Neutral Citation Number: [2021 EWHC 820 (Ch)

Case No: BR-2019-001475

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 6/04/2021

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

- -

Between :

HSIAO-MEI LIN	**Applicant**
- and -	
(1) AUDUN MAR GUDMUNDSSON	**Respondents**
(a bankrupt)	
(2) MARK SANDS	
(3) BRIAN BURKE	
(as joint trustees in bankruptcy)	

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Rex Howling QC (instructed by **Richard Nelson LLP**) for the **Applicant**
Mr Gudmundsson in person
Steven Fennell (instructed by **DLA Piper UK LLP**) for the Second and Third Respondents

Hearing dates: 23, 24 March 2021

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10:00 hrs on 6 April 2021

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CICCJ Briggs:

1. Mr Gudmundsson was adjudicated bankrupt at 11:23 on 26 February 2020 on a petition presented by Nikolaus Ortlieb, a friend and business associate of Mr Gudmundsson. The second and third Respondents (the "Trustees") were appointed trustees-in-bankruptcy of Mr Gudmundsson's estate by the Secretary of State for Business, Energy & Industrial Strategy in April 2020.

2. This is the trial of a hostile application to annul the bankruptcy made by Hsiao-Mei Lin ("Miss Lin") the ex-wife of Mr Gudmundsson.

3. The Family Court made an order for financial relief in March 2020 and shortly after a decree absolute. As the financial relief was granted after the order of bankruptcy, a transfer of Mr Gudmundsson's interest in the matrimonial home to Miss Lin, ordered by the Family Court, has been frustrated.

4. Miss Lin asserts that the bankruptcy order ought not to have been made. The witness statement in support of the annulment (the "Annulment Application") raises two grounds, which may be taken together:

   4.1. "Mr Ortlieb, and Audun have colluded in this bankruptcy by failing to declare all of Audun's assets and introducing inflated debts";

   4.2. "It is my case that Audun was not technically bankrupt at the time that the order was made".

5. In counsel's skeleton argument produced on behalf of Miss Lin, a jurisdictional challenge is added: "it is submitted that the bankruptcy order should not have been made…because England was not the First Respondent's COMI…".

6. Miss Lin and Mr Gudmundsson expressed a hope that they would receive a quick decision from the Court on the Annulment Application. There had, for one reason or another, been considerable delay in the family financial relief proceedings and both parties wish to "get on with their lives". The Trustees are neutral as to the outcome.

7. At the end of the trial I was able to inform the parties that I had reached the decision to dismiss the Annulment Application and would provide my reasons in a written judgment.

8. This judgment is not concerned with the details of the marriage breakdown. Nevertheless some context is required. The structure of my written reasons for dismissal is as follows:

   8.1. the end of a marriage (paras 9-14);

   8.2. events leading up to the making of the bankruptcy order- the judgment of the Family Court (para 15-27);

   8.3. the petition debt and bankruptcy hearing (paras 28-36);

   8.4. the financial circumstances of Mr Gudmundsson (paras 37-43);

   8.5. the legal principles engaged (paras 44-52);

8.6. discussion on jurisdiction (paras 53-57);

8.7. discussion of collusion and solvency (paras 58-77); and

8.8. Conclusion (paras 78-84).

The end of a marriage

9. Miss Lin was born in Taiwan, attended the Royal Academy School of Arts in London, obtained citizenship in the United Kingdom, and met Mr Gudmundsson in 2006. Mr Gudmundsson was born in Iceland and has two siblings. After his father died his mother gifted to each of her children a small sum of money received from her late husband's estate. Mr Gudmundsson used his gift to start a mezzanine finance business, raising capital from outside private investors. Mr Gudmundsson gave evidence that the mezzanine finance provided through corporate structures incorporated in England and Jersey was aimed at companies that required extra capital leveraging or capital for shareholder buyouts. The finance could be viewed as either expensive debt or less expensive equity due to the higher coupon.

10. Mr Gudmundsson and Miss Lin have two young children. Miss Lin explains that Mr Gudmundsson acquired a drug habit. In her position statement provided to the Family Court she states: "the Father was diagnosed with ADHD on 17.3.16. He also has a long-standing addiction to methamphetamine and significant cocaine use".

11. She describes a change of his behaviour that included "outbursts of temper and emotional abuse and violence". The change of behaviour led to his arrest and a charge for assault in 2016. There was an arrangement in mid-2016 and after separation that Mr Gudmundsson would have unsupervised visits with his children including overnight stays. The arrangement came to an end in early 2017 after Miss Lin asserted that the flat, where Mr Gudmundsson stayed, housed "drugs paraphernalia" and there was "inappropriate sexual behaviour". Mr Gudmundsson's evidence is that Miss Lin had become a committed Christian and they had different values which led to argument. In mid-2017 Mr Gudmundsson spent some time in hospital after testing positive for methamphetamines. He was required to demonstrate that he was free of drugs before resuming contact with his children. Happily he was able to do so until an incident that is said to be relevant to the Annulment Application.

12. In October 2019 one of the children told Miss Lin that there was "drug paraphernalia" in Mr Gudmundsson's flat and drew a picture for illustration purposes. Mr Gudmundsson's response was to submit to a voluntary drug test.

