

ENGLAND AND WALES / JUDGMENT

Ann Nilsson & Anor v Timothy Edward Jones

Source: caselaw.nationalarchives.gov.uk · Research copy typeset by Esheria. Not court-issued or certified.

Neutral Citation Number: [2026] EWHC 319 (Ch) Case No: BR-2024-000795 IN THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES INSOLVENCY AND COMPANIES LIST In The Matter Of TIMOTHY EDWARD JONES And In The Matter Of THE INSOLVENCY ACT 1986 Royal Courts of Justice, Rolls Building Fetter Lane, London, EC4A 1NL Teams Remote Date: 17 February 2026 Before: I. C. C. JUDGE JONES (Sitting in Retirement)

- ----- Between:

1. ANN NILSSON
2. MATTHEW CARTER (As Joint Trustees in Bankruptcy of Timothy Edward Jones) and TIMOTHY EDWARD JONES Applicants Respondent Ms Morwenna Macro (instructed by Howes Percival LLP) for the APPLICANTS Mr Rowen Pennington-Benton (instructed by Pinder Reaux) for the RESPONDENT Hearing date: 12 January 2026 Approved Judgment This judgment was handed down remotely at 10.30am on 17 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives. 17/02/2026..... I. C. C. JUDGE JONES (sitting in retirement) 2 I. C. C. Judge Jones (Sitting in Retirement) A)

Introduction

1. The judgment of 16 October 2025 (“the First Judgment”), with which this judgment is to be read, adjourned the Trustees’ annulment application (“the Application”) and granted permission to amend the Application Notice to address the following two issues: a) b) Whether the Bankruptcy Order (“the Order”), made by an Adjudicator on 21 December 2021, ought not have been made and should be annulled because Mr Jones’ domicile was in Austria with the result that there was no jurisdiction to make the Order (“the First Issue”); or Whether the Order should be annulled or rescinded because: Mr Jones had no assets (or only nominal assets) within this jurisdiction when the Order was made; he incorrectly asserted in his bankruptcy application that he owned a half share in the equity of his former matrimonial home in England; the assets which would form the bankruptcy estate were in Austria; Austrian law does not recognise a bankruptcy based on domicile but requires it to be based on the location of the centre of main interests, which was in Austria not England; and such an order is justified in the context of post Order conduct (“the Second Issue”). In a

nutshell, the first issue turns upon whether Mr Jones retained his domicile of origin or had acquired a domicile of choice in Austria. At this stage, it is sufficient to describe the legal test of change of domicile as being: whether the Trustees have proved on the balance of probability whether directly or by inference from the evidence that Mr Jones' domicile of origin was superseded at the time of the Bankruptcy Order by his domicile of choice because Mr Jones not only resided in Austria but had the intention that Austria was his permanent home, the place where he would reside indefinitely, where he was an inhabitant. Mr Jones would not have abandoned his domicile of origin if, for example, his intention had been to reside in Austria for a limited period or for a particular purpose on the basis that he would leave there once that purpose was completed. If he abandons a domicile of choice, the domicile of origin will revive in the absence of a new domicile of choice. There can only be one place of domicile. It is more difficult to prove abandonment of the domicile of origin than abandonment of a domicile of choice (see generally paragraph 6-042 of Dicey, Morris & Collins, "The Conflict of Laws" ("Dicey") and the law as set out in paragraph 19 of the First Judgment). As to the Second Issue, the Trustees abandoned their claim for rescission at the hearing. It was agreed with Mr Jones that I am bound by precedent to conclude there is no jurisdiction for such an application before the Companies and Insolvency Court when the Order was made by an Adjudicator on a debtor's application. That is because there can only be a 2. 3. 4. 5. B) 6. review of a decision made by a Court of co-ordinate jurisdiction (see section 375(1) of the Insolvency Act 1986 ("the Act") and *Sands v Layne and Another* [2016] EWCA Civ 1159,

[2017] 1 WLR 1782). The Second Issue, addressing annulment, first concerns the Court's discretionary power to refuse to make a bankruptcy order even if the statutory requirements are met. Mr Jones disputes that this power applies to an Adjudicator's decision upon a debtor's application. If it does, the Second Issue asks the question, whether the Order ought not to have been made because that discretion should be exercised. If the answer is that it ought not to have been made, the further question is whether the Court should exercise its discretion to annul. The Respective Cases There are no statements of case other than the Amended Application Notice, to which was added (by agreement between counsel) details set out in an email sent by the Trustees' solicitors on 20 October 2025 ("the October 2025 Email"). The substance of the respective cases is to be derived from the evidence. The First Judgment has addressed the evidence filed in support and in opposition, so that material is not repeated except when it is necessary to do so. Over the adjournment, there has been filed further evidence in support addressing the position of creditors, further evidence in answer setting out facts and matters relied upon in opposition to the amended Application and additional evidence in reply. 7. As to the First Issue, the following summary of the Trustees' case is taken from Counsel's skeleton argument: "The Trustees' case as to domicile is that at the time of the bankruptcy application the Bankrupt had acquired a domicile of choice in Austria. He was resident there and the relevant intention can be inferred (in addition to the Bankrupt's previous evidence in the family proceedings as to his intention and domicile). There had been

material changes since the family proceedings. Reliance will be placed on the matters set out in our evidence and skeleton arguments. In the alternative, the order ought not to have been made and ought in the court's discretion be annulled and/or rescinded in all the circumstances set out in the evidence and skeleton arguments. These include: i) The incorrect contents of the bankruptcy application – the Bankrupt wrongly suggesting he had an interest in the former matrimonial property in England and therefore an asset in England; this would have been a material consideration as to whether a bankruptcy order ought to be made The asset position of the bankruptcy estate – there are no substantial assets in the UK; there are assets in Austria, however the Trustees are unable to realise such ii) iii) iv) The subsequent conduct of the bankrupt – including non-cooperation and actions taken to thwart recognition in Austria / realisation of assets; not facilitating the Trustees in recovering property vested in them The lack of recognition of the Bankruptcy in Austria and its consequences, including the consequences for the unsecured creditors

8. Mr Jones' case, as derived from his further evidence, is that his domicile did not change between 1 September 2018 when the Family Court rejected his claim to a change and the Order. In briefest summary, he relies upon the following evidence: a) b) c) His residence in Austria only became permanent in about February 2021. He continued to have parental ties with his children in England. "WhatsApp" exchanges with friends in 2019, 2020 and 2021 evidence the absence of any intention to remain in Austria permanently and a December 2020 email to a friend reveals his interest in an English business venture, a public house, in England. Business interests continued to be held in England involving Blush Hospitality Limited, Genus Care Ltd, Vistair Limited and start-ups including Triton Energy Resources Ltd. He paid UK tax and national insurance and had bank accounts, loans and investments in England. He maintained his military and civil ties with England. and his right to vote in the UK as a registered overseas elector. He continued to receive a UK military pension. He did not vote in Austria. He has a UK passport, not an Austrian EU passport. Currently he works with South Wales Fire Service concerning youth training. His home in Austria is owned by Sparkasse Bank and there is a second Austrian, secured creditor. It will become vested in him only if the mortgage is redeemed. His home has been repossessed by the Bank and is unavailable to the bankruptcy estate. d) e) f) g) h) 9. The Trustees' evidence in reply includes a statement from Mr Jones' former wife, Sally Jones. She draws attention to the following facts and matters to challenge Mr Jones' stated evidence of intention (including, again in briefest summary, but noting that not all the matters need to be addressed or repeated for the purpose of the decision): a) b) c) d) Whilst Mr Jones occasionally travelled to the UK, for example for divorce proceeding hearings held on 2-6 February 2020, his stated intention was to move to Austria and become an Austrian citizen with permanent residence. An application made on 1 May 2019 in Austria by Mr Jones to have the children returned to him in Austria from England and a second such application in the same year. Mr Jones' application was refused. Mr Jones' absence of reference to any intention to return to England in July 2019 (the date of one of the WhatsApp exchanges). A judgment in 2020 of an Austrian Court which gave permission for her to return to England with the children in which it was recorded that it

