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THE HIGH COURT

BANKRUPTCY

2012/736P

IN THE MATTER OF A PETITION FOR ADJUDICATION OF BANKRUPTCY BY THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND AGAINST BRIAN O'DONNELL

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IN THE MATTER OF THE PETITION FOR ADJUDICATION OF BANKRUPTCY BY THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND AGAINST MARY PATRICIA O'DONNELL

Judgment of Mr. Justice Charleton delivered on the 23rd day of August 2013.

1. The Bank of Ireland petition to have Brian O'Donnell and Mary Patricia O'Donnell adjudicated bankrupt. The application arises out of a debt by way of borrowing or guarantee of borrowing amounting to €71,575,991.29. This debt is proven. Judgment in that sum was entered by consent of the debtors by Kelly J. on the 12th December, 2011.

2. There are six questions for determination on the hearing of this petition:

> 1) is the date for adjudicating the centre of main interest of a debtor the date of presentation of the petition in bankruptcy or is it the date of the hearing of that application;
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> 2) is the centre of main interest of the debtors Ireland or is it England;
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> 3) if the centre of main interest has changed from Ireland to England is it ascertainable by creditors;
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> 4) is the service of the petition in bankruptcy defective;
>
> 5) are there defects in the bankruptcy petition;
>
> 6) if there are such defects, can these be excused.

3. Firstly, a concise general background with a chronology of some pertinent dates.

Background

4. The debtors in these proceedings are husband and wife. Brian O'Donnell is a distinguished solicitor who established his own practice, Brian O'Donnell & Partners, in Dublin in 1999 after practicing in a large Dublin law firm. Mary Patricia O'Donnell is a medical doctor and has a specialisation in psychiatry. In addition to their respective legal and medical careers, the debtors engaged in the business of property investment. They held directorships in a number of companies established for this purpose; including Vico Capital Limited, Avoca Properties Limited, Georgian Corporate Limited, Recess Property Limited and Menlo Property Limited. They also hold shareholdings in companies outside Ireland. In related proceedings by the Bank of Ireland, an issue has arisen as to whether the legal ownership of some of these shareholdings is in trust for their children. The relevant properties are in Dublin, London, Washington and elsewhere. These issues cannot be resolved herein. By investments through these and other commercial entities, as well as personal investments, the debtors apparently acquired a substantial property portfolio. In Ireland, properties at 61/62 Merrion Square, Dublin; 61/62 Fitzwilliam Lane, Dublin and 84 Ailesbury Road, Dublin, were registered in the joint names of the debtors. In or about 1997 the debtors acquired a house called Gorse Hill, Killiney, Co. Dublin, demolished it and built a residence on the site in or about the year 2000 which, the Court was told, was valued at €30m at the height of Ireland's nationally ruinous property overvaluation. According to the Bank of Ireland, this property was the family home where the debtors lived with their children until the 29th December, 2011. Investment was also made in a country estate called Gortdrishagh House in Oughterard, Co. Galway. It has a small strip of land near or beside it of about 2ha. These properties were, it seems, owned by Vico Limited, an Isle of Man company, and Avoca Properties Limited respectively. Brian O'Donnell also has a 50% interest in a property at Merchants Arch, Wellington Quay, Dublin city and owns a 20% interest in two plots of land at Cratloekeel, Co. Clare.

5. The debtors' portfolio also ostensibly included substantial properties in the England, the United States, France, and Sweden. These seem to include: a building at 15 Westferry Circus, Canary Wharf, London, owned by Hibernia (2005) Limited; an office block at 17 Columbus Courtyard, Canary Wharf, London, owned by Fourteen Ninety Two Limited; a house called Bishop's House at 8 Barton Street, London owned by Vico Barton Limited; the Sanctuary Buildings, Westminster London, owned by Redicent Limited; a château in Courcheval, France called Chalet Hermine, owned by Greystoke SA; a property at 2099 Pennsylvania Avenue, Washington, United States owned by Vico 2099 LLC; and an office block known as the Fatburen Buildings in Stockholm, Sweden owned by Myrtleville AB. Sorting out the shareholdings, as to beneficial or legal interest, is far from easy and the debtors have joined issue with the Bank of Ireland as to the substance of what they or their children in fact have any entitlement to. That is a matter for another day and is not now before this Court.

6. In order to finance these investments, the debtors borrowed huge sums of money and became heavily indebted to a number of creditors, including the Bank of Ireland. From 2008 to the date of this judgment, residential property in Ireland declined to about one third of its exaggerated value and development land declined to agricultural prices, if rural, or about one twentieth of its value if in urban areas. This much has been obvious from the many cases heard by this Court over the last five years. This overvaluation of property prices left the debtors in severe financial distress. On the 23rd December, 2010 the Bank of Ireland commenced summary proceedings against the debtors seeking judgment for the sum of €69,379,394.87 in respect of unpaid borrowings made to them, or guaranteed by them, in respect of corporate entities. On the second day of the hearing of those proceedings, the 4th March, 2011, a settlement agreement was reached between the Bank of Ireland and the debtors pursuant to which the debtors agreed to judgment being entered against them if they failed to satisfy a number of obligations including complying with a repayment schedule. When, for whatever reason, commitments under that agreement were not in fact met, the Bank of Ireland applied for judgment and this, under the terms of the agreement, was to be on consent. This was entered by Kelly J. on the 12th December, 2011 in the amount of

€71,575,991.29 and costs. The Bank of Ireland's solicitors then wrote to the debtors on the 22nd December, 2011 requesting a statement of affairs. A short time later, on the 29th December, 2011, Brian O'Donnell and Mary Patricia O'Donnell travelled to the United Kingdom by ferry and apparently began to reside at the property at 8 Barton Street, London. It is asserted that on the 6th January, 2012 they met with David Rubin & Partners, Insolvency Practitioners, to discuss filing for bankruptcy in the UK. On the 19th January, 2012 the Bank of Ireland's solicitors received a letter from London based solicitors Edwin Coe LLP informing them that they had been retained by the debtors and requesting a further six weeks to complete a statement of affairs referable to the judgment debt. The letter stated that David Rubin of David Rubin & Partners had been instructed to complete the relevant statement of affairs. This statement of affairs was sent on the 23rd February, 2012 together with an individual voluntary arrangement proposal for the debtors which was rejected by the Bank of Ireland as entirely unacceptable; apparently due to a proposal contained therein that assets over which the Bank of Ireland had appointed receivers would be returned to the debtors on the basis that they were best placed to realise a return on them.