13. The test showed he was drug free but Miss Lin noticed anomalies in the report and asked the drug testing company to confirm the authenticity of the report. The test company informed Miss Lin's solicitors that the report did not originate from the company. That led to an ex-parte application to prevent contact on the basis that Mr Gudmundsson had forged the negative drug report and could not be trusted to look after the children. Mr Gudmundsson admitted to falsifying the report in the family proceedings and admitted to it again in cross examination conducted in this Annulment Application. A later incident took place outside the matrimonial home and ended with Mr Gudmundsson's arrest. He said in evidence that he felt he had been treated unfairly and had come to fear the English legal system.

14. The marriage was brought to an end by a decree absolute on 30 April 2020.

The judgment of the Family Court

15. The events leading to the judgment given by the Family Court on 4 March 2020 (the "FCJ") are a little unusual in that there was a delay between the date of the hearing and handing down due in part, to several requests made by Mr Gudmundsson. Looked at retrospectively Miss Lin views the events with an eye of cynicism. Mr Gudmundsson was tested as to his motives and tested as to the reasons for seeking adjournments prior to the handing down of the judgment.

16. The hearing for financial relief took place over three days in February 2019. The court ordered that Mr Gudmundsson transfer all his interest in the matrimonial home situated at 9 Southcote Road London N19 ("Southcote Road") to Miss Lin but he: "retain, in his sole name, his business interests in Iceland, his interests in Carta Capital, his property at Hafrathing 5, 203 Kopavogur, Iceland, his pensions with Old Wealth and Frjalsi and any interest that he may have in either the Gudmundsson Family Settlement or the Gudmundsson Family Trust Foundation."

17. The FCJ recorded the history of the relationship, gave information about the children of Mr Gudmundsson and Miss Lin and set out their respective financial resources. The analysis of financial resources was not confined to that stated in the Form E financial statements which had to be provided to the court in advance of the hearing. The judge heard evidence from Mr Gudmundsson regarding trust assets and his businesses. The judge found that the financial resources and obligations of Miss Lin were relatively straight forward whereas he described Mr Gudmundsson as setting up "deliberately opaque" financial structures [116]:

> "The complex and deliberately opaque structures set up by the husband with the assistance of Mr Jones made it particularly difficult to understand the realities of the husband's position. "

18. The judge had difficulty with understanding the financial position [117]:

> "Events since the end of the hearing have made the already difficult task of defining the husband's resources, intentions and true needs yet more difficult".

19. The judge explains [30]:

> "The hearing completed on 20 February 2019, and I invited written submissions which were provided. I had hoped to give judgment on 6 March 2019. I will set out below developments since the hearing which have greatly prolonged the proceedings."

20. Those developments included e-mail exchanges between (at first) solicitors for Mr Gudmundsson and the court, and later direct from Mr Gudmundsson. The judge said that by September 2019 he had "almost completed the judgment" when the court was notified of a development that may have had an effect on the outcome:

> "In May 2019 Jirehouse had been closed by the Solicitors Regulation Authority because of suspected dishonesty by Mr Stephen Jones, Jirehouse Partners LLP and Jirehouse Trustees Ltd in connection with their business; and subsequently in August 2019 Mr Jones had been sentenced (by Zacaroli J) to 14 months imprisonment for contempt of court. The allegations relating to Mr Jones and his legal practice were unrelated to the parties in the present case".

21. The contempt was a failure to comply with an undertaking. Jirehouse is or was an unlimited company providing legal services, regulated by the Solicitors Regulatory Authority. Three other entities share the first name, Jirehouse Partners LLP, Jirehouse Trustees Limited and Jirehouse Fiduciaries Nevis Ltd (I shall refer to them as "Jirehouse" unless I state otherwise). Mr Gudmundsson regarded Mr Jones as a friend and confidant. He assisted with the setting up of two trust funds which are said to be for the benefit of his four children: two from his first marriage and two from his second. The first trust known as the "Pasla Settlement Trust" (the "Trust") is said to have been established in 2003. The second trust is the "Gudmundsson Family Trust Foundation" (the "Foundation"). Jirehouse advised in respect of the Foundation. The evidence given by Mr Gudmundsson in the Family Court was that the Foundation was created to receive the assets of the Trust. The judge used the term "decant" to describe the transfer of assets from the Trust to the Foundation. Mr Gudmundsson informed the court that he could not provide any details about the Foundation because he was not the client. One of the reasons for the creation of the Trust and the Foundation was to avoid (or mitigate) tax. It was later discovered that payments made to Mr Gudmundsson as capital by the Trust were exposed to a risk of taxation. It is said (by Mr Gudmundsson) that the vulnerability was due to him being named as the settlor. The Foundation did not name him as settlor. His evidence is that he has no interest in the Foundation. The settlor is named as his mother. It was because he had no interest in the Foundation that Jirehouse did not recognise him as a client and refused to provide any information. Accordingly the only evidence about the Foundation was that provided by Mr Gudmundsson in his written and oral evidence. No application has been made by Miss Lin seeking disclosure from Jirehouse, the settlor or trustees of the Foundation.