was put on behalf of Mr Jones that he “will not go to England and thus the father-child relationship will be impaired.. (and that) in the early days in which the children in England have to settle, no personal contact is guaranteed”. An application by Mr Jones in May 2020 to this jurisdiction to remove the children to Austria due to Covid (she being an NHS key worker), his removal of the children to Austria despite a prohibited steps order and the fact that their return had to be secured by order of the High Court made on 2 June 2020. The terms of the “Contact Final Order” made on 19 April 2021 including the children holidaying with Mr Jones in Austria and him spending additional weekends with them in England. Mr Jones not exercising the right of weekend access and not having seen them for 14 months prior to a two-week holiday in England in August 2021. Thereafter, only spending one week with the children in the UK in 2021. A statement by Mr Jones in his application to the Family Court on 7 December 2021 objecting to them moving to South Wales and stating that: “I am an Austrian permanent resident” together with his reference to an appeal against the Austrian Court’s decision granting her the right to remove the children. Non-disclosure of active business interests in the UK or of share value in Blush Hospitality UK Limited during the February 2020 financial remedy hearings. The judgment of the Family Court in 2020 recording an agreement that the Genus Care limited shares were worthless and ordered their transfer to her. Mr Jones’ statement in July 2024 during family proceedings that he had taken no income from Vistair Limited. The failure previously to mention involvement with Southwest Fire Service. e) f) g) h) i) j) k) l) 10. One of the Trustees, Mr Carter, also filed a further witness statement responding to Mr Jones’ further evidence. His repetition of Ms Jones’ evidence can be ignored and I need only refer in briefest summary to the existence of a bank account in the UK into which his military pension is paid and to Triton Innovations Limited (now called Energy Resources Limited) having been incorporated on 9 December 2022. 11. As to the Second Issue, the Trustees’ case can be identified from the following passage within the above-mentioned email of 20 October: “In the alternative, the order ought not to have been made and ought in the court’s discretion be annulled ... in all the circumstances set out in the evidence and skeleton arguments. These include: i) The incorrect contents of the bankruptcy application – the Bankrupt wrongly suggesting he had an interest in the former matrimonial property in England and therefore an asset in England; this would have been a material consideration as to whether a bankruptcy order ought to be made ii) iii) iv) The asset position of the bankruptcy estate – there are no substantial assets in the UK; there are assets in Austria, however the Trustees are unable to realise such The subsequent conduct of the bankrupt – including non-cooperation and actions taken to thwart recognition in Austria / realisation of assets; not facilitating the Trustees in recovering property vested in them The lack of recognition of the Bankruptcy in Austria and its consequences, including the consequences for the unsecured creditors”.

12. Mr Jones’ case is summarised in his counsel’s skeleton argument as follows: “This Court can only annul where there are “grounds existing at the time the order was made” which show that “the order ought not to have been made”. Lack of assets and any other discretionary

factors on which the JTs now (belatedly) seek to rely, are irrelevant. None of those would constitute “grounds existing at the time the order was made” that could have led the adjudicator to have refused to make the order. As previously submitted, the adjudicatory regime is a separate and standalone scheme which operates on different principles. It provides for a simple and streamlined process for dealing with personal insolvencies. The provisions are clear. They are not designed to be the subject of detailed (in this case a weeklong) attacks years after the event. Either there is jurisdiction or not; if there is and the debtor cannot pay, the order is made. That is it. Points about the existence and value of assets are irrelevant as they form no part of the adjudicator’s decision-making framework. None of the points now raised (even if established on the facts) would have entitled the adjudicator to have refused, under the statutory scheme, to decline to make the order. Accordingly, none of them can constitute grounds that enable the Court now to annul the bankruptcy. The arguments about TEJ misstating the position are hopeless ... he was the owner of the property ... there was a court order saying that he had to transfer his share of it to his ex-partner but that did not mean he was not the owner of the property ... His name was on the deeds /LR documents. Anyway, the adjudicator was plainly aware of the family proceedings and the orders that had been made within them.... there were assets in the jurisdiction ... Even if there were limited assets here, this is not a reasonable basis for refusing to make a bankruptcy order ... this was the right order to make (there was jurisdiction, the debtor could not pay his debts, the debtor wished to enter an insolvency process). It is fanciful in the extreme to think that an adjudicator (or a court for that matter) could refuse to make a bankruptcy order in these circumstances, simply because of the fact that the order might not be enforceable against a reversionary interest in foreign property. As for the other complaints about the way things have turned out, none of these are matters that existed at the time the order was made (cf. section 282), and are anyway makeweight and cannot rationally ground a decision to annul an order made 4 years ago. The order was not wrong. It was made pursuant to and in accordance with the statutory scheme. It is not for this Court, years later, to seek to interfere with the order because it has some misplaced sense of sympathy with the JTs for taking on the case and not being able to take the property in Austria. The property belongs to the bank. The order is not enforceable there. This is life. None of this has any impact or relevance to the vires or appropriateness of the order under the UK statute. None of it, either, is TEJ’s fault. He simply used the available scheme as he couldn’t pay his debts. He should not be punished for this.” C) The Hearing C1) The Witnesses 13. It was agreed that the witness Trustee, Mr Carter, need not be tendered for cross-examination as he did not have personal knowledge of any facts and matters occurring prior to his appointment. Mr Jones also decided that Mrs Jones need not be cross-examined. His evidence must be read as not having been challenged.

14. Mr Jones was cross-examined. I have decided to treat his evidence with particular caution because of the inherent risk of “false memory” resulting not only from the gap between relevant events and the hearing but also because he has endured a particularly difficult and emotional time as a result of the divorce, its custody issues and the effect upon his business

and normal life of the divorce's financial settlement, other financial demands upon him and the consequences of Covid. That decision does not mean he is necessarily to be disbelieved or that doubts or adverse decisions over one part of his evidence will mean that he is to be disbelieved on other parts. It means that the Court will address his evidence with particular care, for example testing it against contemporaneous evidence. C2) Admissibility of Evidence 15. The evidence relied upon includes facts and matters appearing within earlier Court judgments in different proceedings. It is appropriate to explain, therefore, that I will adopt the following principles: a) b) c) d) e) A final judgment and a judgment at an interlocutory stage deciding a claim has no reasonable prospect of success, are conclusive between the parties and their privies of its existence, date and legal consequences. It will in normal circumstances (for example, absence fraud or collusion) preclude re-litigation between them of the cause(s) of action or issue(s) identifiable from the judgment and/or pleadings. A bankruptcy trustee is the privy of the bankrupt (see para 116 of the Court of Appeal's decision in *Joint Stock Company Aeroflot Russian Airlines v Berezovsky and others* [2013] EWCA Civ 784 and paras 202–207 of Mrs Justice Carr's judgment in *Sabbagh v Khoury* [2014] EWHC 3233 (Comm)), noting para [203]. They can also be conclusive in proceedings involving others if a refusal by a party/privy to the proceedings to accept the conclusions of the court would be an abuse of process because it would be manifestly unfair to require re-litigation or such a course would bring the administration of justice into disrepute (see *Shierson and Birch v Rastogi (A Bankrupt)* [2007] EWHC 1266 (Ch); [2007] BPIR 891). Whether the Trustees are to be bound as privies for the purposes of the Application when they are reflecting the interests of an office holder appointed to give effect to a class remedy for creditors is an issue that did not arise and, therefore, the parties did not consider necessary to address. Subject to the above, the judgment is inadmissible as evidence of the facts found or the decision reached and the opinion of that court is irrelevant to later proceedings. However, any narrative of evidence within the judgment may be referred to for the purpose of identifying the evidence before the court (see generally the cases above and *Re Hellas Telecommunications (Luxembourg) II SCA (in Liquidation)* [2016] EWHC 558 (Ch), [2016] BPIR 903, [46-49]. C3)

Submissions

16. The submissions followed the statements of case described above. In that circumstance I will only refer to them further expressly insofar as it is appropriate and necessary to do so. It is to be mentioned that the time estimate appeared potentially optimistic during the afternoon when submissions began. However, that was resolved by counsel being informed they could assume that I had already “listened” to the submissions within their skeleton arguments. As far as matters were not addressed, that was not for lack of time. D) The Evidence and Findings of Fact 17. 18. There is no dispute that this jurisdiction is Mr Jones' domicile of origin. Nor is there dispute that between at latest 2012 and the end of 2017 Mr Jones and his family were living and working in Austria. Their family home was in Tux, the ski holiday letting business was operated from the top floor of the apartment building, Mr

Jones' micro brewery, partnership business was started on the lower floor in September 2016 and his wife carried on her work there as a physiotherapist whilst (from his evidence) he cared for the young children. Mr Jones does not dispute that Austria became his place of residence or continues to be so. However, their ties with England were maintained. They let out their family home and in May 2016 Mr Jones applied to be added to the register of overseas electors, although it appears this was not renewed. The crucial issue, therefore, for the purpose of determining whether there has been a change of domicile is whether by the date of the Order he was living in Austria with the intention of permanent or indefinite residence. 2017 witnessed the beginning of a scenario of divorce, serious and troubling allegations made against him, bitter recriminations and disputes which linger to this day. Divorce proceedings were started by Mrs Jones in this jurisdiction on 29 March 2018. Mr Jones started his own proceedings in Austria the next day. Mrs Jones applied in Austria for permission to remove the children to England under her custody. The Court's judgment of 13 August 2018 refers to the children having only ever spent about 7 weeks in England and that Mr Jones' advocate stated on his behalf that: "... the father will not go to England and thus the father-child relationship will be impaired and it has already been delivered to the children's mother according to the report page 40 of accompanied visits to England, whether if it could in total lead to children's endangerment:".