7. On the 27th March, 2012, at the hearing before the High Court in Ireland of a motion for examination of the debtors, counsel for the debtors informed the High Court that the couple had presented bankruptcy petitions in London that morning. The motion for examination in the High Court was granted. Cross examination as to the financial affairs of Brian O'Donnell took place on the 17th, 18th, 24th and 25th April and 5th July, 2012. Meanwhile, on the 4th April, 2012 an order for fieri facias in respect of the property at Gortdrishagh House, Oughterard, dated the 2nd April, 2012 was sent to the county registrar for the county of Galway for enforcement. On foot of the seizure of certain goods pursuant to this order by the county registrar, the Bank of Ireland executed a bankruptcy petition in Ireland against Brian O'Donnell on the 25th May, 2012 which was presented to the Examiner's Office on the 1st June, 2012. A petition in respect of Mary Patricia O'Donnell was presented on the 7th June, 2012. On the 1st June, 2012 the Bank of Ireland had applied to be joined as a party to the UK petitions for the purpose of challenging the assertion that the debtors' centre of main interest was London. The Bank of Ireland was joined to those London proceedings on the 14th June, 2012. By agreement between the parties, the Irish proceedings were adjourned pending the outcome of the petitions before the bankruptcy division of the High Court in London.

8. That bankruptcy hearing commenced before Newey J. on the 27th November, 2012 and continued over seven days on the 27th, 28th, 29th, 30th November and 3rd, 4th, 6th December, 2012. Newey J. delivered judgment on the 21st December, 2012 finding that as of the 27th March, 2012, the date on which the petitions were presented in London, the debtors' centre of main interest was not in England. Notices of appeal were filed on the 11th January, 2013 seeking to appeal the orders of Newey J. of the 21st December, 2012. On the 18th January, 2013 the debtors both filed a notice for review, rescission or variation of Newey J.'s orders of the 21st December pursuant to s.375(1) of the Insolvency Act 1986. This is a kind of reconsideration application. That review was heard on the 5th March, 2013. On the 6th March, Newey J. dismissed the applications on the basis that the debtors had not demonstrated the existence of circumstances justifying the exercise of the statutory discretion to review his decision in their favour. This decision was appealed to the Court of Appeal and permission to appeal the orders of Newey J. of the 21st December, 2012 and the 6th March, 2013 was refused by Rimer L.J. on the 27th March, 2013. The debtors were subsequently also refused permission to appeal at an oral hearing before the Court of Appeal on the 26th June, 2013. This was a very efficient disposal.

9. It is against this background that the proceedings come before this Court. I now consider the legal issues.

Question 1: the date for adjudication in Bank of Bankruptcy

10. A large measure of uniformity of legislation exists within the European Union on bankruptcy by virtue of Council regulation (EC) number 1346/2000 of 29 May 2000 on insolvency proceedings, the Insolvency Regulation. Two alternate dates are presented as being appropriate for judging where the centre of main interest of Brian O'Donnell and Mary Patricia O'Donnell was. The first, urged on their behalf, is the date of hearing of the bankruptcy petition; which took place before this Court from the 16th July, 2013. The second, urged by the Bank of Ireland, is the date of presentation of a petition to the Central Office; which as to Brian O'Donnell is the 1st June, 2012 and is to Mary Patricia O'Donnell the 7th June, 2012.

11. There is over a year between these two sets of dates; the presentation date and the hearing date delayed to await the decision in the bankruptcy division in London. At issue is the logical application of legislation in aid of the enforcement of legitimate debt. Such proceedings should be timely as to disposal and should focus on a time for adjudication which reasonably relates to the issue of conduct of the creditor in seeking relief and any relevant response from the debtor. From the point of view of principle, an insolvent person may decide to change the place in which they carry on their economic affairs. As with any such decision, implementation takes time. Facts on the ground are more likely to be established the longer a person is allowed time to embed their affairs in a new homeland. The regime for the adjudication of bankruptcy and discharge from that state vary among the member states of the European Union. In Ireland, the years which a debtor must remain under the control of the official assignee as to his or her affairs has decreased through legislative intervention on two occasions over the last five years; the latest statutory amendment not having been commenced by Ministerial order as of the date of hearing. It is perceived that the regime in the neighbouring kingdom is more liberal, in the sense that a debtor may there spend less time as an undischarged bankrupt. The United States of America apparently has a more liberal approach yet. Staying with the European Union, the efficiency of court systems also varies from country to country, as does the priority afforded to various kinds of legal applications. In theory, therefore, it is possible for an insolvent individual to decide to leave the centre of economic interest in which large debts have been generated and to move to a legal system which provides time for the bedding in of affairs, because it may be slow, and which is attractive because the period under administration as a bankrupt is less. As a date for adjudication, the mere fact of appearance before a judge is not a reasonable basis either. In some legal systems a party may come before the court sooner rather than later; as for instance in those systems where a matter must be mentioned before a judge and directions given as soon as a particular type of proceeding is instituted.

12. As a matter of principle, legal decisions which are founded on the choice of a date for adjudication which is dependent upon the degree of efficiency of a legal process, whether there is more work or less for those courts and whether that work can be processed expeditiously, are deeply unattractive. Experience also demonstrates that there can be many reasons why a case can be delayed. Furthermore, any legal process which one side has an advantage in never seeing completed can be stymied by applications of a preliminary kind that are speculative or unnecessary. Certainty also tends to indicate towards a date which is readily ascertainable on taking a simple step; such as that of initiating a proceeding. When that is done, and when that is the date on which a later adjudication must refer back to, the parties have certainty and an incentive to order their affairs for the swift disposal of the legal cause. Efficiency must be encouraged.

13. Within the context of that approach, the decision of the Court of Appeal of England and Wales in *Shierson v. Vlieland-Boddy* [2005] 1 W.L.R. 3966 is queried by the Bank of Ireland from a public policy point of view. But the job of a judge is to adjudicate on the law in the way in which legislation presents it. At paragraph 55, having analysed the relevant authorities, Chadwick L.J. set out the following as principles applicable to a choice between jurisdictions in bankruptcy:

> (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.
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> (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.
>
> (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 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.

14. Both Nourse J and Longmore LJ doubted the first principle. Their reasoning was that this conclusion would have the advantage that the debtor could build up his case as to the local centre of main interest over the period of months between the presentation of the petition and its adjudication in court. That makes sense. Shortly after this decision, the Court of Justice of the European Union decided *Staubits-Schreiber (Case C-1/04)* [2006] E.C.R. I-701 and answered the following question from the Bundesgerichtshof in Germany:

> Does the court of the Member State which receives a request for the opening of insolvency proceedings still have jurisdiction to open insolvency proceedings if the debtor moves the centre of his her main interests to the territory of another Member State after filing the request but before the proceedings are opened, or does the court of that other Member State acquire jurisdiction?

