should not be assisted in this regard."

A further issue was referred to in that the bond proposed to be vested in the Official Assignee was not the property of the petitioner but was owned by two third parties.

Thus, it was submitted on behalf of Anglo that the petitioner was seeking to mend her hand by proposing at this late stage to vest property in the Official Assignee. This was described as an attempt to cure the apparent want of jurisdiction. It was submitted that a want of jurisdiction cannot be cured subsequently by a new proposal to vest property. In any event it was pointed out that what was proposed was not in fact a vesting arrangement within the meaning of s. 93 of the 1988 Act as what was proposed to be vested was not the property of the petitioner, but was the property of M T. D and A T. D.

Mr. Dunleavy in support of his arguments in relation to the question of jurisdiction referred to Halsbury's Laws of England, 5th Ed., Vol. 24, para. 623 where it was stated therein as follows:-

> "Jurisdiction must be acquired before judgment is given."

The authority given for that statement is the case of *Thompson v. Shiel* [1843] I.R. Eq. R. 135, in which the Master of the Rolls stated at p. 141:-

> "... it is well settled, that the order of justices, or the judgment of any foreign or inferior court is examinable as to the matters touching its jurisdiction; and if it appears that there was not jurisdiction, the proceeding is absolutely void."

In the circumstances it is contended on behalf of Anglo that there was no jurisdiction to make the order for protection and in those circumstances it is submitted that the order of protection should be set aside.

Mr. Foley S.C. in his submissions on behalf of the petitioner outlined the history of these proceedings to date. The petition for an arrangement was brought in this jurisdiction in reliance on the Insolvency Regulations on the basis that the petitioner had her centre of main interest in this jurisdiction. Submissions to that effect were furnished to the court when the order of protection was made. It was accepted by Mr. Foley that to come within the framework of the Insolvency Regulation, there has to be a total or partial divestment of property of the debtor vesting in the Official Assignee.

Mr. Foley was highly critical of the conduct of Anglo in relation to these proceedings and in relation to their conduct in the Isle of Man. However, having noted his criticism, I think I can say that the matters raised by Mr. Foley in that connection do not have a bearing on the issues I have to decide on this application.

Mr. Foley then examined the provisions of the Bankruptcy Act 1988, and in particular those provisions commencing with s. 90 of the Act. Section 90, as set out previously, provides the procedure to be followed on the grant of protection. Section 91 provides for the filing of statements and has been amended to provide that the arranging debtor can file a statement of affairs at least seven days before a private sitting. He noted also the provisions of s. 92 and noted in particulars. 92(1)(b) which provides for the proposal or any modification thereof to be binding on the arranging debtor and all persons, where creditors at the date of the petition and who have notice of the sitting if the proposal or any modification thereof has been approved by the court. Given the terms of s. 92(1)(b) Mr. Foley pointed out that it is clear that a proposal may be modified. The proposal originally before the court in this case did not include a vesting arrangement, but there is now a proposal to vest a bond in the Official Assignee. He argued that what was required at the date of presentation of the petition for arrangement was simply a proposal, not necessarily a proposal which included vesting arrangement. He emphasised therefore, that the time to make a vesting arrangement or proposal containing a vesting arrangement remained open until the court approved the proposal of the arranging debtor. There was no time frame in this regard provided for in the 1988 Act. Therefore he contended that it was not until a final proposal was approved by the court that one could say whether or not one came within the framework of the Insolvency Regulation. On that basis he argued that the application by Anglo to set aside the order of protection at this stage was premature.

Finally, he commented that it was fatuous to argue that the petitioner was not the owner of the bond proposed to be vested in the Official Assignee. An undertaking had been provided to make the money available.

Counsel on behalf of Mr. D, the largest creditor of the petitioner, supported the arguments of Mr. Foley.

Mr. Dunleavy in reply commented that the proceedings in this jurisdiction were not yet opened. There was no evidence at the time of the presentation of the petition that the arrangement included a vesting arrangement. He made the analogy with the situation where a vesting arrangement was included in the original proposal but not followed through by the arranging debtor. In those circumstances, he contended that the jurisdiction of the court would lapse. Finally he reiterated that it was clear in this case that no insolvency proceedings have been opened in this case because the petitioner's original proposal did not contemplate a vesting arrangement. In those circumstances, these proceedings do not come within the framework of the Insolvency Regulation and accordingly the court does not have jurisdiction to deal with this matter pursuant to the Insolvency Regulation and the proceedings should therefore be set aside.

Decision
Annex A of the Insolvency Regulation defines insolvency proceedings as including "arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution". Article 3(1) of the Insolvency Regulation deals with the question of jurisdiction and I think it would be helpful to set out the terms of Article 3(1) again. It 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 its main interests in the absence of proof to the contrary."