19. Mr Jones in cross-examination explained that this statement reflected his intention and decision at the time. This appears (by implication from the evidence) to have been based upon Austria being their settled home, he having cared for the children whilst his wife worked and the anticipated rejection of the serious allegations against him. However, on 13 August 2018, the Austrian Court granted custody of the children to his wife in England. Mr Jones emphasised that this changed everything. He said he was shocked by that decision. His Austrian legal advice had been that the Judge would not reach that conclusion. He genuinely thought the children would not see him again if they returned to the UK under the control of Mrs Jones. He commented that had he known what the Austrian Court was going to decide when his advocate made the statement, he might have approached it differently.
20. The judgment also records that Mr Jones described the financial circumstances concerning their two properties as follows: The property in Tux is burdened by slightly less than €400,000, - debts, €350,000, - approximately. The house is about € 900,000, - worth. The brewery has €90,000, - debts. We received a grant from the state for a 10-year business plan. We started with the brewery 2 years ago. The house in Burnham is worth €600,000 and has debts of €250,000. I have no credit card debt. I have debts to my friend €25,000. It's a loan he helped me buy the house in Tux."
21. Mrs Jones and the children returned to England the day judgment was delivered. Mr Jones remained in Tux. On the same day, an interim non-molestation order was made against him by the Central Family Court with directions for an opposed hearing. 22. On 1 September 2018 Judge Meston decided that the Central Family Court had jurisdiction to hear the divorce proceedings. His decision was based on the domicile of both parties at the date the divorce petition had been presented by Mrs Jones. He rejected Mr Jones' case and evidence that he

was domiciled in Austria. Whilst this could give rise to interesting arguments as to whether that decision binds the Trustees as Mr Jones' privies, they do not arise because the Trustees do not suggest that an intention of permanent residence had yet been formed. However, they rely upon various parts of the judgment to identify facts and matters presented in evidence which develop the potential for such an intention forming soon. The judgment recorded the following, which is admissible evidence, in the context of considering where Mr and Mrs Jones were domiciled: a) b) In his Acknowledgement of Service Mr Jones stated that he did not agree with the grounds in the Petition asserting jurisdiction. He relied upon the facts that there were divorce proceedings in Austria, the parties were habitually resident and domiciled in Austria and that all significant assets and business were in Austria. He represented that he considered Austria to be their place of domicile. In his "Answer" dated 30th April 2018 Mr Jones said: "... he and the family were domiciled in Austria where they had been resident for 51/2 years and where the bulk of their assets and businesses were". He said they were completely integrated and dependent upon the Austria's school, social and welfare systems. He said his wife and he were both gainfully employed in Austria and the children in full-time education there. They had no good reason or intention to return to the UK. Those points were repeated in a covering letter to the court of the same date. c) Mrs Jones' evidence included her saying: "... they decided to take an extended sabbatical while the children were young and not yet in the English school system. Their initial plan was to relocate to their property in Austria for a year. [She] maintained her registration as a physiotherapist on the HCPC Register ... Mr Jones had various business ventures which did not succeed, all registered as English companies. They retained their house in England and agreed to let it out partly furnished, storing the rest of their belongings in Austria where they had space available. On that basis they moved to live in Austria on 3rd October 2012 ... they did not change their address for bank accounts and bills, and completed yearly requests for the redirection of their mail from Burnham to Austria ... at the end of their first year in Austria in 2013 they decided to stay there longer: she said they then thought it would make sense to stay longer, the husband's reasoning being that once the children were at school in England there would not be another opportunity to live abroad in that way ... they never had any discussions about making a permanent move to Austria, neither at the time of the original 'sabbatical', nor later ... they talked 'all the time' about when they would return to the UK, having various discussions about it ... they agreed that the appropriate point to return home would be when [one of the children] was due to start junior school in Austria (i.e. at the age of 10) ... they thought there was a benefit to the children and being immersed in the German language while they were young, and that their plans were to return to England once the children were a little older and secure in their German language skills." d) The evidence of Mr Jones before the Family Court also included the statement: "We are a global family with extended family all over the world. I have no intention of ever returning to live in the UK and I genuinely believe that the petitioner shared that view. We receive our medical care in Austria and only returned to England for occasional holidays as we would in other parts of the world." e) During cross-examination Mr Jones stated that (in summary): they had decided never to return to England at some date after the children had moved to

their middle school; he would stay in Austria even if his wife was able to return the children to England with her; and “he was an Austrian resident and that was where his home and family (i.e. the children) were”. f) The Court accepted jurisdiction, preferring Mrs Jones’ evidence. 23. I find, therefore, that during 2018: a) b) c) Mr Jones claimed habitual residence and domicile in Austria from which he said the family had no good reason or intention to return. Mr Jones stated he had no intention of ever returning to the UK and that he would stay there even if Mrs Jones was able to return to England with the children. Mrs Jones stated a different version of facts to the effect that there was no change of domicile. d) The Central Family Court accepted jurisdiction. 24. 25. 26. On 4 October 2018 Mrs Jones issued an application for financial remedy. On 9 November 2018 Deputy District Judge Harvey made a one-year non-molestation order in the context of Mr Jones having not attended the hearing. Around this time, Mr Jones issued an application under the Children Act 1989 in the Family Court in Slough for permission to return the children to Austria. Mr Jones’ evidence during cross-examination was that throughout, he wanted the children to return to Austria where they had lived throughout their minority. A decree nisi was made on 27 February 2019 and financial remedy directions given. Further directions followed, including expert valuation and tax reports, together with, no doubt, substantial costs, some of which appear to have been attributable to procedural non-compliance by Mr Jones. In March 2019 undertakings were given to the Central Family Court by both Mr and Mrs Jones. They included binding requirements not to discuss with the children (in briefest summary) a future return to Austria. This indicates that Mr Jones was still looking to a future with the children returning to and residing with him in Austria. The Children Act 1989 application was yet to be heard and on 1 May and 4 July 2019 Mr Jones issued further applications to be permitted to remove the children to Austria under his custody. He also issued an application for a Guardian to be appointed.

27. Mr Jones relies upon a “WhatsApp” exchange with a friend, Mr Poole, on 8 July 2019. When Mr Poole raised doubt over the Court allowing the children to return and asked if there was a compromise position or if Mr Jones could return to the UK to raise them, Mr Jones responded as evidence “Looking at all options! ... Thinking about a week in uk and week in Tux – need to find a way to perhaps make that work.” I note that the remainder of the message has not been produced but at this stage I am satisfied from his evidence to the court that whilst Mr Jones did wish to stay in Austria permanently/indefinitely with the children, he was still trying to work out what would happen should they not be returned to him. 28. 29. On 14 November 2019 the application to appoint a Guardian was refused. On 20 November 2019 permission to return the children to Austria was refused. A contact order was made by the Central Family Court. On 6 February 2020 Deputy District Judge Todd delivered judgment upon Mrs Jones’ financial remedy application. In a nutshell, the decision left Mrs Jones with the former family home in England, whilst Mr Jones retained the property and businesses in Austria. Mr Jones, on the basis that he still paid maintenance to the children of 317 Euros each month as ordered in Austria, from a net income of £4,569 a month was required to pay £929 a month as maintenance to Mrs Jones. It was observed by