22. Mr Howling made the following submissions in respect of Mr Gudmundsson's finances:

    22.1. Mr Gudmundsson has an interest in the Foundation;

    22.2. He has an interest in a hotel business in Reykjavik (the "Iceland hotel");

    22.3. He was able to secure a loan from Esquiline Finance Limited of £2,376,529 without providing security;

    22.4. Mr Gudmundsson was the settlor of the Trust making available "income and profit" received from "a mezzanine fund run under the umbrella of Carta Capital Mezzanine Fund 1 LLP. He had a 50% interest in the various companies established under the Carta Capital umbrella."

    22.5. Miss Lin was a director of a company known as Cartainvest II. This was a service company for Carta Capital Mezzaine Fund I. She says that she "understands how the company was run and how much she was asked to 'sign for' as a director";

22.6. The sum "decanted" to the Foundation in or around 2010 (long before marriage difficulties) is reported to be €2,344,072;

22.7. The Iceland hotel "appears to be running at a loss" but Mr Gudmundsson was "running a business in Iceland".

23. The Carta Capital Mezzanine Fund 1 LLP has a registered address in St Helier, Jersey, care of Ernst & Young LLP. Carta Capital Limited was registered in England and Wales and filed its last accounts soon after the petition for divorce was presented.

24. The judge in the Family proceedings found that the main asset in the United Kingdom was Southcote Road. Mr Gudmundsson had other assets including a house in Iceland and an interest the Iceland hotel. The extent of his interest in the Iceland hotel was in issue as was the extent, if any, of his interest in the Foundation. The judge commented [48]:

> "Much of the hearing was taken up with exploration of the realities of the trust arrangements and in particular the creation and value of [the Foundation]. Much of the evidence about this was unclear and unsatisfactory. The husband's position was that he was not a beneficiary or potential beneficiary of the [Foundation] and he was not a trustee of it. He said that he never had any communication with the trustees in Nevis."

25. The judge made the following finding of fact [49]:

> "Having reviewed the evidence and the arguments, I am unable to find that [the Foundation] is a resource available to the husband. All that could be said is that [the Foundation] had an interest in the hotel because it owned, via AMG Financial Holdings Ltd, 55.5% of 105 Management Ltd who owned the other 90% of the hotel business."

26. He also found that Mr Gudmundsson had no mortgage borrowing capacity. In other words, he did not have an income that would support an advance by a conventional lender to be secured against a property for the purpose of its purchase.

27. I turn to the delay in handing down the judgment. Initially it was fixed for 27 January 2020. Mr Gudmundsson e-mailed a few days before asking the judge to postpone handing down due to an auction of one of his disclosed assets in Iceland. The court initially refused to postpone and then received a further e-mail where Mr Gudmundsson suggested that "your judgment might be clouded and unfortunately, in my opinion, not fair to me, the children and to any resolution that can be found with not accommodating my request of attendance which makes it impossible…". The judge did not immediately adjourn the handing down of the judgment. At the hearing scheduled for the hand-down, having raised the adjournment issue with Mr Howling for Miss Lin, an adjournment was granted until 4 March 2020. Further correspondence about the Foundation ensued. It was only at that hearing that Mr Gudmundsson disclosed that Mr Ortlieb had petitioned for his bankruptcy on 22 December 2019, and he had been adjudicated bankrupt on 26 February 2020. The bankruptcy order discloses that counsel acted on behalf of Mr Ortlieb and Mr Gudmundsson was present, acting in person.

The petition debt

28. Mr Gudmundsson's evidence is that he did not dispute the sums stated on the face of the statutory demand; he had borrowed the money and had not repaid it: "I asked to borrow this money, promised to pay it back when my divorce was over from any settlement I received." He expresses regret at not being able to repay: "I feel I abused my friendship with him by borrowing the money and not paying it back when I promised." He explains that Mr Ortlieb "became so fed up with my excuses" that he "had no choice to sue for his money back". His evidence is that Mr Ortlieb wanted the money "for his own personal family needs." An experienced insolvency professional may find it curious that Mr Ortlieb would choose to bankrupt a friend to recoup his loan.

29. Mr Ortlieb was not joined to the Annulment Application and does not give evidence. He provided an e-mail to the Trustee in July 2020 which reads as follows:

> "I see absolutely no reason why Mr Gudmundsson's bankruptcy should be annulled. He owes me the money and accepted his bankruptcy based on my petition as he told me there was no way he could pay me back. The whole point of the bankruptcy was for me to know that was true and the Official Receiver or his Trustees-in-Bankruptcy could tell me so after they had investigated his affairs. I therefore strongly object to the application and ask that it be dismissed. I am not Mr Gudmundsson's "employee" and simply want money I lent him in good faith repaid, although accept that I may never see a penny of it again."

30. In his written evidence Mr Gudmundsson explains that he borrowed money from the Trust:

> "when I needed funds personally for the family or myself I did ask to borrow funds from the Pasla Trust (Trust 1) and which then became the Gudmundsson Family Foundation (Trust 2). My borrowing requests were not always granted. The Trusts did not always have the liquidity available. At all times, I regarded myself as having a duty to repay the funds I borrowed and accepted this. If not, I felt I would be stealing from my own children. My intention was to repay from my other assets but over a period of 15 years the debt spiralled out of control and hence the consolidated loan facility with EFL and their request for security over my assets".

31. The reference to EFL is a reference to Esquiline Finance Ltd: I shall refer to the loan as "EFL" and (subject to context) use the same abbreviation for the Company. In evidence before this court Mr Gudmundson was pressed about the EFL:

> "Q. you were taking money out by way of loans
>
> A. no, I was not taking out by way of loan. The advice I received from the manager of Pasla is that money should have been lent out in loan but unfortunately it was paid out as a principal payment which had adverse tax treatment."