15. In paragraph 29, the Court commented that the date of adjudication under the Insolvency Regulation should be "when the debtor lodges the request to open insolvency proceedings… if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened." In *Interedil v. Fallimento (Case C-396/09)* [2011] E.C.R. I-0000 the Court of Justice of the European Union reiterated that since the concept of centre of main interest derived from European legislation, that concept was to be determined by European and not national law in order to ensure consistent interpretation of the Regulation across the European Union. At paragraph 55, the Court inferred that since the Regulation provided that where the centre of a debtor's main interest is transferred after lodging a request to open a proceeding to another Member State, the original court retains jurisdiction: "in principle, it is the location of the debtor's main centre of interests at the date on which the request to open insolvency proceedings was lodged that is relevant for the purpose of determining the court having jurisdiction."

16. I am bound by these decisions of the Court of Justice of the European Union. This is because the consistent interpretation of European law has been set out by the Court for implementation by national courts in accordance with the duty of effective cooperation. Furthermore, while an analysis of the variable results that are likely to devolve from a choice of date based upon the vagaries of competing court systems and the approach of litigants to bringing forward a hearing which may be a very unpleasant prospect was not part of the reasoning, it is sensible to see the lodging of a petition in the court system as the operative date for adjudicating the centre of a debtor's main interest: it is at that point that creditors definitively make the case that an apparently insolvent person should be adjudicated bankrupt. This may be seen as analogous to re-entry on land by virtue of issuing a summons but, most importantly, it also has the virtue of establishing certainty as to date and enables a swift response to creditors where suspicion arises that a new centre of main interest is sought to be established for an improper motive. The date of adjudication as to the centre of a debtor's main economic interest as the date on which a request to open insolvency proceedings both avoids the mischief of delay and is inherently logical in establishing a proper basis for the efficient disposal of bankruptcy proceedings.

17. I would therefore conclude that the date on which the centre of a debtor's main interest is to be established, is that on which an application seeking to adjudicate that person bankrupt is first lodged as part of the legal process that will ultimately lead to the trial of whatever issues are necessary for judgment.

Questions 2 and 3: centre of main interest

18. What may be found to be the centre of main interest of a debtor is based on the definition and indications as to interpretation in the Insolvency Regulation. If a the centre of main interest of a debtor is in a particular jurisdiction, that is where the insolvency process must take place in preference to any other jurisdiction. Recital 4 declares:

> 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).

19. Recital 6 declares:

> 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.

20. Recital 13 declares:

> 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.

21. Recital 22 deals with mutual recognition of insolvency proceedings within the European Union and declares:

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

22. Article 2 of the Regulation, which deals with definitions, provides:

> For the purposes of this Regulation:
>
> (a) "insolvency proceedings" shall mean the collective proceedings referred to in Article 1(1).These proceedings are listed in Annex A;
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> […]
>
> (g) "the Member State in which assets are situated" shall mean, in the case of:
>
> -tangible property, the Member State within the territory of which the property is situated,
>
> -property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,
>
> -claims, the Member State within the territory of which the Third Party required to meet them has the centre of his main interests, as determined in Article 3 (1);
>
> (h) "establishment" shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

23. Article 3 of the Regulation, which deals with jurisdiction as between Member States, provides as follows:

> 1. 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.
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> 2. 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 that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

24. Some assistance is also to be gleaned from the Report on the Convention on Insolvency Proceedings by Virgos and Schmidt, academic experts on insolvency law. Through what was initially a convention, the Insolvency Regulation came to be drafted. Regard may be had to this report in aid of interpretation of the legislation. The third section of the report at part B, chapter 3, references the concept of centre of main interest thus:

> The concept of 'centre of main interests' must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we shall see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated. By using the term 'interests', the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression 'main' serves as a criterion for the cases where those interests include activities of different types which are run from different centres. In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence.

25. What is the centre of main interest of a debtor? This will vary from person to person and situation to situation. While the assessment is entirely fact based, important indications as to the proper approach in adjudication are evident in the text of the Regulation. It is clear that a centre of main interest is not a transitory situation which can be changed from day to day at the will of the debtor. While there is a right to every citizen of the European Union to establish a place of residence and a business within every Member State, the rights of freedom of movement and of establishment, the rights conferred by European law are not to be abused. If a transaction seeks to set up ostensible situations of compliance with a view to avoiding the requirements of the law, then the true effect and nature of a transaction must be analysed in order to ensure that the law is not misused in order to avoid its application. Whether it is a matter of taxation, or a matter of apparent choice of jurisdiction, the principle whereby abusive process identifies and then nullifies a purported compliance with law has been part of the jurisprudence of the European Court of Justice since at least 1974; *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid (Case C-33/74)* [1974] E.C.R. 1229. A case applying that to a domestic transaction is *Cussens v. Brosnan* [2008] IEHC 169, (Unreported, High Court, Charleton J., 11th June,

2008); and see also Charleton and Kelly, *"The Oracle Speaks: Case C-128/11",* (2013) 18 Bar Review 33.

26. Tangible property, property rights and claims are central to any decision as to economic activity; this much the definitions in Article 2 make clear. Shopping for an inappropriate forum with a view to obtaining more favourable legal treatment is expressly subject to the requirement for a correct underlying legal analysis; Recital 4. Member States are required to give mutual recognition to the judgments of the courts of other Member States without the necessity to reanalyse the basis upon which a decision is arrived at; Recital 22. It is therefore in accordance with Recital 13 that the court should focus on where "the debtor conducts the administration of his [or her] interests on a regular basis". This approach is not to be divorced from the clearly expressed deprecation of forum shopping with a view to avoiding the correct jurisdiction on which the legislation proceeds. The requirement that a centre of main interest is to be ascertainable by third parties not only establishes a requirement of putting down indicators in a public way that a debtor is now carrying on economic activity in a different forum, but underlines the common rationality that deceptive manoeuvres by way of public declaration do not overcome the requirement of the fact-based approach. Central to economic activity is, of course, such ordinary commonplace actions as buying and selling, importing and exporting, leasing and purchasing and selling properties, establishing a business by way of manufacture or service and, crucial to all of these activities, the borrowing and paying back of funds. Those third parties who would, on a commonsense basis, ascertain that a debtor has moved from one country to another, would also make up their minds as to whether, in truth, the centre of economic activity has moved based upon whether they have been left in the lurch as to payment for goods and services supplied or as to the fundamental obligation of every borrower to intend to and to actually repay a loan.

27. Keen legal analysis as well as much practical sense of what moving a centre of main interest involves is to be found in the judgment of Deeny J. in *Bank of Ireland Resolution Corp Ltd v. Quinn* [2012] NICh 1. It is to be noted in particular that he deprecates the notion of creditors being required to search every telephone book across Europe. Any such approach, he rightly states, would be an undermining of the effect of the law. He also sensibly turns down making it a requirement that potential creditors take upon themselves the burden of expensive investigations. This reinforces the view that any logical analysis of centre of main interest must include a global account of the interaction of a debtor with creditors and how the debtor has behaved in running up the debt and on that debt being called in. In the Interedil case, the Court of Justice of the European Union emphasised at paragraphs 48 to 53 that the criteria for determining the centre of a debtor's main interest was objective and that the presence of bodies responsible for managing a firm, the places where assets are held, where immovable property is owned and the place of the "existence of contracts for the financial exploitation of those assets", as well as ascertainability by third parties, are crucial factors.