the Judge that this would be affordable even if his income had been over-assessed (due to a lack of information concerning micro-brewery expenses) by some £1,000 or even £1,500. Although the transfer of the property in England required the release of Mr Jones from the mortgage, Mr Jones was ordered to transfer all his legal estate and beneficial interest by 4pm on 31 March 2020. 30. The Trustees rely heavily upon the contents the closing argument presented by Mr Jones, (appearing in person) as recorded in the judgment: “I intend to make a declaration that the Gore is held upon trust for the wife absolutely, on the basis that she pays the money due under the mortgage and indemnifies the husband in respect of the mortgage. I will then order a transfer of the property to the wife upon the husband being released from the mortgage, and I will hear submissions as to the date by which that should be achieved, and if not, the property should be sold. The wife can afford to pay the current level of mortgage and that will give her flexibility and time to organise and re-mortgage in her own name. I do not see the husband will be prejudiced by not being released from the mortgage at this stage, as he is clearly able to raise money on mortgage in Austria, despite being subject to the mortgage secured on 1 The Gore. I would also add here that, in his closing submissions, the husband told me that he intends to move permanently to Austria; he intends to apply for permanent residence and then citizenship there, so if he is going to base himself in Austria, the fact that he remains on the mortgage in this country will definitely not prejudice him.” 31. During cross-examination, Mr Jones accepted that he quite possibly said words along the lines of those underlined above. However, he emphasised that this decision was a disaster. He tried to appeal it. Permission was refused but not until 14 February 2022. During his reply evidence, he told this Court that he had intended to live in Austria permanently until the financial settlement which “changed everything”. 32. His evidence was that, from his perspective, he would be unable to make the payments required by the Deputy District Judge’s order and was left insolvent. Its implementation would mean that he could no longer afford to reside in the property in Tux and he would no longer qualify for a resident’s visa. He would have to leave Austria. He stressed that his previous statements concerning permanent residence had all to be understood within the context of the divorce proceedings. They were conditional upon his anticipated outcome that he and the children (for whom he had been the principal carer whilst his wife worked) would live in Austria permanently. The divorce proceedings created such uncertainty, however, that no final intention or decision concerning where he would live were or could have been reached. That was not only for financial reasons but also because he would need to reconsider his position if the children were to reside in the UK as Mrs Jones wanted.

33. Mr Jones refers to a “WhatsApp” exchange with Mr Simon Jones on 8 February 2020. In it he describes himself as having “been shafted” and “about to go under” and agrees with Mr Simon Jones’ quip that it is “time to die and disappear” having lost the house in England, having to pay £950 maintenance, lost 16.5% of his pension and been left with £150k of previously joint debt, whilst still having to pay Mrs Jones’ Austrian bills totalling £6k, now due, and having been ordered to pay £57k costs. As mentioned above, during his cross-examination, Mr Jones was adamant that the order meant he was insolvent, that he could no

longer keep a visa and residence in Austria and that this was a life changing decision which he appealed. He said that he had had conversations with many people about how he would return to the UK and he anticipated he would stay with his friends in Esher, who had previously allowed him to stay with them. 34. Despite this despondency, it appears from the evidence that Mr Jones decided to take or had already taken active steps to address his financial position. On 2 March 2020 he began a consultancy contract with Vistair Limited for whom he continues act. He also decided not to take the existing outcome of the litigation lying down. There was the outstanding application for permission to appeal the financial award and in cross-examination he was adamant that he believed in the merits of his appeal. In May 2020, he issued a further application to remove the children to Austria. The ground relied upon was that Covid was rife (the UK lock down started from 23 March 2020), his wife was at risk due to her employment with the NHS, and the children needed protection.

35. Mr Jones' evidence was that Covid also adversely affected his income in Austria. The ski rental bookings ceased (inevitably bearing in mind lock down throughout the world including Austria) and the brewery business folded never to be resurrected. His evidence was that he relied upon his military pension and upon Covid, the Austrian Government's Covid payments for his income. There would also have been his Vistair Limited fees. Mr Jones relied upon the travel restrictions to explain his very occasional return to the UK. Despite the Court's refusal of his May application and a Prohibited Steps Order made on 21 May 2020, he removed the children. They were returned pursuant to a court order made on 2 June 2020. 36. The Trustees point to the fact that in September 2020 Mr Jones opened a second bank account in Austria, whilst Mr Jones refers to an email he sent on 22 December 2020 to Mr Stewart, subject matter "Pub for sale in Epsom\Rocket. LA-9221131" with the only content being a web-site link to an estate agent's "pubs for sale" site. In his statement he merely says that this "demonstrates my consideration of business opportunities in England" up to the date he applied for bankruptcy. Under cross-examination he explained that this was a possible business venture with Mr Stewart that arose because he had a publican's licence. It was pointed out to him that there was no other documentation to evidence this as a serious proposition or venture. He responded that he probably had other documentation. 37. In his witness statement, Mr Jones identified February 2021 as the date around which he became permanently resident in Austria. He said this: "My residence in Austria for the majority of the Relevant Time was temporary. This only became permanent in approximately February 2021, but even then, my permanent home being in Austria, does not mean or reflect or is evidence that I have given up my domicile of origin and acquired a domicile of choice. I have not." 38. 39. During cross-examination he explained that a permanent residence was required following the "Brexit" negotiations because he had to apply for a residency permit to operate a business in Austria. However, his position that the decision of Deputy District Judge Todd had changed everything had not altered except for the fact that the Covid restrictions started about a week later meant he had to stay in Austria. It froze everything. On 19 April 2021, the Family Court at Reading made a final Child Arrangements Order with "the Guardian" recommending direct contact between Mr Jones

and his children in the UK and Austria. The order continued the interim arrangements but added provision for the children to spend time with Mr Jones during school holidays and on birthdays. The children would either be collected in England by Mr Jones or they would be delivered to the airport to fly to Austria by Mrs Jones. They were not to travel during school term time. There was also provision for telephone and other indirect communication.

40. Mr Jones referred to a “WhatsApp” exchange with Mr Simon Jones reporting upon the order the day it was made. The exhibited message is incomplete. Following an undisclosed beginning, Mr Simon Jones asked: “UK or their home with you?”. Mr Jones responded: “Home uk, come to Austria as I please”. I cannot accept his self-serving statement in cross-examination that this meant he viewed England as his home. Plainly, he was describing the children having their home in the UK, whilst being able to visit him in Austria. It was put to him that by this stage he was a permanent resident in Austria but he maintained the position that whilst he lived there and his business were there, he did not and in the circumstances could not consider that to be the place he would live permanently (ie indefinitely). 41. The children spent a fortnight with Mr Jones in Austria during August 2021 and a week with him in the UK in October 2021. They also spent Christmas 2021 with him in Austria. In November Mrs Jones issued an application in the Central Family Court to enforce her costs order with a hearing on 14 February 2022 by which time the bankruptcy application made on 3 November 2011 had resulted in an adjudicator’s refusal on 22 November 2021, a request for a review on 6 December 2021, additional evidence on 17 December 2021 and the Order on 21 December 2021. The Adjudicator decisions are detailed in the First Judgment but the following matters are of particular note: a) b) c) Whilst Mr Jones had stated in his application that he had a 50% interest in the UK property, he did not. He was still registered as a joint legal owner with his wife (albeit because he had not complied with the Court Order to transfer) but he no longer had a beneficial interest. He had significant debts derived in England and Austria including debts secured against the property in Tux, but no assets within the jurisdiction except two potential preference claims. At no time did he raise the issue or assert that he had an intention to remain in Austria. 42. On 7 December 2021, Mr Jones issued a further application before the Family Court sitting in Reading requesting a Prohibited Steps Order against Mrs Jones. Section 8 of the form dated 6 December concerns cases with an international element. It includes the following: Question: “Do you have any reason to believe that any child, parent or potentially significant adult in the child’s life may be habitually resident in another state? Answer: “Yes ... I am an Austrian permanent resident”. 43. During cross-examination Mr Jones explained that his “permanent residency” was contingent on what would happen in the future and was of a limited lifespan, five or ten years. Austria was certainly not going to be his place of indefinite residency. He had lost everything, not only in the UK due to the divorce but also in Austria. His brewery business had finished and he could not afford his liabilities, including the mortgage, because of the financial order made by District Judge Todd. Although he had wanted to stay in Austria and for the children to return and grow up there, he could not have had a settled intention to stay in Austria indefinitely when he simply did not know whether he would be allowed to

bring up the children there. He said in evidence at this hearing that so far as he was concerned, by December he no longer had a viable future in Austria.