32. He went on to explain that principal payment meant a payment of capital as a gift. The money owed to EFL arose after the Trust was "decanted". Mr Gudmundsson explained in cross-examination:

> "The [Foundation] was set up to avoid a tax penalty from HMRC. The Esquiline Loan worked so that the money I had from [the Trust] would be entered as a loan due from Esquiline. I would then owe Esquiline… I don't believe I will have to pay that loan back. I never received money from Esquiline –The loan was a bit of window dressing."

33. The position of the Trustee is that he does not know whether the debt is real or, as has been suggested, a sham. Further investigations have to be made. The Trustee informs the court that the liquidators for EFL have submitted a proof of debt but the proof has yet to be adjudicated upon. Given that the purpose for the EFL loan was said to avoid tax on the money paid by the Trust to Mr Gudmundsson, it is not illogical to conclude that if the EFL is enforceable a large unsecured debt is owed by Mr Gudmundsson, and if unenforceable there is a prospect, subject to taxation laws, that he will be liable for tax on the sums he received from the Trust. The judge in the Family court found [paragraph 67] that the EFL "was not formalised to do anything more than to create an impression for tax purposes. In the circumstances there has to be a very real doubt as to whether it is ever likely to be enforced by or on behalf of Esquiline, particularly in the absence of any evidence beyond the loan agreement itself indicating expectation of payment." No new evidence has been provided to the court since the judge made this finding.

34. Mr Gudmundsson's evidence is that he could not pay his debts at the time he was adjudicated bankrupt. There were a number of creditors as well as the petitioning creditor: "I was clearly insolvent and remain so."

35. There is a transcript of the petition hearing. The petition (as is the usual way) was listed in a list of many:

> "Judge Baister: Yes all right, so you are claiming you've lent him money, he hasn't paid it back and you want it.
>
> Mr Ortlieb: Yes, I did.
>
> Judge Baister: Right, what do you say?
>
> Mr Gudmundsson: I borrowed the money from Ortlieb.
>
> Judge Baister: Right, can you pay it back?
>
> Mr Gudmundsson: No.
>
> Judge Baister: So he's entitled to a Bankruptcy Order, isn't he?
>
> Mr Gudmundsson: Yes, I believe, yeah.
>
> Judge Baister: And you live in this country.
>
> Mr Gudmundsson: Yes."

36. Miss Lin accepts that a debt was properly due to Mr Ortleib and accepts that he had not been paid. The Trustee has confirmed that he has traced monies being paid to Mr Gudmundsson from Mr Ortlieb.

The financial circumstances of Mr Gudmundsson

37. The positive case of Miss Lin is that Mr Gudmundsson is likely to have been the "powerhouse" behind the Trust and now the Foundation: "It is simply implausible that a man who transfers the fruits from his business endeavours into a trust is then going to agree to transfer those benefits into a further trust, to which it is said he has no entitlement unless either this assertions is wrong and he retains access to those funds or he had access to other funds…". Miss Lin proposes that that the Foundation can be "unravelled" once evidence is heard from Mr Jones who created the trust, and Southcote Road had sufficient equity to pay his debts.

38. Some information regarding the Trust and Foundation has been made available to the solicitors acting for Miss Lin. They instructed Faye Hall of Smith & Williamson to decipher the financial structures used by Mr Gudmundsson. Miss Hall explains that Mr Gudmundsson raised approximately €50m from investors which was invested by December 2006. The Carta Capital companies were instrumental in managing and operating the investment activities of Carta Capital Mezzanine Fund 1. These entities were entitled to management and performance fees and Mr Gudmundsson (and other fund managers) was entitled to a share of the profits realised from the Mezzanine Fund's investments. This is consistent with the evidence given by Mr Gudmundsson in this court. Miss Hall explains that the settlor to the Trust was Mr Gudmundsson which is again consistent with the evidence he gave. She states that the trust funds were transferred "piecemeal" from the Trust to the Foundation between 31 March 2015 and 31 December 2016 (prior to the initiation of divorce proceedings). Mr Gudmundsson invested returns he received from the Mezzanine Fund 1 to a second fund ("Fund 2"). Fund 2 not only included personal investments but also capital paid into the Trust. Miss Hall is unable to identify the sums directly invested from the Trust or Foundation and unable to identify the sums invested by Mr Gudmundsson directly. There is some doubt that her analysis is correct. That the investment in Fund 2 was made by Mr Gudmundsson by raising a loan secured against Mezzanine Fund 1. However Miss Hall makes clear that she has not seen the financial statements of the Trust in the period prior to the transfer of funds to the Foundation nor a shareholders' or partnership agreement governing relationships between the Carta Capital companies *inter se* and between them and the Trust.

39. I have mentioned the letter from Miss Hall. I should also add that Miss Lin does not rely upon it. I raise it to demonstrate consistencies and inconsistencies of evidence.

40. The Form E financial information submitted by Mr Gudmundsson in the family proceedings disclosed that he had received an income of £8,500 in the year 2017/2018. That income came from his employment as an investment director at Carta Capital Ltd. At the time of the FCJ he was no longer employed. He informed the court that he had no other earned income or investment income.