28. All of this is a matter of good sense. It has been part of the history of the Irish nation, as an island community, that people leave in search of work and economic or professional experience elsewhere. Whether they leave their families behind, whether their families go with them, whether they obtain a job elsewhere, whether they simply seek social assistance in another place, whether they sell their house or leave their flat, whether they buy or lease a new place where they move to, whether they leave a business ticking over under a manager while establishing a business in a new place; all these are factors which will tend to show where their centre of main interest is. Economic interests and obligations are not like a blackboard on which mathematical equations are written and which can then be simply wiped clean. Where debtors have entered into obligations, the extent of those obligations and how far down the road they are in dealing with them are factors which cannot be ignored. It is all very well to talk about re-establishment, but that is not looked at as a fair process and, depending on all of the circumstances, it may not accord with the true underlying nature of transhumance from one country to another, for creditors to be simply left in the wake of such an apparent move with no provision as to how debt is to be dealt with.

29. It is correct, as the debtors have asserted in argument, that debt alone is not a determining factor for adjudicating a centre of main interest. A number of other issues also require to be considered in any such adjudication as to where, in truth, the centre of main interest of debtors lies. Where are the properties of the debtors? Where did the debtors live when they bought these properties and for what purpose? Where were the debtors when any professional practice, or any work for reward, was being carried on? Where was that practice or work and, if it was regulated, then by what national or professional body? Where did the debtors enter into contracts of purchase of real or personal property and, with a view to supporting such purchases, of loan and with what financial entity and under what legal system? What corporate instruments did the debtors use for their affairs and where are these registered? Where do the debtors live? Where is it in fact convenient in terms of reality for the debtors to be living? By what means and in what circumstances have the debtors ostensibly moved their interests and what substantial evidence is there that this was not for the purpose of finding a congenial insolvency regime? To what extent was there economic activity in the new jurisdiction prior to the move and was that move consistent with any genuine motive to develop that business there? What would any reasonable creditor, having knowledge of the dates and facts, have concluded as to the true underlying nature of the transaction whereby the debtors moved from one jurisdiction to another? I turn to that analysis.

30. It is impossible to be impressed with the genuineness in terms of setting up a new centre of main interest in England of Brian O'Donnell and Mary Patricia O'Donnell. They have left immediately behind them, in terms of time, a massive judgment in Ireland which they sought to deal with under an apparently more favourable insolvency regime. The stark nature of the dates makes this apparent. It is only a matter of a short time, as between judgment being marked by the High Court in Dublin on consent on the 12th December, 2011 and the clear manifestation of an intention by the debtors to seek the regime in bankruptcy in London. They officially filed for bankruptcy in England, having earlier sought legal advice and insolvency advice, on the 27th March, 2012. They were then called back before the High Court in Ireland, Brian O'Donnell speaking for both debtors, to an examination in aid of execution of the judgment debt; a fact in relation to which Brian O'Donnell seems to take issue by stating that he was brought back here pursuant to a penal process, by which he means an endorsement on the summons. Every legal process must involve compulsion as an ultimate safeguard of the authority of the courts.

31. As to moving, or reestablishment of economic centre as the debtors would argue, in this instance, it was from Dublin to London in the immediate wake of a huge monetary judgment against them. Then there are the property and other transactions. The manner in which any claim as to legal privilege as between the debtors and their insolvency advisors in London has been disposed of is in accordance with Irish law. Whether personally, or through companies, or through the kind of labyrinthine corporate international structures that seem to define the property holdings that are relevant, the debtors own property in Merrion Square in Dublin, two properties in Fitzwilliam Lane in Dublin, they owned a property in Aylesbury Road in Dublin, they owned a house together with a sliver of land near Oughterard in Galway which has since been sold, they owned a property at Merchants Arch on the River Liffey in Dublin. In addition, they seem to have legal holdings of shares which establishes ownership in properties in Canary Wharf in London, in Westferry Circus in London, in Barton Street in London, a house which they lived in pursuant to an undervalue in rent while seeking to sell it. The debtors have property interests in Sweden, in Chalet Hermine in France, and the in property on Pennsylvania Avenue in Washington. Even this terse recitation tends towards indicating a centre of main interest in Dublin. Personal property may also be significant. In one of the borrowing transactions with the Bank of Ireland, with a view to seeking money, the debtors claimed to have €7.5 million worth of "antiques and paintings" in their house at Vico Road in Killiney to the south of Dublin city. Apparently the value now is shown to be less than €200,000. Brian O'Donnell told a distinguished radio commentator who was interviewing him on RTÉ,

following the publicity surrounding the judgment against him that founds these proceedings, that this Vico Road property was his home. This change of valuation of the "antiques and paintings" is presented by the Bank of Ireland as a matter as to evidential credit. I do not accept it as a mark against the credit of the debtors. Rather it is redolent of the kind of mutual delusion as between banks and developers or investors in property which characterised the devaluation of prudence in the Irish banking system in the decade ending in September 2008. Nonetheless, while no doubt money was lent on the strength of this eminent stupidity, what matters to this process is that the antiques are said by the debtors to be those of the debtors, as are the paintings, and that they are situated in the house which Brian O'Donnell publicly claimed on national radio to be his in this jurisdiction.

32. It is further clear that the application for bankruptcy in London was put off by the debtors on the basis of advice received on the 29th February, 2012 from a distinguished insolvency practitioner. It was to this effect: "One other issue, I would not advise you to file for bankruptcy until I am completely comfortable that your [centre of main interest] and the shares held in trust are completely bombproof." Any issue as to privilege was properly considered before the courts of England and Wales and the consent order of the 9th November, 2012 is, in that regard, noted. As of the relevant dates, the debtors are on the role of electors in Ireland and are entitled to vote for local and national representation and, as Irish citizens, in constitutional referenda. There are also bank accounts. Brian O'Donnell claims that he does not have any operational bank accounts in Ireland but the discovery process reveals that income from an AIB Bank account in England showed transfers to that bank in an account in Ireland of about €1.2 million in the 13 months prior to filing for bankruptcy in London. The last transaction in the relevant account in Ireland was in October 2012.