44. Mrs Jones in her unchallenged evidence made reference to him having used (on an unspecified occasion(s)) “a possible bankruptcy application as a threat if [she] did not ‘rescind’ child maintenance [ordered] in Austria” and that he “threatened [she] could lose [her] home [in England] if [she] did not do as he asked”. 45. 46. 47. 48. During examination, Mr Jones said that he knew a bankruptcy order would mean he would lose his assets not only in the UK but globally. That was because of on-line research and information from and discussions with the Insolvency Service. In his re-examination he repeated that he thought all his assets, including those in Austria, would be liquidated and used to pay the creditors. He wanted to repay his creditors to the extent that it could be done. I do not accept his evidence of understanding and intention at the date of the Order. There is no such statement in his witness statement. It is not supported by his actions during his bankruptcy. Such evidence was given only after the many references to breach of duty in the First Judgment. It is a classic example of evidence needing support because of the risk of false memory. There is no evidence in support. No part of the bankruptcy estate within Austria has been passed to the Trustees. There is no evidence of any dialogue with the Trustees during which he (at least) did his best to ensure that the assets could be recovered by the Trustees whether immediately or in due course and whether by their transfer or by sale and the transfer of the net realisations. The bankruptcy application referred to residency in Tux where he lived alone and to Mrs Jones and the children living in England at the former matrimonial home. He correctly described himself as an owner of that property since he was still registered as a legal owner at the Land Registry. He incorrectly stated he had a financial interest with a share of 50%. The Order of Deputy District Judge Todd transferring his share to his wife had been unequivocal and he had been present in Court when the judgment was delivered. In his bankruptcy application, Mr Jones valued the Tux property at £430,000 and the mortgage debts at £38,234.07, £127,673.08, £40,174.11, £93,482.81 and £74,430.85. His equity was therefore in the region of £56,000 less costs and expenses of sale. He identified two preferential payments to individuals in the UK of about £13,500 and £6,000. The information concerning his bank accounts refers only to those in Austria but he explained during his examination that his former English account had been closed and was the subject of debt recovery as set out in the list of creditors. There was no reference in the application to the account into which his military pension was paid but details of the pension were provided. 49. During cross-examination, Mr Jones emphasised that it remained his intention that the net proceeds from his property in Tux, as and when it will be sold and after payment of the secured creditors, will be available for his creditors as far as there is a surplus available for them. He observed, whilst still opposing annulment, that the existence of the bankruptcy is 50. 51. 52. detrimental to the consulting business he is building in the defence sector based upon his former military skills. He sought to impress upon the Court that he is not seeking to avoid his duties as a bankrupt. There is no evidence to support that proposition. The unsecured creditors listed in the application were located in the UK, the Netherlands,

Germany, Denmark and Austria. Of those in the UK, the total debt was in the region of £162,000. One was the debt collector for the National Westminster Bank's debt of just under £26,000, whilst the other seven were individuals. Mrs Jones was owed the most, £64,440. The overseas creditors consisted of 10 individuals with total debts in the region of £31,000. Mr Jones' stated income did not cover his expenditure. There did not appear to be a realistic prospect anything being paid other than a small dividend to the unsecured creditors after realisation of the bankruptcy estate and payment of the costs and expenses of the bankruptcy. The Order was made on 21 December 2021 and the Adjudicator's reasons for the decision on review are set out in the First Judgment (paragraph 4). For the purpose of deciding whether it ought not to have been made, the facts and matters below can only be relevant to the extent that they identify evidence which could have been available on that date and to the extent that it is relevant to a discretion to annul. The Trustees assert that on 12 July 2022 Mr Jones issued an application in Austria challenging recognition of the Order and asserted that his main residence had been in Austria since 3 October 2012, as shown by a document for registration details pursuant to section 18(1) of the Austrian Registration Act at the Central Residential Register. Mr Jones stated that his COMI was in Austria. During cross-examination he stated that he did not challenge the Trustees' application for recognition but as summoned by the Austrian Court to explain the facts concerning his centre of main interests. An Austrian Court document in the bundle suggests otherwise. In any event, its contents sustain the conclusion that he was only addressing residence in the context of the test concerning location of his centre of main interests.

53. Mr Jones' current position is that he remains living in Tux without the children other than when they visit. It is his centre of main interests. He still has the letting business and seeks to expand his consultancy work, which is not location but internet based with travel. It has increased significantly in value since the Order and during cross-examination Mr Jones suggested it may even be worth in the region of £1.6 million. The Tux property is, however, subject to repossession proceedings with its auction postponed pending their final

determination.

54. During cross-examination Mr Jones said that his understanding was that the mortgagee bank owned the property and would be entitled to all the net proceeds of sale even if they exceeded the secured debt. No explanation has been offered for this assertion and his claim that he is not the legal owner is not reflected in Austria's equivalent of the Land Registry's 55. 56. register for the property. His understanding is inconsistent with his bankruptcy application in which he proclaimed ownership of Tux and whilst I have no expert evidence concerning Austrian property ownership law, it would be very surprising if that approach is correct. In any event, absent evidence of Austrian law, it is to be concluded pursuant to English law principles that he is incorrect. As to the extant repossession proceedings, Mr Jones accepts the mortgage debt but he is objecting to the proceedings on the bases that: (i) he was not served, the Trustees were; and in any event (ii) he has a set off/counterclaim that exceeds the debt. It results, he said, from the Bank's dealings with the Trustees, and

particularly their wrongful closure of his bank accounts on learning of the Order. It is his claim this caused (amongst other loss and damage) permanent closure of the Microbrewery. Those are matters for the final determination of his claim. The Trustees' 2022 valuations of the Tux property were in the region of 600-650 Euros. The current valuations mentioned in Court range from 1 to 1.6 million Euros (the latter being Mr Jones' view) and it appears that the mortgage is for considerably less. The Trustees' evidence refers to a more recent valuation from one of the secured creditors, Sparkasse Bank, which values the property at 1,279,500 Euros (two apartments, plus basement, plus car parking spaces). The Trustees understand that the "all monies" charge secured against the property was for a loan of 489,489 Euros and that the arrears stand at 154,954 Euros. They conclude that this would give equity of 626,057 Euros, with Mr Jones' 538/541 shares worth 622,585 Euros. This would provide a significant surplus for distribution even after payment of all costs and expenses. Based on Mr Jones' figures, it would be considerably more. 57. The Trustees in the further evidence of Mr Carter informed the Court that so far, they have received proofs of debt from five UK creditors and one non-UK creditor totalling in the region of £200,000. It is stated: "Whilst the bankruptcy continues, the UK unsecured creditors are bound by it and cannot themselves take steps to enforce. As set out in my First Witness Statement, there are only very limited assets within the jurisdiction that vest in the bankruptcy estate. The advice we have received from our lawyers in Austria is that if the Austrian courts will not recognise the bankruptcy, there are no options available to us to take possession of and realise the property that TEJ owns in Austria for the benefit of his creditors As Trustees, we have considered the position of creditors carefully. At the moment we are unable to realise assets for the benefit of unsecured creditors. Annulment will in our opinion put some of the UK creditors in a better position as they will themselves potentially be able to enforce (and one has stated that is what they intend to do)." 58. The facts above have not yet addressed the evidence concerning Mr Jones' businesses interests/employment, his pension and banking in the UK or his time spent in Esher for the period from about 2012 to the Order, all of which were also relied upon by Mr Jones to support his opposition. It is more convenient to consider them now: a) b) c) d) His shareholding in and directorship of Blush Hospitality Limited need not be addressed in any detail because his involvement ended by 1 August 2020. The same conclusion can be reached for all the companies dissolved or from which he resigned. The position concerning Genus Care Limited does not take the issue further. The facts that he had a bank account with National Westminster Bank, that his account was closed and the debt pursued and that he subsequently had his pension paid into an on-line account do not take the issue further other than it is clear that his day to day banking was conducted in Austria where his centre of main interests certainly was and remains. The fact he has a military pension and his stated allegiance to the UK with his intention to retain his citizenship does not take the issue further and nor does the fact that he stayed with friends when in the UK prior to the bankruptcy application. E) The First Issue E1) Discussion 59. There are various facts and matters established by the evidence which undoubtedly raise the potential for a change in domicile. They concern the original relocation to Austria, the fact that prior to the divorce Tux had become the family's home whether in terms of housing,