41. Mr Gudmundsson invited the Family Court to find that he and his wife had "similar" housing needs. His submission was that Southcote Road should be sold. The net proceeds of sale were sufficient for he and Miss Lin to buy a home in London. That would provide

him with a base to see and spend time with his children. HHJ Meston QC expressed grave doubts about his financial stability [para 70]:

> "The real difficult is whether that is still realistic and feasible. He has now suggested that his personal and financial circumstances have deteriorated greatly since the end of the hearing. More significantly, it has become unclear whether, when and to what extent the children will be able to stay with the husband in either London or in Iceland. It is now also unclear whether the husband will be able to discharge his debts or generate an income. It is unclear also whether he could afford or would want to maintain 2 homes. Moreover, it is now quite unclear whether he could regularly and reliably meet financial responsibilities for the children."

42. The judge referred to an asset and liability summary [paragraph 93] which showed a number of liabilities: only the EFL was seriously challenged. His disclosed assets included his interest in the Iceland hotel and pension. They did not include his house in Iceland or Southcote Road. Nonetheless, it is apparent that the judge knew of these assets. The judge accepted that Mr Gudmundsson had borrowed money from his mother to assist with his living expenses but also found that his 10% interest in the Iceland hotel, his Icelandic home and Southcote Road "remain intact". It is now known that the Foundation has a 49.995% interest in the Iceland hotel which reported a loss for the year ending 31 December 2017. Mr Gudmundsson is thought to have received income from the hotel in that year although he contends that the accounts do not bare out the assertion. There is no evidence that he received an income in subsequent years. The Trustees understand that the business is in the equivalent of administration in Iceland. That is consistent with the evidence provided to HHJ Meston QC in the Family Court.

43. This court has seen no new evidence regarding the sums held on trust for the four children of Mr Gudmundsson; the Foundation trust instrument which may or may not support Miss Lin's suspicion that the trustees may make funds available to Mr Gudmundsson; no evidence from Mr Jones or Jirehouse; no evidence of other accessible funds; or an income to support a loan that could have been raised to pay the petitioning creditor in February 2020.

Legal principles

44. Annulment of bankruptcy orders is governed by section 282 of the Insolvency Act 1986. This application concerns section 282(1)(a) which provides that:

> "The court may annul a bankruptcy order if it at any time appears to the court-
>
> That, on any grounds existing at the time the order was made, the order ought not to have been made…"

45. There are a few observations to make about the jurisdiction to annul. First, there are two stages to the test. The first stage is to analyse if grounds existed at the time the bankruptcy order was made. In this regard authority shows that the court may take account of evidence that was not before the court at the time. Conversely it is not generally permissible to take

account of evidence relating to post bankruptcy events. Secondly if the court finds that grounds did exist at the time it moves to the second stage where it has a discretion to exercise. There is only a discretion to annul. There is no obligation to make an annulment order. Thirdly, if an annulment order is made it has the effect of putting the bankrupt into the position he was in before the bankruptcy order was made: he will be liable for his bankruptcy debts.

46. In the context of family proceedings Mr Howling points out that the court should be alive to one party seeking to circumvent a financial order by obtaining a bankruptcy order.

47. In this regard he refers to *F v F* [1994] 1 FLR 359, *Paulin v Paulin* [2009] BPIR 572 and *Arif v Zar* and another [2012] BIPIR 948. In the latter case, Patten L.J. advised [paragraph 21] that the courts need to be alive to the real possibility that husbands (or wives) may attempt to use the protection of a bankruptcy order as a shield against the claims of their spouses for ancillary relief. The common feature in this case trilogy is the petitioner and the bankrupt are the same person. In a disputed ancillary relief context, there is generally more suspicion of abuse where one of the spouses petitions for their own bankruptcy in the course of financial relief proceedings. The remarks provided by the Court of Appeal in *Arif* carried with them a warning that there need be "credible evidence" of abuse.

48. The husband had presented his own petition and obtained the bankruptcy order on the day when the wife had activated her claim for ancillary relief against him in *re Holliday (A Bankrupt); Ex p Trustee of the Property of the Bankrupt v Holliday* [1981] Ch 405. Goff L.J (as he was) explained [414] that if the husband was not able to pay his debts when they fell due then "prima facie those orders were rightly made." Although *re Holliday (A Bankrupt)* is not recent it remains good law: *Paulin v Paulin* [48]; *Re Coney* [1998] BPIR 333. The position is different if the statements supporting the petition are false, there were no debts or the bankrupt could pay the stated debts as they fell due: *F v F*; *Couvaras v Wolf* [2002] 2 FLR 107.

49. Unlike the trilogy I have mentioned *Couvaras* concerned a creditor's petition and the court found collusion between the creditor and debtor. The court found that the bankruptcy petition had been a sham, and the proceedings an abuse of the process of the court. The husband had net resources amounting to much more than debts he claimed and was not insolvent.

50. In my judgment cases concerning a debtor's own petition for bankruptcy and a creditor's petition need to be distinguished. The warning that a party to financial relief proceedings may attempt to use the protection of a bankruptcy to avoid a spouse from receiving the benefit of an order, is not directed at cases where a genuine creditor petitions and the debtor cannot pay the debt. In this case Miss Lin has the burden of proving, that as at the date of the bankruptcy order, Mr Gudmundsson was able to pay his debts: *Paulin v Paulin*.