33. Then there are issues as to the ownership of substantial properties in London. What appears on the surface may be what is correct but it is now seriously in issue as to whether the debtors actually own the controlling shares whereby these properties are held in a beneficial sense. I cannot go into that issue, despite the Bank of Ireland claiming that it is relevant, because it is entirely separate by way of another set of proceedings. It may be complained that deeper analysis of share transactions and holdings and of apparent, but disputed, trust structures should be engaged in by the Court. The Court is not entitled to make a definitive resolution and, furthermore, could not possibly speculate as to the outcome of other proceedings. More proceedings may yet be issued, for instance as to the ownership of the vaunted art in the Vico Road property. The Court cannot enter into speculation on the validity of trusts, or the motivation behind apparent trusts, for office blocks in London. As to the Vico Road property, the Bank of Ireland claim that for the first time on the 27th April, 2012, before Kelly J, in the High Court, Brian O'Donnell asserted that this house was held through a legal shareholding in favour of his children. In a judgment of 31st July 2013, *O'Donnell and Others v Bank of Ireland* [2013] IEHC 375, McGovern J held against that assertion.

34. The debtors have been enthusiastic in subscribing to limited liability companies. The Court must take into account the directorships which each holds and which are listed in the Companies Registration Office in Dublin Castle. These include Vico Capital Limited (the reference to the road in Killiney is hardly a coincidence); Avoca Properties Limited, in receivership (the name refers to a very nice village in County Wicklow); Georgian Corporate Limited (central Dublin is full of architecture from the time before Queen Victoria); Recess Property Limited (referencing a village in the West of Ireland, otherwise Sraith Saileach); and Menlo Property Limited (a village and townland close to the shore of Lough Corrib). Counsel is now instructed that these many companies are dormant and did not trade. How is any creditor to know this? No sensible business person would regard the trouble and expense of setting up at least five Irish companies as being anything other than a serious enterprise. Furthermore, as of the appropriate date, the relevant directorships speak to Ireland as being the main centre of interest of Brian O'Donnell and Mary Patricia O'Donnell. To any creditor, the application for a practising certificate by Brian O'Donnell on the 1st February, 2012, is at the very least evidence that he was considering his options and, together with other evidence, establishes a clear probability that his centre of main interest was to remain in Dublin. The shutting and the winding up of that practice, which started a few days later, would be seen by any reasonable creditor as the debtor following the advice that he was being given in London. The Court has been given a vast bulk of documentation on English activities engaged in by the debtors as to grave plots, attending events such as outdoor parties that included snail races for the jubilee celebrations of Her Majesty Queen Elizabeth, the purchase of groceries, the taking out of driving licences, the joining of libraries, the writing of a book, the move to Barton Street in London and the subsequent move to another location, the subscription to entertainments, and so on. I have considered the entire of the evidence in this regard. At the very most, these activities are equivocal as to intention in the context within which they have occurred, but do not establish a probability that as of June 2012 the debtors had established London as their centre of main interest. Furthermore, and an important factor as to where a centre of main interest lies, the preponderance of the debts of Brian O'Donnell and Mary Patricia O'Donnell are left behind in Ireland. Then it is said that this litigation and all of the other litigation of the debtors is being conducted from London. Where litigation is conducted and is being dealt with from may be significant but here that significance is limited. Certainly, the debtors are dealing with complex litigation from an address in London. That is because they have chosen to go there. I am not satisfied that as of the relevant date it was for purposes of economic resettlement. Nor am I satisfied that any such move was made after having thought about, much less made, reasonable provision for the creditors which they left behind. Any person living here is subject to execution in aid of a judgment and as a matter of the plain reality of the situation, heading over to England to live makes it more difficult for a creditor to obtain some form of redress based on the fundamental premise upon which loans have been made throughout human history: that of trustworthiness and that of the availability of assets in the event of default. To any but the most credulous of creditors, the move of the debtors to London was for the express purpose of avoiding debt and not dealing with their responsibilities in Ireland, save by evasion. Regrettably, the kind of manoeuvring demonstrated in response to the Bank of Ireland's assertion that the centre of main interest of the debtors is in Ireland lacks cohesion, credibility and any reference to reality.

35. The court has had regard to all of the evidence and has listened intently to the carefully thought through submissions on behalf of Brian O'Donnell and Mary Patricia O'Donnell. It is impossible not to find that as of, respectively, the 1st of June, 2012 and the 7th June, 2012, the centre of main interest of the debtors was in Ireland.

36. To this, a brief addendum might be added. It has been argued that the High Court in Ireland is bound by the final and conclusive judgment in England and Wales as to the same facts by Newey J that the centre of main interest of the debtors as of the 27th March, 2012 was Ireland. I cannot agree. The decision of the learned judge is that he would not open bankruptcy proceedings in England and Wales because the centre of main interest of the debtors was not London. As night follows day, it might be argued that since the centre of main interest was not London it had to be Dublin. But who knows? There could be other aspects of this history of economic activity by the debtors which might be uncovered or revealed at an appropriate time. It is also clear that several countries outside of Ireland and Britain may be involved; France, the British Virgin Islands, the United States of America, Sweden, and more. In terms of Article 3 and Recital 22 of the Regulation, automatic recognition in other Member States would be given to any decision of the courts of England and Wales that the debtors had their centre of main interest in London. But that is not what has happened. There was a refusal to open bankruptcy proceedings because of an absence of jurisdiction. This decision is binding, and even in the absence of the Regulation, it would be respected and followed in this jurisdiction. It is also argued that Newey J made a decision that Ireland was the centre of main interest of the debtors as of the 27th March, 2012 and that the only period with which this Court may be concerned is the interval between that and the date of presenting a bankruptcy petition here, some eight or nine weeks. I cannot find any authority to support that proposition. Nor do I think that counsel for the debtors at any stage in the past conceded that point.

37. The requirement for foreign judgments to become *res judicata* is dependent upon the judgment being a final decision on the merits by a court of competent jurisdiction between the same parties or privies and concerned with the same facts; see McDermott, *Res Judicata and Double Jeopardy* (Dublin: Butterworths, 1999), Chapter 14. While reading those judgments of Newey J with admiration, the date for determination here is different. Furthermore, I have carefully taken into account both the intangible media coverage of the mistaken declaration by some lawyer for the debtors before the High Court in Dublin on or after that date that they had been declared bankrupt in England, and every other fact which might possibly establish that the centre of main interest of the debtors has changed. The principle that another judge has decided this matter does not apply. Nor am I bound by any decision in any other court that the debtors intended at some stage in the past to live permanently in England. My view on the different evidence before me is not that.

Question 4: service of the petition

38. Order 76 Rule 25 of the Rules of the Superior Courts provides that a bankruptcy petition by a person other than the debtor shall be served, not less than seven days before the hearing of the petition, by delivering to the debtor personally a copy of such petition and by showing to the debtor at the time of such service the sealed original. The process may also be served in such substituted manner as the court may direct. On this issue, it must not be forgotten that Brian O'Donnell is a most experienced solicitor.