The point made on behalf of Anglo in this case is that this Court does not have jurisdiction to deal with the petitioner's proceedings as these are not insolvency proceedings within the meaning of the Insolvency Regulation.

The provisions of s. 93 set out above are of relevance in considering what constitutes a vesting arrangement.

It is not disputed on behalf of the petitioner that to bring these proceedings within the framework of the Insolvency Regulation, it is necessary that there should be a vesting arrangement contained in the proposal of the petitioner. Absent a vesting arrangement, the proceedings cannot come within the provisions of the Insolvency Regulation.

Section 87 of the 1988 Act permits any debtor unable to meet his engagements with his creditors and wishing to place the state of his affairs before them with a view to making a proposal for the composition of his debts, under the control of the court, to present a petition to the court setting out the reason for his inability to pay his debts and requesting that his personal property may be protected until further order. Once an order is granted, directions are given for the calling of a preliminary meeting of the creditors at which a statement of assets and liabilities should be presented. The arranging debtor must also keep a minute of the proceedings at that preliminary meeting. Subsequent to the preliminary meeting a private sitting has to be held before the court to consider the arranging debtors proposal. Sanfey and Holohan in *Bankruptcy Law and Practice* (2nd Ed.) set out the purpose of the preliminary meeting at para. 16-11 as follows:-

> "The purpose of the meeting is to allow the arranging debtor to meet his creditors and explain his failure to meet his engagements and outline any proposal he intends to make to his creditors. The creditors have the opportunity to question the debtor on any aspect of his affairs and to discuss any proposal which the debtor may make."

The application for an order of protection was made herein on an *ex parte* basis on the 24th November, 2010, as all such applications are made. The application was grounded upon an affidavit of the petitioner and she sought the protection order with a view to making a proposal to her creditors for the payment or compromise of her debts. She referred in the course of her affidavit grounding the petition to a statement of affairs filed with the petition and affidavit dated the 21st October, 2010. It was noted by the court at the time of making of the order of protection that no binding conclusions were being made regarding the residency of the petitioner. It was also indicated that nothing done by virtue of making the order of protection was to be taken as preventing or prohibiting any interested party from raising the issue of the debtor's centre of main interest. Following the making of the order of protection, directions were given as is required under the Bankruptcy Act 1988 for the holding of a preliminary meeting and fixing the date for a private sitting.

A preliminary meeting took place as directed on the 4th January, 2011. At that meeting a proposal was put to the petitioner's creditors. The proposal on that date was in the following terms:-

> €100,000 within fourteen days of the ih February, 2011.
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> €232,932 within eight weeks of the 7th February, 2011, (being net proceeds of sale of Knockchree, IOM).

€283,000 within sixteen weeks of the 7th February, 2011, (being the net proceeds of sale of ..., Sandymount, Dublin 4).

Total €615,923.

Less Official Assignee's costs €24,636.92

Net total for distribution: €591,286.08

Dividend: €0.07409 per €1.

The proposal was dated the 4th January, 2011, and signed by the petitioner. At the preliminary meeting a number of parties were in attendance and there was discussion about various matters set out in the petitioner's statement of affairs. Ultimately a vote was taken and the majority of creditors voted in favour of the proposal.

There is no dispute between the parties that the proposal put to the preliminary meeting following the making of the order of protection was not a proposal which included a vesting arrangement. In the normal course, a private sitting takes place following the preliminary meeting. The private sitting was scheduled to take place in this case on the 7th February, 2011. The private sitting was adjourned to the 11th April, 2011, as the proof of debts was not completed.

As I have indicated above, Mr. Foley S.C. has conceded that in order for the court to have jurisdiction to deal with this matter under the Insolvency Regulation, the arrangement proposed by the petitioner must be a vesting arrangement. On the face of it, given that the proposal put to the preliminary meeting did not contain a vesting arrangement that would appear to dispose of the issue raised herein. However, Mr. Foley made two further points. The first of those was that the application now made by Anglo is premature given that the proposal voted on by the creditors has not yet been approved or disapproved by the court. The second point made by Mr. Foley is that there is now a further proposal which does involve a vesting arrangement.

I think it is necessary to refer briefly to the effect of making a protection order. Section 88 of the Act, provides that the arranging debtor cannot without the sanction of the court pledge, part with or dispose of property or any part thereof, save in the ordinary course of trade or business. Such a provision clearly protects the creditors from any act on the part of the arranging debtor which would have the effect of reducing the assets available to the creditors for the payment of the debts of the arranging debtor. Section 89 protects the debtor from process in relation to execution orders in circumstances where the Sheriff or County Registrar has not made a seizure or gone into possession on foot of an execution order. Thus it will be seen that the effect of the making of a protection order restricts the ability of a creditor from seeking to recover a debt in the normal way.