51. The Trustees refers me to several authorities concerning the insolvency test and cash flow insolvency: *BNY Corporate Trustee Services Ltd v Eurosail UK 2007 3 BL plc* [2013] UKSC 28 and *Re Cheyne Finance plc* [2007] EWHC 2402 (Ch). Reference has also be made to *Gittins v Serco Home Affairs* [2012] EWHC 651 (Ch) at [33] to illustrate the test.

52. Finally, insofar as I am asked to draw adverse inferences from a failure to disclose information or otherwise, I remind myself that there is no obligation on the court to do so. There must be some evidence, however weak, adduced on the matter in question before the

court is entitled to draw an inference: in other words, there must be a case to answer on the issue. If there is some credible evidence given for a failure to disclose information or silence, even if it is not wholly satisfactory, the potentially detrimental effect of the absence or silence may be reduced or nullified: *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882 [28].

Jurisdiction

53. The issue of jurisdiction was not a matter included in the application to annul or supporting witness evidence. Due to the late introduction of the issue it was not a matter that Mr Gudmundsson or the Trustees were equipped to argue: *Dhillon v Barclays Bank Plc* [2020] EWCA Civ 619. Following a debate at the beginning of the trial, agreement was reached. I shall deal with the issue briefly.

54. A person's centre of main interests ("COMI") has the meaning as stated in the EU Regulations on Insolvency Proceedings 2015/848: Rule 1(2) Insolvency Rules 2016. COMI is not defined by EU Regulations. Recital 13 of the Regulations states that COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is ascertainable by third parties: *Eurofood IFSC Ltd* [2006] Ch 508. The authors of *Schaw Miller and Bailey* [4.16] explain that if a person is in independent business there is a presumption that COMI is at their place of business, but if there is no business COMI is presumed to be where that individual has their habitual residence. If the person's habitual residence has moved from another Member State within the six months before the request to open insolvency proceedings, then the presumption does not apply.

55. A court seized of a request for the opening of insolvency proceedings is duty-bound to examine for itself whether it has jurisdiction to open proceedings, and must state in its judgment whether the proceedings are main or secondary proceedings.

56. It is self-evident that the court considered the jurisdictional question and found that COMI was in England and Wales as set out on the face of the bankruptcy order. There is no doubt that Mr Gudmundsson was involved in the Iceland hotel and that he did not live at Southcote Road on the date of the bankruptcy order. There is some doubt as to whether his habitual residence was in England and Wales at that time or whether Mr Gudmundsson had moved from England and Wales within six months of the request to open insolvency proceedings. His evidence in these proceedings is: "Since the making of the Financial Order, I have had no choice but to relocate to Iceland". This suggests that he moved from England and Wales after February 2020.

57. There was no cross examination aimed at revealing habitual residence or movement within six months of the request to open insolvency proceedings. It was conceded by Miss Lin that even if the court were to find that Mr Gudmundsson did not have his COMI in England and Wales it should not exercise its discretion to annul the bankruptcy order. Mr Gudmundsson had "in the period of three years ending with the day on which the petition is presented …a place of residence in England and Wales" satisfying section 265(2) of the Insolvency Act 1986. Accordingly the court had jurisdiction to make the order.

Collusion

58. It is helpful to consider in a little more depth the circumstances in which an experienced Family Court judge found collusion in *Couvaras v Wolf*. Mr Cater was the petitioning creditor. Wilson J (as he then was) explained (p113):

> "Mr Cater is the cohabitant of the debtor's first wife. Mr Cater therefore is the de facto stepfather of the debtor's child by one of his earlier marriages. As the foundation for the bankruptcy proceedings, Mr Cater alleged that in March 1997 he lent the debtor £5,000, repayable in 6 months. Mr Cater exhibited to his affidavit, which was sworn before it was decided that he would take no active part in this application, an apparent acknowledgement of the debt by the debtor, apparently dated 1997. The trouble about that is that, according to the wife, the document is typed upon paper with a letter-heading which recites a telephone number for the debtor which he ceased to have in 1995. In his affidavit Mr Cater proceeded to say that he had pressed the debtor for the repayment of the sum of £5,000 plus interest over the succeeding 3 years. He exhibited no documentary evidence whatsoever in support of that allegation. We do know of course that, at his request, a statutory demand was issued against the debtor in September 2000, namely less than 3 months before the date fixed for the substantive hearing of the wife's claims against the debtor. Even more curious is the role of Mr Cater on 14 December 2000. I have already explained the curious events which took place in court on that date, namely the sudden withdrawal by the two companies of active opposition to the wife's claims. It is now admitted by Mr Cater that he was in the corridor of this building, outside this court, on that day. I find the conclusion irresistible that Mr Cater was part of a plan which included the debtor, though he was absent, and certainly included the companies, which I found to be the debtor's companies, that the better way of defeating the wife's claims would be not by further participation in the proceedings but by a bankruptcy petition presented against the debtor days following the anticipated reservation of judgment."