39. Brian O'Donnell avers on affidavit that on the 5th July, 2012 he was handed two envelopes which were sealed, one of which was addressed to him and one of which was addressed to Mary Patricia O'Donnell. He says that he was not informed as to what these envelopes contained. As will be recalled, on that date, he was before the High Court for examination in aid of execution of the debt. Mary Patricia O'Donnell avers that she has never been personally served with these bankruptcy proceedings, or otherwise served, and that she is unaware of any order of the court providing for service by way of substituted service or any order deeming service good. An account is given by Eve Mulconry, a solicitor acting for the Bank of Ireland, which starkly differs. She avers that Brian O'Donnell attended at the Four Courts on the 5th July, 2012 and an examination took place before Kelly J. At the end of the court sitting, it was indicated to Kelly J that perhaps the examination would finish the following day. Brian O'Donnell informed the court that his wife was ill and that he had a pressing family arrangement to attend to in London, necessitating his return that night. The matter was adjourned by the court on the basis that if agreement could be reached as to discovery in aid of execution, the hearing on the following day would not be necessary. The parties therefore engaged in discussion after the court had risen, the debtors not being represented, as I understand it, in respect of this process. These discussions were cordial. In the course of them, Brian O'Donnell was told that a law clerk was waiting to affect personal service on him as he left the Four Courts. A reference was made to the debtor being chased down the quays of the river Liffey. Any such reference is typical not of a threat, as Brian O'Donnell has represented it to be, but of a cordial and jocose discussion between Dublin lawyers. What Eve Mulconry has to say about service carries the ring of truth. She told Brian O'Donnell that while he had already received on behalf of himself and his wife the affidavits as to debt and notices of motion by email on the 25th June, 2012, that both would have to be personally served. She suggested that to save him and his wife the stress of being served in the normal course, particularly in the circumstances relating to Mary Patricia O'Donnell's understandable worry over this entire matter, he could agree to accept service of the bankruptcy petition against him and of his wife's bankruptcy petition there and then on behalf of both of them. She said that this was a matter entirely for him. I accept her evidence. I have no doubt that Brian O'Donnell then agreed. The papers were then retrieved from the person primed to effect service. The papers were removed from the envelope, being a copy of the bankruptcy petition, affidavit of debt and notices of motion. These were handed to Brian O'Donnell while the envelope and the original sealed bankruptcy petition was retained. Similarly, the original sealed bankruptcy petition as against Mary Patricia O'Donnell was retained while the appropriate documents were then given to Brian O'Donnell in similar form and accepted service on her behalf.

40. Appropriate service for court documents is set out in general in Order 9 of the Rules of the Superior Courts. Rule 15 thereof additionally provides: "In any case the Court may, upon just grounds, declare the service actually affected sufficient." In *Lancefort Ltd v. An Bord Pleanála* [1997] IEHC 83 (Unreported, High Court, 13th May, 1997) service was required to be effected in a particular manner according to legislation, the Planning Act 1963, on An Taisce, a notice party. These statutory requirements were not met. Morris J., nonetheless, deemed service good, stating:

> I am left in no doubt whatever that since the purpose and object of achieving proper service in Court proceedings is to ensure that the party concerned is adequately informed of the matters contained in the notice so as to suffer no prejudice and since it is abundantly clear that An Taisce was so informed and that no possible prejudice arises in the case, even if I were to hold that the service… did not strictly comply with the statutory provisions, I would unhesitatingly declare that service was sufficient under Order 9, Rule 15.

41. An argument has been thoughtfully advanced that the regulation of bankruptcy as set out in Order 76 is a self-contained code, that there is no warrant for adherence to any form of service other than personal service and, in particular, that the exception of deeming service good cannot be applied. I disagree. There are many authorities for the proposition that participation by parties to an action may properly be a ground for invoking the exception whereby service may be deemed good. In *Sheldon v. Brown Bayley's Steelworks Ltd and Another* [1953] 2 All E.R. 894, it was held that an unconditional appearance could cure a failure to serve a writ within a prescribed time limit. In *Volkes v. Eastern Health and Social Services Board and Another* [1990] N.I. 388, Campbell J held that where a defendant wished to dispute the service of a writ, that the appropriate procedure was to enter a conditional appearance and that an appearance which was marked without prejudice was insufficient for that purpose. Some forms of service are, indeed, to be approached with more circumspection, as with the motion to commit in *Mander v. Falcke* [1891] 3 Ch. 488. Even still, the issue is the same: was there notice in fair and comprehensive form and if there is any defect in service how has the party claiming to be wronged by such service reacted? Some arguments as to improper service may be without merit and some points may require an application as to any alleged technical defect is to be taken at the first available opportunity; *The People (DPP) v. Nicholas Kehoe* [1985] I.R. 444.

42. It would be contrary to the proper functioning of the courts to undermine the process that has been engaged in here through the substantial cooperation of the parties. This application in bankruptcy was adjourned before the bankruptcy list judge at the request of the debtors on several occasions in order that the proceedings in England and Wales should be dealt with first. On no such occasion was there a claim that they were wrongfully served. Even now, there is no evidence that any prejudice has been suffered. Rather, they were enabled to continue with their application in the neighbouring kingdom and never prior to this hearing at any stage claimed that the Irish proceedings were defective.

43. I am deeming the service good on both debtors. Any other decision would be contrary to their approach to these proceedings.

Questions 5 and 6: defects in the petition and curing same

44. Multiple defects are alleged in the bankruptcy petition. This matter is governed by the Rules of the Superior Courts and by the Bankruptcy Act 1988. Section 11(1) of the Act, as amended, provides as follows:

> A creditor shall be entitled to present a petition for adjudication against a debtor if-

> (a) the debt owing by the debtor to the petitioning creditor (or, if two or more creditors join in presenting the petition, the aggregate amount of debts owing to them) amounts to €1900, or more,
>
> (b) the debt is a liquidated sum,
>
> (c) the act of bankruptcy upon which the petition is founded has occurred within three months before the presentation of the petition…

45. Section 11 (2) states:

> If a creditor who presents or joins in presenting the petition is a secured creditor, he shall in his petition set out particulars of his security and shall either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudicated bankrupt or give an estimate of the value of his security. Where a secured creditor gives an estimate of the value of his security, he may be admitted as a petitioning creditor or joint petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated in the same manner as if he were an unsecured creditor but he shall on application being made by the Official Assignee after the date of adjudication give up his security to the Official Assignee for the benefit of the creditors upon payment of such estimated value.