bringing up their children (including schooling), their businesses and income, their centre of main interests or simply spending time there. Obviously, that is not enough for the purpose of a change of domicile. Those facts and matters do not in themselves establish Austria as their permanent home in the sense of indefinite residence; especially when they still had a home, now tenanted, in England, there were family and some business connections remaining in England, and questions their future with their children (i.e, pre-divorce), including during their adulthood, were not addressed by those facts alone. The Trustees accept this. Their case is based upon the position after the Family Court's decision upon jurisdiction on 1 September 2018. 60. From 2017/2018, the acrimonious divorce and continual "fight" over custody and location of the children raise the potential for a case, as proposed by Mr Jones, that nothing could be settled concerning location until a clean break resolution was achieved. His case is that 61. 62. this had not occurred by the date of the Order. Acrimony continued, the dispute over custody continued and the Financial Award causes Mr Jones to assert that he could no longer afford to and would no longer have the right as a result to live in Austria. The contemporaneous communications relied upon by Mr Jones are said to support this. There is potential for the conclusion that the chaos of the divorce was diametrically opposed to the concept that Mr Jones would alter his domicile. On the other hand, the Trustees point to the position adopted by Mr Jones and what he told the Courts during various proceedings through to the date of the Order. In particular: the position he appears to have adopted when opposing permission to remove the children from Austria (13 August 2018); his claim to Austrian domicile in the jurisdiction preliminary issue (1 September 2018 judgment); his consistent applications to return the children to his custody in Austria (1 May 2019, 4 July 2019, May 2020, 7 December 2021, the application including a statement of permanent residency and reference to an appeal of the August 2018 decision); the need to give undertakings (March 2019); his statement of an intention to move permanently to Austria before Deputy District Judge Todd (6 February 2020 judgment); and section 8 of his application concerning the children referring to permanent residency (7 December 2021). Potentially those statements and actions will hold particular significance when applying the change of domicile test and balancing the facts relied upon by the Trustees against those relied upon by Mr Jones to support their respective cases. The test for a change of domicile, to be applied with the object of connecting a person with a system or rule of law, is easy to express as "an intention that Austria was his permanent home, the place where he would reside indefinitely, where he was an inhabitant" (see paragraph 2 above) but not necessarily easy to apply. It may be contrasted with the test of a place of residence. That requires a degree or expectation of permanence or continuity to provide a sufficient connection with a jurisdiction but does not require a lengthy, and certainly not indefinite, period of settlement. It is to be noted that whilst both tests refer to "permanence" the meanings are distinct as further explained below.

63. Whilst there is a test of intention, it is not a subjective test. Domicile of choice is a conclusion or inference to be derived from all the relevant facts and does not require an intention to acquire domicile. That is not always, as here, a straightforward test to apply. As

the editors of Dicey opine ([6-005]): “While the notion of permanent home can be explained largely in the light of common sense principles, the same is certainly not true of domicile. Domicile is “an idea of law” which diverges from the notion of permanent home in two principal respects. In the first place, the elements which are required for the acquisition of a domicile go beyond those required for the acquisition of a permanent home. In order to acquire a domicile of choice in a country a person must intend to reside in it permanently or indefinitely. A person who intends to reside in a country for ten years and no more does not acquire a domicile in it, although they have their home there during the ten years. Again, a person cannot acquire a domicile of choice in a country in which they have never been physically present, but they may well have their permanent home in it if they establish their family there and intend shortly to join them. Secondly, domicile differs from permanent home in that the law in some cases says that a person is domiciled in a country whether or not they have their permanent home in it. Thus a person may in fact have no home, either because they are a permanent vagrant or have abandoned one home and not yet acquired another; but the law nonetheless attributes a domicile to the person....” (my underlining for emphasis). E2) Application of the Change of Domicile Test – Case Law 64. In the circumstances summarised at paragraphs 59-61 above, it is helpful, as guidance, to consider the application of the change of domicile test in case law and within the opinion of the editors of Dicey. As set out in the commentary of “Rule 9 of Dicey”, in the context of a test requiring the application of common sense to the particular circumstances, the person asserting a change of domicile of origin has a more difficult task of meeting the burden of proof because “its character is more enduring, its hold stronger, and less easy to shake off” (citing *Winans v Att-Gen* [1904] AC 287). The commentary on “Rule 12” opines, which helpfully distinguishes the two meanings of “permanent”) [6-043]: “A person who determines to spend the rest of their life in a country clearly has the necessary intention even though he or she does not consider that determination to be irrevocable. It is, however, rare for the *animus manendi* to exist in this positive form: more frequently a person simply resides in a country without any intention of leaving it, and such a state of mind may suffice for the acquisition of a domicile of choice. The fact that a person contemplates that he or she might move is not decisive: thus a person who intends to reside in a country indefinitely may be domiciled there although he or she envisages the possibility of returning one day to their native country. If they have in mind the possibility of such a return should a particular contingency occur, the possibility will be ignored if the contingency is vague and indefinite, for example making a fortune or suffering some ill-defined deterioration in health; but if it is a clearly foreseen and reasonably anticipated contingency, for example the termination of employment, or the offer of an attractive post in the country of origin, succession to entailed property, a change in the relative levels of taxation as between two countries, or the death of one’s spouse, it may prevent the acquisition of a domicile of choice. If a person intends to reside in a country for a fixed period only, they lack the *animus manendi*, however long that period may be. The same is true where a person intends to reside in a country for an indefinite time but clearly intends to leave the country at some time. In deciding whether a person has the intention to reside permanently or indefinitely in a country it is relevant to

consider whether he or she became a naturalised citizen of that country, but it is now settled that this consideration is not decisive as a matter of law ..." (my underlining for emphasis and to note references in this judgment to the meaning of "indefinite", including the use of the word "permanent" as its alternative, are to be read accordingly). 65. On a creditors' bankruptcy petition the Court of Appeal when addressing the concept of domicile in *Henwood v Barlow Clowes International Ltd (In Liquidation)* [2008] EWCA Civ 577; [2008] BPIR 778 set out a number of guiding principles (judgment of Arden LJ, as she then was, at paragraph [8], as amplified in respect of intention at [10-19] and in respect of abandonment at [20-21]) all of which will be taken into consideration but it is only necessary here to draw attention to the following matters as applied to this case: a) b) c) d) e) f) g) The party asserting change has the burden of proving that a new domicile of choice superseded the existing domicile of origin by the combination of residence and an intention of permanent or indefinite residence. "The intention of residence must be fixed and must be for the indefinite future. It is not enough for instance that at any given point in time its length has not been determined". It is a conclusion or inference to be reached from consideration of all the circumstances in which a person has resided in a particular territory. That includes any circumstance relevant to the requirements which must be met to establish that the residence is fixed for a general or indefinite period in the person's future contemplation not for a limited or particular purpose. Circumstances may include, for example, the motive behind the taking up of the residence, a relevant change of motive over the relevant time, whether it was freely chosen, whether it was precarious and any changes over the relevant period to those factors. Naturalisation is not required and citizenship is not decisive. The reference in earlier cases to "ending one's days usefully emphasises the need for the subject to have a fixed purpose that he will live in the country of his domicile of choice". Declarations of domicile are relevant evidence, but their weight depends upon (amongst other matters depending on the facts) the circumstances in which they were made, to whom they were made and their purpose. They may require consideration of the understanding of the meaning of the words used. If the existing domicile was a domicile of choice, it can be superseded by a new residence of choice meeting those requirements or it can be abandoned without a new domicile of choice when the domicile of origin will revive. 66. The guidance at sub-paragraph (f) should be set out in full bearing in mind the Trustees' reliance upon Mr Jones' statements to various Courts, which because of the context in which they were given cannot be described as slight indications or casual words:

- [19] Frequently the subject of a dispute as to domicile (often called 'the propositus') will make statements or declarations as to what he intends. But the court should not rely on these statements unless corroborated by action consistent with the declaration. Thus Dicey states: 'The person whose domicile is in question may himself testify as to his intention, but the court will view the evidence of the interested party with suspicion. Declarations of intention made out of court may be given in evidence by way of exception to the hearsay rule. The weight of such evidence will vary from case to case. To say that declarations as to domicile are 'the lowest species of evidence' is probably an exaggeration. The present law has been