59. Each case is fact sensitive. And the facts of this case, as accepted by Miss Lin are quite different. Miss Lin argues that Mr Gudmundsson has been dishonest about his dealings and the dishonesty infects how the court should view the disclosure he has made about his financial circumstances. The allegation is serious. It is said that Mr Gudmundsson gave inconsistent information about his place of residence. He informed the Family Court that he was in Iceland and the Insolvency Court that he was in England and Wales. One must be a lie. He lied about the hair strand test forging the outcome to permit access to his children. He informed the Official Receiver that he owed a debt to EFL but in this hearing doubted it was debt. Lastly, not so much a lie but an inconsistency is revealed as he seeks to appeal the decision in the Family Court but maintain his bankruptcy.

60. I have referred to Mr Gudmundsson's written evidence that he left London on a permanent basis after the Family Court proceedings had concluded. He was asked where he was living until 4 March 2020, and his apparent change of position in cross-examination:

> "Q you can't have been living in Iceland and living in London at the same time. Which one was it? Where you living in a permanent basis in London?
>
> A. I was living on a permanent basis in London- but staying with friends because I had to give up the lease on my flat as I could not afford to pay it. Your client knows this very well. The children visited me in the flat and she brought them to me."

61. He was taken to the Form E financial statement he provided to the Family Court, and in particular a passage which stated "I am not habitually resident in the country and understand CMS does not have jurisdiction. In any event, I currently pay approximately £I,000 a month to Hsiao-Mei for the benefit of Alden Lin and Alisa Lin." He was then asked how he could reconcile that statement with living in London:

> "I was paying money to my wife: at that time I was not seeing the children. I was prohibited. At the time I wrote that statement it was correct, that was correct in 2018. I moved to Iceland and when I was able to see the children again I moved back to London."

62. In my judgment the alleged inconsistency of evidence given in respect of residence is more apparent than real. It was conceded on the issue of jurisdiction that Mr Gudmundsson was in the jurisdiction and had a place of residence at the time the bankruptcy order was made. He had family and business interests in Iceland. He moved from one place to another staying in one location more than the other dependent upon his changing circumstances.

63. In evidence Mr Gudmundsson accepted that he was wrong to forge the hair strand test. He accepted it was deceitful and wished he had not done it. The judgment of HHJ Meston QC deals with the issue [paragraph 95-120]:

> "In a separate statement relating to the proceedings concerning the children the husband admitted that his failure to a relapse in the use of drugs had been a serious misjudgement by him. He admitted the forgery of at least one drug testing certificate…
>
> It is important to remember that if a party is shown to have told a lie or to have withheld relevant information the court must bear in mind that a party may lie for many reasons, such as shame, panic, fear and distress, and must also bear in mind that the fact that a party has lied about some matters does not mean that he or she has lied about everything. Clearly I have had to consider carefully whether there is or might be an innocent explanation for the husband's conduct in respect of the drug test certificates. I assume that he falsified the certificates because he wished to maintain contact with the children, but it is not possible to disregard the deliberate nature of the attempt to deceive his wife (and ultimately to deceive the court if the falsification of the test results had not been discovered). It is not to be treated as direct proof that he had been deceiving the wife and the court in the

> financial proceedings; but, as submitted, it is a reason to be cautious about unsupported aspects of his evidence."

64. I comment that Mr Gudmundsson was honest about his failings in this court. I do not consider that the mention of the EFL in his sworn statement of affairs is indicative of dishonesty. If Mr Gudmundsson had not revealed the purported EFL, the Official Receiver and now the Trustees would consider that he failed to fully disclose his financial position. In the event EFL has submitted a proof of debt. The Trustees' position is simply that more investigations are required. The Trustees do not allege that Mr Gudmundsson has failed to co-operate or disclose information.

65. My assessment of Mr Gudmundsson as a witness is positive. He gave his evidence clearly, thoughtfully and in a straight forward manner. In my judgment he was an honest witness. I do not consider the change of residence or the EFL as indicative of dishonesty. Mr Gudmundsson has admitted forging the hair strand test. He has also admitted that at that time he was addicted to drugs and was trying to have contact with and see his children. These factors do not excuse his "serious misjudgement" but I take them into account in determining that the evidence he gave in this court was reliable.

66. I find that there has been no failure on his part to disclose details of the Foundation. It is accepted by all parties that the Trust no longer has a function: its assets were "decanted" into the Foundation. Mr Gudmundsson is neither a settlor nor beneficiary. If he has no interest in the Foundation there is no reason why he should have access to information. The one identified person who may have information about the Foundation is the settlor: Mr Gudmundsson's mother. She was not subpoenaed or called as a witness. There was no third party disclosure order to obtain the trust instrument.

67. On the other hand Mr Gudmundsson has provided an answer as to why he is unable to provide evidence about the Foundation. Although it may be viewed as weak, it is sufficient, in my judgment to ward off the invitation to make an adverse inference that he had access to the Foundation funds to pay the petitioning creditor and all other creditors. The Family Court found that he did not have such access. Simply put this court has been provided with no better evidence to make a finding or draw such an inference.

68. Although it has been said that there was collusion by reason of the friendship between the petitioning creditor and Mr Gudmundsson, the relationship was also one of creditor-debtor. In the second of his filed reports the Trustees explain:

> "Since the date of the Joint Trustees' prior report, I have received a further 2 claims from 2 unsecured creditors totalling £172,020. This includes the claim of the petitioning creditor, which has been received in the sum of €186,387 (£157,020 at a rate of £0.8424393681/€1). The petitioning creditor has provided me with documentation to support the debt owed, including a schedule of payments made to or on behalf of the Debtor and bank statements showing payments."