The petitioner in this case as mentioned previously, invoked the jurisdiction of the court under the Insolvency Regulation. The court has jurisdiction under the Insolvency Regulation in the case of a vesting arrangement but has no jurisdiction in respect of a non-vesting arrangement. The arrangement put to the creditors of the petitioner herein was not a vesting arrangement. In circumstances where it is clear that the proposal put to the creditors involves a non-vesting arrangement and, therefore, is one which the court does not have jurisdiction to deal with under the Insolvency Regulation, I do not think it can be necessary for a creditor who wishes to challenge the jurisdiction of the court making the protection order to wait until the court is dealing with a request to approve the proposal of the petitioner before seeking to set aside the protection order. A proposal must be approved by the court. Nevertheless the proposal can only be approved if the court has jurisdiction to deal with the matter. It is clear that the court does not have jurisdiction to deal with a non vesting arrangement under the Insolvency Regulation. In those circumstances I see no reason why the creditor, in this case Anglo, cannot make an application for the setting aside of the order of protection before the proposal for the arrangement comes before the court for approval.

The second point raised in this regard by Mr. Foley on behalf of the petitioner related to the argument that the application was premature in circumstances where the proposal was open to the possibility of modification. To that extent I think it is important to consider in full the provisions of s. 92 of the Bankruptcy Act 1988, which was relied on by Mr. Foley in respect of this issue. It provides as follows:-

> "(1) (a) If, at the private sitting referred to ins. 90 or any adjournment thereof, three-fifths in number and value of the creditors voting at such sitting either in person or by an agent authorised in writing in that behalf accept the proposal or any modification thereof, it shall be deemed to be accepted by the creditors, subject to the approval of the Court.
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> (b) If approved by the Court, the proposal or any modification thereof shall be binding on the arranging debtor and on all persons who were creditors at the date of the petition and who had notice of the sitting.
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> (2) A creditor whose debt is less than £100 shall not be entitled to vote. (3) The arranging debtor shall attend the sitting and the Court shall have power to examine him on oath or any witness produced by him or any creditor or person claiming to be a creditor.
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> (4) The Court may require any person so examined to sign a transcript of his evidence.
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> (5) Debts may be proved at the sitting."

It is clear from the provisions of the section that a proposal can be modified. The scheme of the Act seems to me to be predicated on the basis that full information as to the assets and liabilities of the arranging debtor is provided at all stages to the creditors. The creditors are able to examine the arranging debtor as to the statement of affairs and the proposal at the preliminary meeting. After that the matter comes before the court at a private sitting for approval or otherwise, as the case may be, of the proposal. It would, I accept, be very unusual for a court not to give approval to a proposal which has been accepted by the creditors.

In this case the petitioner is now proposing a vesting arrangement which has not been through the rigours of a preliminary meeting. The proposal made at the preliminary meeting and accepted by the creditors is entirely different to that now proposed. It is now proposed to have a vesting as opposed to a non-vesting arrangement. It could be said that the creditors could question and examine the petitioner at the private sitting but that is not the procedure provided for under the Act. Bringing forward a different proposal to the private sitting from that which was approved at the preliminary sitting means that the creditors have been deprived of the opportunity they would otherwise have had to examine the arranging debtor at the preliminary meeting in relation to their statements of affairs, their assets and liabilities and as to the proposal to be made. Given that this is so, I have misgivings about the approach of the petitioner in this case in attempting to change the arrangement originally proposed at the preliminary meeting into a vesting arrangement. This is not so much a modification of the proposal as a complete change to the proposal originally made.

Apart from any such misgivings, it is clear from the provisions of s. 93 of the 1988 Act that there are other stumbling blocks in the path of the petitioner in seeking to change the proposal from a non vesting arrangement into a vesting arrangement. First of all the consent of the Official Assignee is required to a vesting arrangement. Until the consent of the Official Assignee is obtained, no property can vest in him.

Secondly, and perhaps more importantly, the point is made by Mr. Dunleavy that s. 93 of the 1988 Act, envisages "the vesting of all or part of the arranging debtor's property". The new proposal is to vest a bond which is not the property of the petitioner in the Official Assignee. This does not appear to be something contemplated by the Act. It raises a number of questions. For example, does the provision of a bond by the third parties amount to a gift? Is there any tax implication from the provision of the bond? If not a gift, what are the terms upon which the bond is to be provided? Does the petitioner have any legal obligations to the owners of the bond? These are questions which could create concerns for the creditors and indeed, for the Official Assignee. For these reasons, the fact that the bond is not the property of the petitioner is a matter of substance and it does not appear to me that the bond can be regarded as the property of the petitioner. Therefore, the petitioner does not appear to me to come within the ambit of s. 93 of the Act.