46. While it is argued by the debtors that defects in the petition cannot be overlooked, because these arise by virtue of statute, nonetheless, as in the *Lancefort* case, the Bank of Ireland claims that any such defects can be overlooked on a *de minimis* basis. Such a submission certainly has force in other branches of statutory regulation, following the line of authority referable to planning decisions. In that regard, in *Weston Limited v An Bord Pleanála* [2010] IEHC 255 (Unreported, High Court, 1st July, 2010) this Court stated at paragraph 28 that "[the *de minimis* rule] is not an exception to planning controls; it is an acceptance of minor errors that do not have a real planning impact and so do not require to be corrected". In *O'Connell v. Dungarvan Energy Limited* (Unreported, High Court, 27th February, 2001) Finnegan J. quoted with approval the following passage from the judgment of Lord Denning in *Lever (Finance) Limited v. Westminster Corporation* [1971] 1 Q.B. 222:

> In my opinion a planning permission covers work which is specified in the detailed plans and any immaterial variation therein. I do not use the words "de minimis" because that would be misleading. It is obvious that, as the developer proceeds with the work, there will necessarily be variations from time to time. Things may arise which were not foreseen. It should not be necessary for the developers to go back to the planning committee for every immaterial variation. The permission covers any variation which is not material.

47. Simons, *Planning and Development Law* (Dublin: Round Hall, 2nd ed., 2007, p. 18) has a passage to the same effect:

> the concept of a material contravention seems to allow for a *de minimis* argument. To put the matter another way, it may be possible to argue that a contravention of the development plan is nevertheless immaterial in the circumstances…

48. A court should always look to what is material to any case and how any factor of substance to the proceedings, if so adjudged, may have adversely affected those who claim their legal rights are undermined. It seems to me that the *Lancefort* case is authority which enables the application of Order 124 of the Rules of the Superior Courts, since compliance with statute and the breach thereof was the foundation for the analysis which led to the conclusion that the substance and effect of any process must be central to a decision. Order 124 Rule 1 provides:

> Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit.

49. In *Re OCS* [1904] 2 K.B. 161, Vaughan Williams L.J. provided the following caution as to bankruptcy proceedings at p. 163:

> Speaking from my own experience as the bankruptcy judge, I know that the rule laid down in *In re Collier* has been constantly acted upon for many years, and I think we ought not now to depart from it. It is said that no injustice will be done by allowing an amendment. I do not feel sure of that. But, whether that be so or not, I think we ought to be very careful about allowing an amendment of a bankruptcy notice, which is to some extent a penal proceeding.

50. Later, in *Re a Debtor* [1908] 2 K.B. 684, Cozens-Hardy M.R. held that formal defects whereby a creditor claims money from a man which was never due amounts to a substantial rather than a merely formal defect. In *Danske Bank v. McFadden* [2011] IEHC 551 (Unreported, High Court, 21st September, 2011), Dunne J. emphasised that a degree of precision is required in the documentation seeking an application in bankruptcy, stated that the obligation to comply with the bankruptcy code was a strict one leading to the necessity to state the precise amount. In *O'Maoileoin v. Official Assignee* [1989] I.R. 647, Hamilton P. referred to a range earlier authorities on this point and stated at p. 654:

> These cases clearly establish that the bankruptcy code, having regard to the consequences which flow from an adjudication of bankruptcy, is penal in nature and that the requirements of the statutes must be complied with strictly; that the debtor's summons to be served within the provisions of section 21 of the Bankruptcy Ireland (Amendment) Act 1872 must be served in the prescribed manner and the amount due in accordance with a judgment, when judgment is relied upon, must be accurate and that a claim for an amount in excess of the amount due in accordance with such judgment would render the notice defective and a subsequent adjudication void.

51. Two distinctions must, however, be noted. Firstly, overstatement in a bankruptcy summons renders subsequent proceedings bad in law. This summons procedure is a method whereby without the benefit of a judgment, necessarily a process where a debtor has an entitlement of contesting whether any money is due at all or in what amount, a party seeks to recover funds on a liquidated basis by giving statutory notice. So, the creditor gives the debtor four days notice of the amount due and, if it is not paid, a statement is included by way of warning that an application will be made to court. The debtor can pay. The debtor cannot, however, be obliged to pay more through the use of this penal process whereby money is extracted on pain of ending up before the bankruptcy court. The process is akin to a notice of debt prior to making an application to wind up a company under the Companies Act 1963 as amended. When the creditor applies to court, the debtor has 10 days to deal with the issue of the debt.

52. This case is different. It is based on an act of bankruptcy following upon a judgment for a debt which has been proven; in this case by an order made with the consent of the debtors. The procedure is therefore a petition in bankruptcy, the amounts in respect

whereof can be disputed and debated before the court and where the strictures arising from the fear of the misuse of the procedure of the bankruptcy summons are misplaced. Secondly, even if there is a minor error in a petition that is not necessarily fatal to the process. Respect for the law is not upheld by the courts taking totemic points on issues which cause no prejudice to any party and which are divorced from the reality of any central issue in the adjudication. So, in a bankruptcy petition, it is not inevitably the case that an insubstantial point should lead to the petition being refused. It is certainly the case, as was argued by counsel for the debtors, that justice is at the heart of this process. Justice is not a concept, however, which exists divorced from truth. As this Court held in relation to a criminal charge, where the penal nature of the sanction not only tends towards, but demands, strictness in procedure, in *Ó Griofáin v Éire* [2009] IEHC 188 at paragraph 10:

> Is é an ceartas an aidhm atá le gach imeacht dlíthiúil. Is í an fhírinne an cuspóir atá ag gach cleachtas breithiúnach. Caithfidh an prionsabal d'fhíor-ord sóisialta atá mar chuspóir ag ár mBunreacht, agus mar a dearbhaítear sa Bhrollach, diúscairt de ghnó coiriúil a bheith ina luach lena mbaineann tábhacht ar leith leis chun sochaí chomhtháite a bhaint amach. [Justice is the aim of every legal proceeding. Truth is the object of every judicial exercise. The principle of true social order attendant on the purpose of our Constitution, and as declared in the Preamble, must place the disposal of criminal business as being a value of particular importance in the maintenance of a cohesive society.]

53. In the context of bankruptcy proceedings, the claim that strictness of procedure always overrules the obligation of the court to analyse truth ceases to be valid as a modern proposition and as a proposition consistent with the obligation of the courts to seek to administer justice on the foundation of truth. A full analysis of the relevant case law was carried out by Finlay Geoghegan J. in *Lloyds v. Loughran* (Unreported, High Court, 2nd February, 2004). She noted the distinction between a bankruptcy notice, which in this jurisdiction is now the bankruptcy summons procedure, and the bankruptcy petition procedure. She stated:

> I have concluded that the principles set out in the judgment of Hamilton P. in *O'Maoleoin v. The Official Assignee* do not preclude me from exercising the discretion which it is accepted the Court otherwise has under O. 124 of the Superior Court Rules in relation to the consequences of non-compliance with O. 76 r. 20 of a petition. Whilst, I note the distinction between the approach to a bankruptcy summons and petition…, in general I accept that there ought to be compliance with the Rules of Court even on a petition but conclude that there is nothing on the authorities which appears to absolutely preclude the Court from exercising its discretion in a proper case… where there is a failure to comply with the Rules on a petition.
>
> For the purpose of exercising my discretion under O. 124 it is relevant that there is no prejudice asserted on behalf of the debtor by reason of the failure of Lloyds to seal and sign the petition in compliance with O. 76 r. 20. Further, I am satisfied on the affidavit that the petition has been sealed and signed in accordance with United Kingdom statutes and bylaws relating to Lloyds. Finally, in exercising my discretion, it appears to me permissible that I should in such factual circumstances also have regard to the prior history in relation to the service of the bankruptcy summons and the petition. A number of applications were necessitated in relation to the service of the bankruptcy summons and also one in relation to the service of the petition. In the course of these applications I formed the view that the debtor was avoiding service of documents and permitted substituted service. It appears to be in the interests of the proper administration of justice and to be doing justice between the parties that the petition be now permitted to proceed, and I so order.