stated as follows: “Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the persons to whom, the purposes for which, and the circumstances in which they are made and they must however be fortified and carried into effect by conduct and action consistent with the declared expressions”. Thus in some cases the courts have relied to some extent on declarations of intention in deciding issues as to domicile; indeed, in one case, the declaration was decisive. But in other cases the courts have refused to give effect to the declarations on the ground that they were inconsistent with the conduct of the propositus: a domicile cannot be acquired or retained by mere declaration. The courts are, in particular, reluctant to give effect to declarations which refer in terms to “domicile” since the declarant is unlikely to have understood the meaning of the word. Declarations which are equivocal have little effect: thus a declaration of intention to reside permanently in the United Kingdom is no evidence of acquisition of a domicile of choice in any of the countries which are included in the United Kingdom; although it may be evidence of the abandonment of a domicile elsewhere.’ (pp 142–143)” (my underlining for emphasis). E3) Mr Jones’ Statements (considered in isolation) 67. It follows from that guidance that the various statements Mr Jones made during the divorce/divorce related proceedings need further analysis. The starting point is to address them individually before applying the facts in the context of the evidence as a whole to decide domicile. However, I will always bear in mind without necessarily repeating that much of the evidence is limited in weight (at least to a degree) by the fact that it is not a transcript of what Mr Jones said but a record of the Judge’s recollection based on his understanding of what he had heard: a) b) c) d) Starting with 13 August 2018, the issue addressed by Mr Jones through his advocate at the Austrian Court (where he was present) was whether Mrs Jones should have custody of the children and be allowed to remove them from Austria to live and be schooled in England. Whilst it was recorded in the judgment that Mr Jones stated he would remain in Austria, there is no suggestion that indefinite residence was a topic or a term mentioned. The judgment records that the consequence of him remaining in Austria for his relationship with the children and for visits was mentioned but it does not refer to any long-term aspect of his residence in Austria. The same conclusion applies to the record of further matters relied upon by Mr Jones to oppose the application including, for example, that “it was far better here [in Austria] than in England”. It may also be noted that Mrs Jones contrasted her absence of debt to his debts in Austria for the accommodation and brewery. Whilst that too did not address a long- term position and is not of great weight, it suggests support for a potential precariousness. Mr Jones claimed Austrian domicile when disputing jurisdiction as recorded in the 1 September 2018 judgment of Judge Meston. He appears to have understood that concept and distinguished it from “habitual residence” when using both terms in his acknowledgment of service. He used the term domiciled in his case “Answer” but whilst it is recorded that he also stated there was “no good reason or intention to return to the UK”, the impression of paragraphs 12 and 13 of the judgment is that indefinite residence was not really being addressed. Instead, the matters referred to appear to address the position existing at the date of the hearing in the context of past residence having created a

foundation only for reasonably foreseeable residence. There is reference to the same points being included in a covering letter, but I have only been asked to address the third party, hearsay content of the judgment which reflects the recollection and understanding of the Judge only. Although the judgment indicates that Mr Jones referred when making that statement to the family's current position/intention in Austria, it does not refer to any statement concerning indefinite residence in Austria other than to identify (without particularity) a conditional intention to stay on a permanent basis. The condition being: "if they got on well in Austria". This lacks specificity and the recorded evidence of fulfilment of the condition appears to be based upon a foreseeable rather than indefinite future: "it had become quite soon that it was going well and that they would stay". That on its own does not equate to an intention of indefinite residence. Indeed, the report of evidence within the same paragraph of the judgment (paragraph 13) suggests the absence of that intention except for a reference to the brewery being a "forever business". That is nowhere near sufficient in itself. It is also to be noted, that the business had not been long in existence and (from the later judgment of Deputy District Judge Todd) was not only not providing an income but e) f) g) h) potentially owed Mr Jones some £29,000. It cannot be treated as a long-term prediction for the purpose of deciding indefinite residence. The judgment also records prior to its conclusion that Mr Jones told the Court that he would stay in Austria even if the children returned, explaining that "he was an Austrian resident and that was where his home and family (i.e. the children) were". That on its own does not specifically address indefinite residence. It also records that he told the Court that he had no intention to return to the UK because they "are a global family with extended family all over the world". That certainly evidences a decision that the UK was not his domicile of choice but on its own is not a declaration that Austria was. Nevertheless, it remains the case that Mr Jones specifically asserted a change of domicile (originally of himself and his wife but later by concession of himself alone). In addition, this judgment gave him direct access to the legal meaning of the term for future reference, the Judge having carefully considered case law and the opinion of Dicey. On the other hand, the evidence of Mrs Jones, as described within the judgment, did not support his claim to a change of domicile. Mr Jones' consistent applications to return the children to his custody in Austria (namely, on 1 May 2019, 4 July 2019, May 2020, 7 December 2021, the latter application including a statement of permanent residency and reference to an appeal of the August 2018 decision), and the need to give the undertakings of March 2019), are facts and matters derived from (at least as shown to me) the judgment of Deputy District Judge Todd (6 February 2020 judgment). It is obvious from this conduct that Mr Jones wanted the children to live in Austria with him but that does not on its own address the concept or test of domicile. That judgment records Mr Jones stating an intention to move permanently to Austria and to apply for permanent residence and citizenship. This too does not necessarily expressly address domicile which goes "beyond the the acquisition of a permanent home" (Dicey at [6-005]). As mentioned, domicile is not established by naturalised citizenship. Although it is plainly a material circumstance it is not itself conclusive (Dicey at [6-044]). This recorded statement is a relevant fact to consider but it is also to be borne in mind that the context was a financial remedy hearing not specifically

concerned with domicile. The judgment (understandably) does not address the context for that statement. Indeed, the Judge, as the reporter of the statement, then refers to the statement being conditional: if he is going to base himself in Austria". That implies that even this concept of permanence was not certain, although (again) the point to be made is that this record is the recollection and summary of the Judge. i) j) Nearly a year later, Mr Jones applied under section 8 of the Children Act 1989 for a prohibited steps order asserting risk of harm. The application contained a statement of truth and a warning of contempt of court proceedings should it contain a false statement. It represented that he is "habitually resident" in Austria being "an Austrian permanent resident" (7 December 2021). As to habitual residence: "A man's habitual residence is his settled, permanent home, the place where he lives with his wife and family, [...] the place to which he returns from business trips elsewhere or abroad ..." (Stojevic v Official Receiver

[2006] EWHC 3447 (Ch), [2007] BPIR 141, ChD at para [59] and Re Eichler (No

- 2) (A Bankrupt); Steinhardt v Eichler [2011] BPIR 1293, at para [142](iv)). This and the reference to being a "permanent resident" are relevant factors to consider when determining a change of domicile. They do not, however, prove domicile in themselves, both being evidence of the current and reasonably foreseeable future but not proof of the intention to reside indefinitely. E4) Domicile Decision, Viewing All Circumstances Together 68. 69. Events leading up to the decision upon jurisdiction in the divorce proceedings in September 2018 lay the foundations for a potential change in domicile. Austria had become the family's home; it was their centre of main interests and indeed provided them with their settled way of life. That was not enough because it did not mean Mr Jones had chosen to live there indefinitely. Indeed, there were still ties with England, not least family ties and continued ownership of the matrimonial home. Change of domicile being an objective test, the fact that Mr Jones claimed domicile in Austria during the jurisdiction proceedings is not definitive. Indeed, the Trustees do not assert it is and proceed from the base, as Ms Macro stressed on their behalf, that material changes occurred after the decision upon jurisdiction in September 2018. Nevertheless, his subjective view as identified within the jurisdiction judgment is to be noted when considering the consequences of those changes. The changes resulted from the divorce proceedings and the removal of the children to the UK where they have resided with Mrs Jones at her/their home since August 2018. There is no doubt from the facts that Mr Jones strove (lawfully and, it appears, on one occasion unlawfully through removal) to have the children returned to him in Austria where they could live with him at his home and at the location where he had his businesses. Indeed, at the location which, based on statements to the Court, he preferred to England. He no longer had a home or any significant asset within England following the order of Deputy District Judge Todd on 6 February 2020.
70. Ms Macro emphasised the evidential importance of the statements, oral and written, by Mr Jones during the various proceedings and submitted they provide direct intention of his intention to live in Austria indefinitely. It is certainly correct that they have evidential 71. 72.

weight in favour of the Trustees' case. However, as analysed in sub-section "E3" above, none are definitive and they do not specifically address an intention to live in Austria indefinitely (as the meaning is explained above). The statement, as recorded, to the Deputy District Judge asserting an intention to "move" permanently to Austria and to apply for permanent residence and citizenship is probably a high-water mark for the Trustees' case. However, the observations made above concerning permanent residence and citizenship not being sufficient proof in themselves for the legal test of domicile apply. This means that the evidence relied upon by the Trustees is not as strong as submitted. Nevertheless, when those statements as analysed are added to the foundations described above and to the facts occurring during the divorce up to the date of the Order they present strong cumulative evidence. Tux continued to be his home, the base for his economic activities, and where he banked on a day-to-day basis. This was where he wanted to bring up his children and for which purpose he made numerous Court applications. As Ms Macro submitted, all these factors (and others mentioned for this purpose in her skeleton argument adopted for closing submissions) are "consistent with him settling permanently in Austria". However, the problem for the Trustees, bearing in mind the burden of proof and that the "character [of a domicile of origin] is more enduring, its hold stronger, and less easy to shake off" (sub-section "F2" above), is that there is no direct evidence of an intention of indefinite residence rather than evidence of permanence in the sense of a permanent residence (see paragraphs 62-67 above identifying the contrast). The evidence of inference, whilst strong, must be addressed within a state of flux. By the end of 2018 Mr Jones' world was turned upside down. Whatever the merits, which are not for me to address, he was fighting not to save his marriage but to "recover" his children. Success would mean them living in Austria with him but that was never assured. Indeed, he was "fighting" a rear-guard action, if he failed, which was always a possibility, he would need to decide further upon his future in the context of his children living in the UK. It is clear from the evidence that he did not want to be disconnected from their lives and that occasional visits would not be enough for him. There was uncertainty and confusion for his life during this period. His life was unstable. That is obvious from the facts, and it accords with his evidence in which he explained that he kept all options open. That in my judgment was because he had to rather than because he wanted to, but it still means that this extremely unhappy scenario provides evidence weighing heavily against the Trustees' case when balanced against the evidence they rely upon.