In those circumstances, the proposal, even if it could be modified to the extent suggested at this stage of the proceedings, is not a vesting arrangement and therefore the court has no jurisdiction to deal with the matter.

The Petitioner's Centre of Main Interest
The decision in relation to whether or not there is a vesting arrangement is sufficient to dispose of this application. Nevertheless, given the importance of the other issue raised, I feel I should deal with it.

The second issue that has to be considered by the court is whether or not the court has jurisdiction to deal with any application on behalf of the petitioner having regard to question of the location of the petitioner's centre of main interests. I have already set out the provisions of Article 3 of the Insolvency Regulation which provides that the courts and the member's State within the territory of which the centre of a debtor's main interests is situated will have jurisdiction to open proceedings. Thus, regardless of the issue in relation to whether or not these proceedings constitute a vesting arrangement, it is necessary for the petitioner to be shown to have the centre of her main interests (COMI) in this jurisdiction for any proceedings commenced in this jurisdiction to be recognised on the basis of the Insolvency Regulation elsewhere,

The petitioner and Anglo in their respective submissions referred to a number of factual matters in respect of the question of COMI. I was also referred to certain legal principles which were said to apply to the determination of COMI. I want to refer to three decisions relied on in the course of the submissions in respect of the question of COMI. They are the cases, *Eurofood IFSC Ltd. (No.2)* [2006] 4 I.R. 307, *Official Receiver v. Eichler* [2007] B.P.I.R. 1636 and *Shierson v. Vlieland-Boddy* [2005] 1 W.L.R. 3966. It would be helpful to refer very briefly to the head note in the case of *Shierson v. Vlieland-Boddy* in which it was held as follows:-

> "A debtor's centre of main interests was to be determined at the time that the court was required to decide whether to open insolvency proceedings in the light of the facts as they were at the relevant time for determination which included historical facts which had led to the position as it was at that time; that in making its determination, the court had to have regard to the need for the centre of main interests to be ascertainable by third parties, in particular creditors and potential creditors; that it was important, therefore, to have regard not only to what the debtor was doing but also to what he was perceived to be doing by an objective observer, and to have regard to the need for an element of permanence; that the place where the debtor lived and had his home was likely to be relevant to a determination of where he conducted the administration of his interests; that there was no principle of immutability and a debtor had to be free to choose where he carried on those activities which fell within the concept of administration of his interests; that it was a necessary incident of the debtor's freedom to choose where he carried on those activities, that he might choose to do so for a self serving purpose, for example, in order to alter the insolvency rules which would apply to him in respect of existing debts; that in those circumstances, the court would need to scrutinise the facts which were said to give rise to a change in the centre of main interests and to be satisfied that the change in the place where the activities which fell within the concept of 'administration of its interests' were carried on which was said to have occurred, was based on substance and not an illusion and that it had the necessary element of permanence; that the judge had been entitled to reach the conclusion that the debtor's centre of main interests had moved to Spain; that, therefore, the jurisdiction to open main insolvency proceedings had not been established under Article 3(1) of the Regulation; but that, in the circumstances, the debtor had an establishment for the purposes of the territorial insolvency jurisdiction specified in Article 3(2); and that, accordingly the petition would be restored."

I think it would also be helpful in the context of the present case to refer to a passage from the judgment of Chadwick L.J. in that case at para. 39, where he stated as follows:-

> "There is not, I think, any doubt as to the date in relation to which the debtor's centre of main interests falls to be determined for the purposes of the Regulation. Jurisdiction to open insolvency proceedings is conferred, under Article 3.1, on the courts of the member state 'within the territory of which the centre of main interests is situated'. The 'time of the opening of proceedings' means 'the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not', Article 2(f). 'Judgment', in that context, includes the decision of any court empowered to open such proceedings: Article 2(e). The judge was correct to take the view that, before it could assume jurisdiction to open main insolvency proceedings, the court of a member state must be satisfied that, at the time that it did so, the debtor's centre of main interests was situated within the territory of that state. That, too, had been the view of the registrar, as appears from the third sentence of para. 16 in his judgment, 'I have to decide now what is his centre of main interests' is."

A further passage from the judgment of Chadwick L.J. is also of assistance. At para. 55 having considered a number of authorities he concluded as follows:

> "I can summarise my own conclusions as follows:
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> 1. A debtor's centre of main interests is to be determined at the time that the court is required to decide whether to open insolvency proceedings. In a case where those proceedings are commenced by the presentation of a bankruptcy petition, that time will normally be the hearing of the petition. But, in a case such as the present, where the issue arises in the context of an application for permission to serve the petition out of the jurisdiction, the time at which the centre of the debtor's main interests falls to be determined will be at the hearing of that application. Similar considerations would apply if the court were faced with an application for interim relief in advance of the hearing of the petition.