69. The evidence of Mr Gudmundsson is that he had borrowed money from his friend to help with legal costs associated with representation during the financial relief proceedings. He had promised Mr Ortlieb to return the money borrowed and had anticipated repaying him from the sale proceeds of Southcote Road. Mr Ortlieb ran out of patience and Mr

Gudmundsson had no other available resources. This evidence was not undermined at the hearing.

70. In his written evidence Mr Gudmundsson explained that he lives with his mother:

> "I assist in the management of the hotel in Iceland, Hlemmur Square, in which my bankruptcy estate has a 10% interest by doing various practical repairs, like fixing dishwashers, laundry and painting. This does not give me any source of income but at least keeps me occupied. My mother supports me through various loans and gifts albeit my living expenses are very low. I have no earned income. I do have a pension but I am not yet of pensionable age but I have been able to draw from on a very limited basis under emergency exemptions recently passed under Icelandic law because of COVIDl9."

71. Mr Howling asked Mr Gudmundsson why he did not inform the Family Court or Miss Lin that the petitioning creditor was pressing for payment:

> "A. I had raised this many times in the court- I raised the fact in court that I was on the verge of being made bankrupt. I then in late 2019 I asked Miss Lin if she could help out with £15,000 she said "no". she was not even going to help with a few thousand pounds to help me be represented in court by a barrister. I was also afraid. Miss Lin got me arrested, kept my children from me; I was refused a loan from my own wife, I was afraid of the UK and my ex-wife. So yes I was not a happy bunny. "

72. He was asked if he concealed the bankruptcy. He responded:

> "I did not know I had to tell the judge that I had been made bankrupt in February. It was not a deliberate omission. I didn't think it relevant. I thought that the court system was the same in Iceland and one court would get information from another court- and it would automatically show up with Judge Meston. It was not done to throw the spanner into the wheel."

73. I was not invited to disbelieve the evidence of Mr Gudmundsson on this issue. I find there to be no reason to disbelieve him.

74. I note the Trustees consider Mr Ortlieb a creditor, although their report makes clear that the claims have not been adjudicated upon for dividend purposes.

75. As can be observed these circumstances contrast to *Couvaras.* There is no evidence of collusion between the petitioning creditor and Mr Gudmundsson. The only available income available to Mr Gudmundsson at the time of the bankruptcy order, derived from the Iceland hotel. The investigation of the Trustees have to date not revealed further income sources.

76. Mr Gudmundsson's written evidence in response to the allegation of collusion was not undermined in cross-examination:

> "There was no collusion as Hsiao-Mei and her Counsel allege regarding my bankruptcy. Mr Ortlieb simply wanted his funds repaid. I had been promising him for over a year that they would be repaid once my divorce was over, I expected judgment to be handed down swiftly following the financial hearing in February 2019 and I could not justify or explain to Mr Ortlieb, as a German national who is fastidious on detail and timing, why an English judge would take nearly 12 months to hand down a judgment."

77. In my judgment Miss Lin has not discharged the burden of proof.

Conclusion

78. An annulment pursuant to section 282(1)(a) of the Insolvency Act 1986 requires evidence that there were grounds existing at the time of the bankruptcy order that the order should not have been made. There is no evidence that the debt demanded by way of the statutory demand and subsequently on the petition dated 22 December 2019 was not due. There is no evidence that the due debt was paid secured or compounded for at the date of the bankruptcy order.

79. It was properly conceded that the Insolvency and Companies Court had jurisdiction to make the bankruptcy in February 2020.

80. It may be a ground to annul if it is shown that the petitioning creditor and debtor colluded in seeking and obtaining a bankruptcy order: that the debtor could pay his debts as they fell due. This hostile Annulment Application is based in part on demonstrating that Mr Gudmundsson has credibility issues and as such the court should make an adverse inference.

81. The evidence does not support the failures in the evidence of Mr Gudmundsson that Miss Lin has advanced. The inconsistencies of evidence he gave were more apparent that real. His admitted failure to provide a honest drug test result in the Family proceedings should not and does not, without more, infect the bankruptcy. There is no link between Mr Gudmundsson's drug habit, desire to see his children, forging of a drug test result and the ascertainment of a due debt that could not be paid to a creditor. The admission of the drug test incident does not, on the facts of this case, act as a lever to open the lid on the bankruptcy: there is absent evidence of fraud, collusion, mistake or misrepresentation. There is no evidence that Mr Gudmundsson failed to make full and frank disclosure of his financial position in the course of the bankruptcy proceedings.

82. There is no evidence to support a ground that Mr Gudmundsson was not able to pay his debts as they fell due or that he had some tangible and immediate prospect of being able so to do.

83. It was not postulated that Mr Gudmundsson's motive or purpose was "to baulk the claim the wife was making for a transfer of property order" as was the case in *Re Holliday*. However, even if that were the case, the authorities demonstrate that cannot alone make a debtor's own petition an abuse of process. That must be all the more so when a creditor petitions and initiates the bankruptcy. The evidence supports a finding that Mr Gudmundsson was unable to pay his debts as they fell due.

84. The application shall stand dismissed. I invite the parties to agree an order.