54. I have examined all of the points so carefully argued by counsel on behalf of the debtors. As to security, the petition of bankruptcy by a creditor correctly states that the Bank of Ireland holds security for the payment of, or part payment of, the debt. These securities are set out as a mortgage in relation to 84 Ailesbury Road; a mortgage in relation to 61 and 62 Merrion Square and 61 and 62 Fitzwilliam Lane; and a share pledge in an entity in the Grand Duchy of Luxembourg. An estimate is given as to the value of the said security at €21,700,000. What is left out is a 2ha strip of land in Oughterard near Lough Corrib. The amount of the debt is set out at €71,575,991.29. This strip of land has been sold and has realised value with a house nearby. In some other proceedings this might be significant, but in this one it is not. I am told, on instructions of counsel for the Bank of Ireland, that the total value realised was less than €1.5 million, including the substantial house which must have been the vast bulk of that consideration. There was never any sense in these proceedings that the amount might not be adjusted: but there is a further point. The labyrinthine complications as to share ownership leading to property ownership have made it more than difficult for any creditor to set out a true position. What is required in such a process is a real and diligent effort. There is nothing to suggest that anything less than an honest and diligent effort has not been made by the Bank of Ireland. In addition to that, I am entitled to take into account the twists and turns whereby it may be reasonably said that with better cooperation from the debtors no difficulty in stating the relevant securities would have been presented.

55. In addition, it has been argued on behalf of the debtors that the receiver has been paid an extraordinary amount of money and that no credit has been given for the rents recovered from the properties under receivership; thus distorting the figures in the petition. Any income from any of the debtors' properties under receivership has, in fact, been discharged to the receiver's fees and expenses. As to any claim of expenses being run up or fees charged that are not due as proper remuneration, there is a complete absence of any evidence to back up that claim. The receiver could have needed to employ security firms, and presumably did, may have needed to spend many hours on the complex structures and claims attendant on a realisation of value out of these various properties, or may have needed to do repairs to buildings. To give any credence to this claim would be to accept an invitation to guess that the sums paid to the receiver are incorrect.

56. Finally, it is also important as to these points that the debtors have admitted by their action in seeking bankruptcy before the courts in London that there is no issue but that they are in fact bankrupt.

57. Order 76 Rule 19(1)(a) provides that a petition by a person other than the debtor is to follow form number 11 and show the nature and amount of the debt and state that the debt has not been paid, secured or compounded. This is, in fact, what the petition does. The petition is based, as I have said, on a judgment that was entered on consent. It is fully set out that the judgment arose as a result of re-entering proceedings for the purpose of enforcing a litigation settlement agreement.

58. Rule 19(1)(g) requires that a notice of the date of hearing be included in the petition. What happened, in fact, was that the petition was issued with a date of hearing which was then prior to the date of service. There is not the slightest hint of any difficulty arising from that fact. At all times, the debtors were aware as to when the hearing was; at all times there were represented and sought adjournments for the purpose of prosecuting their proceedings as to bankruptcy in London.

59. Rule 19(4) requires that the petition is to be verified by affidavit, which can be endorsed on the petition, and which is to verify every fact relied on in support of the statements made for the purposes of establishing an act of bankruptcy. This, in fact, is precisely what the Bank of Ireland affidavits do. Under this procedure, the issue is then joined and the debtors in this case have had every opportunity to dispute the act of bankruptcy. That act arose under section 7(1)(f) of the Bankruptcy Act 1988 and was an

execution against the goods of the debtors under an order of court. What that does not explicitly state, but what is inherent in the process, is that the execution should be insufficient. Here, again, an unimpeded opportunity has been presented to both sides for the facts to be fully traversed. Goods were taken from an address in the West of Ireland, near Lough Corrib. The debtors and their children then claimed some of these goods were of a deeply personal nature; these claims, it must be said, extended to beds and other sundry items. Eventually, by negotiation with the sheriff, some items of little or no value were returned. That failure to realise the full value of the debt through execution is an act of bankruptcy. Apparently, the fifa was returned with the wrong date by reason of a typographical error. In fact it was the 6th April rather than the 6th May 2012. It was returned on the 30th May to the solicitors for the Bank of Ireland when the petition had already been sealed. There is, however, nothing wrong with obtaining information before the sealing of a petition by a body corporate and, in any event, up-to-date information is what is required. It is also claimed that the verification of the act of bankruptcy is contaminated by the recitation of hearsay evidence. The Rules the Superior Courts do not require any gathering together of multiple affidavits in order to prove that, for instance, the centre of main interest of the debtors is in Ireland or that, wrongfully, the debtors have sought to open bankruptcy proceedings in London. The volume of affidavit material presented in this case, amounting to assertion and denial and the presentation of exhibits has taken many hundreds of pages. That is clearly not initially required for an appropriate process; what it amounts to is the exchange of claim and counter claim as to fact. As to initiating the process, it is, instead, sufficient to set out information whereby the act of bankruptcy is shown, the origin of the debt is declared, here as a judgment entered on consent, and a centre of main interest is asserted. If there are points to be made then, as in this case, issue may be joined through the exchange of information in order to set up a contested court hearing.

60. Rule 20(2) provides that a petition by a body corporate is to be sealed with the seal of the company and signed by two directors, or by one director and the secretary, with such seal and signature to be attested. The affidavit evidence proves that precisely that is what happened in this case. An additional insubstantial point is raised that the date was put on when the legal executive was bringing the document to be filed in the Central Office. He is to be congratulated for his vigilance and his honesty is not in question. The date of sealing, signing and attestation is properly proved.

61. Several other points have, rightly, not been pursued, or are so insubstantial as to the merits and substance of this matter as to not require analysis.

Conclusion
62. The debt is proven. An act of bankruptcy on foot of that debt is established. As none of the issues before the court are capable of being answered in favour of the debtors, it follows that Brian O'Donnell and Mary Patricia O'Donnell must be adjudicated bankrupt.