> 2. The centre of main interests is to be determined in the light of the facts as they are at the relevant time for determination. But those facts include historical facts which have led to the position as it is at the time for determination.
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> 3. In making its determination the court must have regard to the need for the centre of main interests to be ascertainable by third parties; in particular, creditors and potential creditors. It is important, therefore, to have regard, not only to what the debtor is doing but also to what he would be perceived to be doing by an objective observer. And it is important, also, to have regard to the need, if the centre of main interests is to be ascertainable by third parties, for an element of permanence. The court should be slow to accept that an established centre of main interests has been changed by activities which may turn out to be temporary or transitory.
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> 4. There is no principle of immutability. A debtor must be free to choose where he carries on those activities which fall within the concept of 'administration of his interests'. He must be free to relocate his home and his business. And, if he has altered the place at which he conducts the administration of his interests on a regular basis, by choosing to carry on the relevant activities (in a way which is ascertainable by third parties) at another place, the court must recognise and give effect to that.
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> 5. It is a necessary incident of the debtor's freedom to choose where he carries on those activities which fall within the concept of 'administration of his interests', that he may choose to do so for a self-serving purpose. In particular, he may choose to do so at a time when insolvency threatens. In circumstances where there are grounds for suspicion that a debtor has sought, deliberately, to change his centre of main interests at a time when he is insolvent, or threatened with insolvency, in order to alter the insolvency rules which will apply to him in respect of existing debts, the court will need to scrutinise the facts which are said to give rise to a change in the centre of main interests with that in mind. The court will need to be satisfied that the change in the place where the activities which fall within the concept of 'administration of his interests' are carried on which is said to have occurred is a change based on substance and not an illusion; and that that change has the necessary element of permanence.
>
> Applying those principles to the facts in the present case, I find it impossible to say that the judge was not entitled to reach the conclusion that he did, that the debtor's centre of main interests had moved to Spain. The judge was clearly aware that there were grounds for suspicion that the move was self serving and might not be genuine. But, unless he were prepared to disbelieve the debtor's evidence as to what he was doing in Spain and why he was living there, the judge was bound to take that evidence into account. He held that it would not be fair to the debtor to disbelieve that evidence in the circumstances that the petitioner had chosen not to test it by cross-examination."

I accept the summary of principles set out by Chadwick L.J. as being applicable to the question of the determination of the centre of main interests. Therefore, one of the first issues that has to be considered by me applying those principles to the facts of this case is, when does the question of the petitioner's centre of main interest fall to be determined? Such a determination was not made by the court at the time of the *ex parte* application made by the petitioner for a protection order. It was stated in *Shierson v. Vlieland-Boddy*, that the appropriate time for consideration of that issue would normally be at the time of the hearing of the petition in the context of applications commenced by the presentation of a bankruptcy petition. These proceedings were commenced by an *ex parte* application for a protection order as I have already indicated. It would not, in my view, have been appropriate to make a determination as to COMI on an *ex parte* application. In *Shierson v. Vlieland-Boddy* the appropriate time was found to be at the hearing of the application for leave to serve out of the jurisdiction. The hearing in this case took place in July challenging the entitlement of the petitioner to bring proceedings in this jurisdiction having regard to the question of COMI and thus I am satisfied that once the challenge to COMI was made, it was necessary to consider the issue. It seems to me that it would be incongruous to allow a petitioner to enjoy the benefit of a protection order if, in fact, the Court lacked jurisdiction to open main proceedings. For that reason, I am satisfied that the decision on COMI can be made now based on the facts and circumstances pertaining at the date of hearing.

There are a number of basic principles to be considered in relation to the question of COMI. First of all, COMI should correspond to the place where the debtor conducts the administration of his or her interests on a regular basis and is therefore ascertainable by third parties. (See Recital 13, of the Insolvency Regulation.) Secondly, it is important to bear in mind that COMI is a matter of substance and not illusion. The third point I want to refer to briefly, is the relevance of residence in considering the question of COMI. To that extent, I think it is useful to refer to the decision in the case of *Official Receiver v. Eichler*, to which I have referred above. In that case, Chief Registrar Baister made the following comments at para. 18:-

> "I have little difficulty in concluding that at the date when these proceedings were opened (which was the same as the date on which they were presented) Dr. Eichler's centre of main interests was in the UK. It is likely that before he came here it was in Germany, but it clear from the authorities to which I am referred that he was free to change it and that he did so. He appears to continue to work here, so there is no basis on which I conclude that his being here is purely temporary. This country appears to be, at present, the place where he is conducting the administration of his interests on a regular basis; it is readily ascertainable by third parties. It may well be that he returns to Germany from time to time, but it is also plain that his habitual residence, in the sense of the residence where he is most often to be found, is here. Certainly, there is no evidence to the contrary. To the extent that it may be relevant (which I doubt) it would also appear that his professional domicile is here if all the expression means is that it is the place where he is carrying on his profession at the present time.
>
> Even if it could be said that Dr. Eichler's presence here was purely temporary, that would not necessarily, of itself, prevent his centre of main interests from being here. As far as I am aware, there is no authority which establishes any minimum period of time which a person must spend in a Member State before it can be said to have become his centre of main interests. Common sense would seem to indicate that a few days (or even a few weeks) would be unlikely to suffice because that would be at odds with conducting the administration of one's interests in a place 'on a regular basis' (as well as being at odds with the idea of an 'habitual residence'). It is unnecessary for me to form a view, however, as that is not the case here."

With those principles in mind, I now propose to look at the factual situation. In the course of Anglo's submissions, a large number of factual matters were set out.

It was submitted on behalf of Anglo that although those were not agreed facts as such, the matters set out in Anglo's submissions were based on facts deposed to in the affidavits before the court and which have not been controverted. I now propose to refer to a number of those facts.

1. The Bank obtained judgment against the petitioner on the 16th June, 2010, in the sum of €2,780,722.97.

2. The Bank subsequently obtained a freezing injunction equivalent to a Mareva injunction in aid of execution directed to *inter alia* the petitioner's movable and immovable property in the Isle of Man, Northern Ireland and in this jurisdiction.

3. The freezing order required the petitioner to disclose to the Bank's lawyers all of her assets worldwide, giving the value, location and details of the same, within 48 hours of the serving of the freezing order upon her.

4. The High Court of Justice of the Isle of Man provided that service of the freezing order upon the petitioner's solicitors in the present matter would be good service upon the debtor.

5. The freezing order was served upon the petitioner's solicitors on the 20th July, 2010. There was a dispute between the parties as to whether or not the petitioner had complied with the obligations pursuant to the freezing order referred to.

6. The existence of the judgment was disclosed to this court in the course of the petition and affidavit filed herein.

7. The existence of the freezing order was not disclosed to this Court in the course of the petitioner's ex parte application for protection.

8. The address provided for the debtor in the petition is care ofher solicitor's office.

9. The petition does not disclose the jurisdiction of this Honourable Court to deal with this matter, save to the extent that it recites, inter alia, "Your petitioner therefore submits herself to the jurisdiction of the court …."

(It was agreed by Mr. Foley and Mr. Dunleavy that one cannot confer jurisdiction on the court if the court does not, in fact, have jurisdiction to deal with the matter).

10. The petitioner is ordinarily resident in the Isle of Man.

(This particular assertion of fact was in dispute. The petitioner contends that she ceased to be resident in the Isle of Man on the 7th July, 2010. At the time that the petition was presented to this Court on the 2nd November, 2010, the petitioner was residing in Northern Ireland.)

11. The petitioner moved to the Isle of Man- to take up a job ... - in 1989.

12. Between November 2002 and December 2006, the petitioner had some need to work in Dublin for short periods ....

13. The petitioner has resided and worked from her dwelling house on the Isle of Man ... for the last twenty years.

14. The petitioner categorises her dwelling house as aforesaid as her family home.

15. The petitioner did not vacate and surrender her family home on the Isle of Man until after the Isle of Man coroner had arrested her family home by affixing an execution order to the door of the property in efforts to enforce the substantial judgment that had been obtained by the Bank.

16. The petitioner's household chattels remain in the Isle of Man, the locus of her family home.

17. The petitioner resided as at the swearing of the first affidavit in Northern Ireland with her mother.

18. The petitioner resides in Northern Ireland as a result of, inter alia, "being forced to vacate my home in the Isle of Man ..."

19. The petitioner was born outside the jurisdiction of this Honourable Court.

20. The petitioner is a British citizen.

21. From the 10th December, 2001, the petitioner carried a British passport issued in the Isle of Man.

22. The petitioner was issued with an Irish passport on the 15th November, 2010.

23. The petitioner previously held an Irish passport issued on the 9th September, 1988 ...

24. The petitioner has a PPS number issued by the State.

25. The petitioner has resident bank account status with Allied Irish Bank plc.

26. The petitioner has paid Deposit Income Retention Tax from her Irish bank account.

27. The petitioner completed Irish tax returns between 2005 and 2010.

28. All of the income returned on the petitioner's tax returns in this jurisdiction for the period from 2005 to 2010, is comprised of rental income.

29. All of the tax returns filed by the petitioner in this jurisdiction for the period from 2005 to 2010, indicate that her address, which she styles for tax purpose as her, *inter alia*:

> Main residence address is either her family home in the Isle of Man or the address of her tax agent in the Isle of Man.

30. All of the tax returns filed by the petitioner in this jurisdiction for the period from 2005 to 2010 indicate that she is

non-resident for tax purposes.

31. The tax return filed by the petitioner in this jurisdiction for the year 2005, the only form on which she was required to respond to such a question, indicates that she is not domiciled within the jurisdiction of this Honourable Court.

32. The petitioner made a tax return in the Isle of Man up to the day the Bank requested the coroner to levy execution against her family home.

It will be seen from the above summary of factual matters relied on by Anglo, that from 1989 onwards, the petitioner worked and lived in the Isle of Man. She was tax resident in that jurisdiction. She worked in this jurisdiction between the period November 2002 and December 2006, but as she herself had said in her affidavits, this work was for short periods only. She continued to reside in the Isle of Man during that period. Clearly, working in this jurisdiction did not affect her place of residence. It is clear from her own affidavits that she regarded her home on the Isle of Man as her "family home". She remained in her home in the Isle of Man until she was "forced" to leave in July 2010, as a result of execution proceedings taken against her in the Isle of Man by Anglo at which time she went to reside in Northern Ireland.

The petitioner has held both British and Irish passports over the years. Most recently, she obtained an Irish passport on the 15th November, 2010. That was just a short time before the presentation of the petition for arrangement herein and the making of the protection order on the 24th November, 2010. In general, I do not think that one could draw a final conclusion on the question of COMI simply by reference to the passports held by the petitioner at any given time. The question of nationality and the use of a particular passport may be of assistance in coming to a view in some cases but given the context of the petitioner who was born in Northern Ireland and is someone entitled to apply for a passport either in the UK or in this jurisdiction, it does not seem to me that the holding of an Irish passport or indeed the existence of a valid UK passport determines the issue one way or the other. One cannot avoid the suspicion that the Irish passport was obtained to bolster the position of the petitioner and accordingly, having regard to the overall circumstances of the petitioner I would not attach too much weight to the fact that she presently holds an Irish passport.

Another issue that may be seen to be of importance in considering the question of COMI is the fact that the petitioner has owned investment properties in this jurisdiction. It also appears that she has owned investment property in the Isle of Man and in the UK. So far as the rental income from her investment property here is concerned, she has paid income tax on that income in this jurisdiction.

The fact that the petitioner paid income tax on the rental income derived from her investment property in this jurisdiction is a factor that could be considered in determining the question of COMI. However, it is one small element of the overall picture.

Taking a snapshot of the position of the petitioner as of November 2010 and applying the principles set out above, it is difficult to come to any other conclusion that considered from the point of view of a third party, the petitioner's centre of main interests at that time, corresponding to the place where she conducted the administration of her interests on a regular basis, was the Isle of Man.

I have indicated above that it would not have been appropriate to consider the question of COMI at the time of the presentation of the petition given that the petition was presented on foot of an *ex parte* application. At the time of making the protection order on the 24th November, 2010, I expressly made it clear that I was granting the order without regard to any argument that might be made at a later stage in relation to the issue of COMI. Therefore, I think it is undoubtedly the case that the time to consider the question of COMI is not November 2010, but rather the time of the hearing before me in July 2011. For that reason I have to ask myself the question, have events changed in such a way between November 2010 and July 2011 as to result in the centre of the petitioner's main interests relocating from the Isle of Man to this jurisdiction.

There can be no doubt that the place of residence of the petitioner is a matter of significance in considering the question of an individual's centre of main interest. The place of residence of the petitioner was the Isle of Man until, to use her own words, she was forced to leave her home there, by reason of the execution process taken against her home in that jurisdiction. In the affidavits sworn by the petitioner in these proceedings, she has referred to the Isle of Man property as being her place of main residence and she has also indicated that the only reason she left the Isle of Man was because of the execution process being taken in the jurisdiction. If there was any doubt about the importance of the place of residence, one only has to consider again briefly the conclusions reached by Chadwick L.J. in the course of the judgment in *Shierson v. Vlieland-Boddy* at para. 55, which I have referred to above. He emphasised that the centre of main interest was to be determined in the light of the facts as they are at the relevant time for determination, but he added that those facts include historical facts which have led to the position as it is at the time for determination. He pointed out that the court would need to scrutinise the facts which are said to give rise to a change in the centre of main interests bearing in mind that there may be a suspicion that a debtor may have deliberately sought to change COMI when insolvent or threatened with insolvency. The court would need to be satisfied that the change in the place where the activities which fall within the concept of 'administration of his interests' are carried on which is said to have occurred is a change based on substance and not an illusion; and that the change has the necessary element of permanence if the centre of main interests is to be ascertainable by third parties.

As I have set out above, the historical facts are that the centre of main interest of the petitioner was the Isle of Man. The petitioner resided in Northern Ireland until shortly before the hearing before me on this issue. It was only on the 1st July 2011, that the petitioner took a lease on a property in this jurisdiction, a move which does not appear to have the necessary degree of permanence. I should add for completeness that in the affidavit sworn by the petitioner on the 20th July 2011 in which she deposed to the fact that she had taken up residence of property in this jurisdiction on the 1st July 2011 pursuant to a letting agreement, the following averment was contained:

"I confirm that ... [Sandymount, Dublin 4] has been my habitual residence since I acquired it in 1995."

I simply do not understand how the petitioner could have sworn an affidavit containing that averment in the light of the other affidavits sworn by her describing her "family home" in the Isle of Man. It cannot be correct.

Mr. Foley in his submissions on this issue emphasised that the petitioner's assets are within the State and that her investments are administered from within the State. She owned property here although she resided and was employed in the Isle of Man. Her shares, property transactions and so on, were here and rent was collected here. On that basis he submitted that although the petitioner was employed in the Isle of Man and worked there, this was the jurisdiction in which her main investments were located. He pointed out also that the judgment obtained in favour of her major creditor was obtained in this jurisdiction.

Mr. Foley also relied on the decision in the case of *Shierson v. Vlieland Boddy*. Further, he referred to the statement in para. 3, of the decision in the case of *In the Matter of Hellas Telecommunications (Luxemburg)* II S.C.A [2009] E.W.H.C. 3199 where it was stated

by Lewison J. that:-

> "It is also the case as one might expect in a system of law which encourages a single market across the whole of the European Union that it is possible for an entity, whether a corporate entity or an individual, to change its COMI from its original or presumed location."
>
> It was also said at para. 5, of that judgment as follows:-
>
> "The purpose of the COMI is to enable creditors in particular to know where the company is and where it may deal with the company. Therefore, it seems to me that one of the most important features of the evidence, which is the feature I mention next, is that all negotiations between the company and its creditors have taken place in London."

Decision

I have referred in detail to the very helpful judgment in the case of *Shierson v. Vlieland-Boddy* and to the decision in the case of *Official Receiver v. Eichler*. The passages referred to from the judgment in *Hellas Telecommunications Ltd*. are also of some assistance in considering the question of COMI. As pointed out in that case the purpose of COMI is to enable creditors to know where the company is or in the case of an individual, where that individual is so that the creditors may deal with the company or the individual. Looking at the evidence before the court in this case, it seems to me, that there is little objective evidence to demonstrate that the petitioner had her centre of main interest in this jurisdiction prior to July 2011. The petitioner undoubtedly and clearly had investments in this jurisdiction. However, there is nothing to show that she conducted any particular aspect of the administration of her interests in this jurisdiction. She resided up to July 2010, in the Isle of Man. She was tax resident in that jurisdiction. She did not reside in this jurisdiction. I accept that from to time she came to this jurisdiction and that she stayed from time to time in property owned by her in this jurisdiction. However, she was not resident in this jurisdiction. In the case of *Eichler*, one of the important considerations was the question of the habitual residence of the debtor. In that case, the debtor was based in the UK, working in the UK, resident in the UK and on that basis it was found that his centre of main interest was in the UK. It was found that the fact that his creditors were in Germany was not a relevant consideration.

If one examines the position of the petitioner from the point of view of what would have been ascertainable by the creditors of the petitioner up to July 2011, what would their view have been as to where the petitioner was conducting her main interest? I think the fact that the petitioner was not habitually resident in this jurisdiction, would have, by itself, almost certainly led to the conclusion that this jurisdiction was not the centre of the petitioner's main interest. I accept that the petitioner took a lease of the property in this jurisdiction shortly before the hearing before me. However, as was stated in the *Eichler* case, common sense would seem to indicate that a few days or even a few weeks would be unlikely to suffice in order to establish that a person can be said to have his centre of main interest in a particular place. Clearly, insofar as the petitioner is concerned, it could not be said that she habitually resided in this jurisdiction at any time. The real issue is whether or not the petitioner's centre of main interests or her business activities could be said to have been conducted on a regular basis in this jurisdiction coming up to the date of the hearing before me. On any objective basis I do not see how that could be said to be the case.

In those circumstances, I have reached the conclusion that the petitioner's centre of main interest is not in this jurisdiction. There may be an argument as to whether it remains in the Isle of Man or could be said to have transferred from that jurisdiction to Northern Ireland, but that is not a question I need to consider or decide.

Finally, I should add that the fact that judgment was obtained by the major creditor of the petitioner in this jurisdiction does not alter my view in this regard. I noted the submissions made on behalf of the creditor in question, Mr. D, but nothing in those submissions alters the conclusion I have reached. As noted in *Eichler* above the fact that creditors of the individual are found in one jurisdiction does not mean that the individual has their centre of their main interests located in that place. In those circumstances, I have reached the conclusion that this Court does not have jurisdiction to deal with the application of the petitioner and for that reason I will set aside the protection order made herein.