73. Mr Jones during cross-examination also stressed that the financial order of Deputy District Judge Todd changed everything. He asserted, as set out above, that it meant he would not be able to continue to live in Austria. The effect of and events following the financial settlement need to be considered. First, the settlement did not alter the fact that the scenario of flux described continued, weighing strongly against a change of domicile. Instead, it added to the factors of uncertainty. Second, the settlement left Mr Jones in a difficult financial position. It placed in issue his future financial stability and his ability to remain in Austria. Indeed, it added to the factors that led to his insolvency (including the consequences of Covid) as evidenced by the bankruptcy application, not least because of the order for costs.

Third, a factor weighing against Mr Jones' case, whilst Mr Jones' communications suggested a move to England, he nevertheless took no active steps to do so. He instead sought permission to appeal the settlement order with a belief, as he told the Court, in the merits of his appeal. I have made findings of fact concerning the communications he relied upon including the fact that he took active steps to address his financial position in Austria. True, there is evidence of a possible venture with Mr Stewart but that does not sustain a finding that he intended to move to England. Instead, he continued to live in Austria and to try to return the children there. Fourth, the absence of active steps must be viewed, however, in the context of the COVID restrictions. Fifth, when it came to taking steps to address his insolvency, he issued an application for bankruptcy here. In my judgment, the overall balance of those four matters adds to the weight of facts and circumstances to be placed in the pan supporting Mr Jones' case when weighing the two cases.

74. Weighing the strong character of a domicile of origin and all the facts and circumstances considered above together, in my judgment the factor that shifts the balance in favour of Mr Jones' case is the state of flux. I am satisfied that (and would be if the burden had been upon Mr Jones) that his domicile of origin was not superseded. Austria was certainly his home and centre of main interests at the date of the bankruptcy application and Order. It was certainly the place that he wanted his children to return to and where he wanted to live with them. However, until the dispute over custody and his financial difficulties were resolved, he was not in a position to choose Austria as his indefinite place of residence. Weighing the evidence of circumstances relevant to the legal test of domicile, I conclude that the Trustees have not satisfied their burden of proof. It follows that the First Issue is decided in favour of Mr Jones and there is no jurisdiction to annul based upon the test of domicile. The Trustees need to establish their alternative case, that the Order ought not to have been made exercising the Court's discretion. F) The Second Issue F1) Discussion - Why Apply for Abatement? 75. The second issue raises a tangled web of law and the question "why apply for abatement?" arises when an application for abatement should be unnecessary. The bankruptcy estate should be available and should be realised. There should be a distribution. The First Judgment stresses the duty of Mr Jones to deliver up the bankruptcy estate (see paragraphs [61-64]). The current position, therefore, should be that Mr Jones will transfer his beneficial interest in the Tux property together with any other assets of the bankruptcy estate to the Trustees leaving the Trustees with the task of realisation. If a transfer of the beneficial interest is not permitted by Austrian law or the mortgagees or any other reasons prevent the Trustees obtaining title to the beneficial interest, there should be arrangements made between them and Mr Jones to ensure they receive the net proceeds of sale after payment of the secured creditors. The precise mechanism should be a matter for agreement with the Trustees and as far as necessary, Mr Jones should permit the Trustees to negotiate with the secured creditors. The result should be (in due course) a distribution to creditors of the bankruptcy estate. That is, after all, what Mr Jones sought to achieve when applying for his bankruptcy in return for which existing creditors could no longer pursue him outside of proving within the bankruptcy (without permission of the Court) and he

could have his rehabilitation. It is his duty to deliver up the bankruptcy estate.

76. Mr Jones may point to a concern (although he has not done so) that creditors in Europe may not accept the jurisdiction of this Court, may not prove in this bankruptcy and may look to his current assets in Austria whatever the arrangements being made with the Trustees. Whether that concern would have foundations depends upon fact and Austrian law. If so, it was a matter for him to address in his evidence and at the hearing. He did not and nor has he taken steps to achieve an insolvency remedy to protect his position in Austria. Further, the position remains that he has not addressed “the real problem”. The bankruptcy estate remains in Austria with no apparent prospect of its return/realisation and distribution to creditors. He has proposed no plan(s) to achieve that aim pursuant to his statutory duties of delivery up or otherwise. 77. Not only should abatement be unnecessary but it should not normally be the remedy required. A bankruptcy order assumes the bankrupt will comply with their statutory obligations. If for some reason it turns out that assets cannot be realised, this will normally be a matter to address in the context of current facts; not by looking only at facts existing at the date of the bankruptcy order as abatement requires (see, for example, *Yang v Official Receiver* [2017] EWCA Civ 1465, [2018] Ch 178). In other words, to address “the real problem”. A realisation problem can arise because, as here to date, the bankruptcy estate is wholly unattainable in a foreign country or because the sum realised from available assets is insufficient to pay the unsecured creditors and unattainable assets abroad are still required to do so. In any such circumstances, directions may be sought. The Court will address alternative remedies (for example giving permission to creditors to bring proceedings 78. 79. 80. abroad on appropriate terms, as referred to in the First Judgment at paragraph [107], or maybe assignment of creditors’ causes of action to the Trustees) and/or potentially the Court will consider rescinding the bankruptcy order. Unfortunately, in this case alternative remedies have not been addressed by the parties (despite paragraph 107 of the First Judgment). This seems on the part of the Trustees to have occurred because they have proceeded on the premise that: Mr Jones will not cooperate; they have no funds with which to continue; and the bankruptcy must be brought to an end or the creditors in this jurisdiction will be left without any dividend, unable to proceed against or otherwise recover the assets in Austria. The creditors, who might have provided funding but are under no obligation to do so, have chosen not to make representations at this hearing. On Mr Jones’ part there does not appear to have been any desire or reason to address methods of achieving a distribution. That is despite his opposition to annulment and his desire for his bankruptcy, which will continue to be accompanied by his statutory duties, to remain. The absence of rescission means the parties cannot rely on the current facts to address the remedy of annulment in the context of asking whether the Order ought not to have been made because of a change of circumstances. Specifically, Mr Jones’ failure to deliver up the bankruptcy estate in circumstances of his continued enjoyment of the assets notwithstanding his bankruptcy. In addition, current circumstances are highly relevant. The practical importance of “the real problem” has increased significantly for the creditors over time because of the increase in property prices in Austria. As has the benefit to Mr Jones of

retaining and enjoying the bankruptcy estate in Austria. As mentioned above, Mr Jones in answer to questions from me asserted that he had always intended and still intends to fulfil his duties and deliver up his bankruptcy estate. It must be observed, however, that this cannot have been his stance in practice to date. If it had been, there would be no need for the Application. The Trustees could realise the estate with his cooperation even if the time might still be needed to achieve it because of the mortgagee possession proceedings in Austria. That cooperation should already have been provided but in any event should still be given. If his answers to me are genuine, he and the Trustees should be discussing how best to ensure realisation in the current circumstances (something I urged when reserving judgment). I appreciate, of course, the significance for Mr Jones of the loss of the Tux property, especially when he may be restoring his earning power through consultancy contracts but that does not justify his avoidance of the statutory requirements of his bankruptcy. It is possible that the significant increase in property value of the Tux accommodation, and possibly even the counterclaim in the repossession proceedings, may offer a new opportunity to reach an arrangement with his creditors. However, even if that is so, Mr Jones has presented no plan to the Court to ensure the creditors are paid within the bankruptcy according to the underlying statutory regime. 81. I should add that it is not to be assumed that I would have agreed that there is no jurisdiction to rescind had the application been argued before me. There are questions potentially to address: whether a purposive construction should be applied following the introduction by amendment of the administrative, Adjudicator process for the purpose of easing the Court's workload? or whether the Court's inherent jurisdiction could be invoked? It is, after all, an extraordinarily wide jurisdiction (see *Donaldson v O'Sullivan*, [2009] 1 WLR 924, *LLoyd LJ* at [41]:

41. All of those cases seem to me to support the thesis that bankruptcy is a court- controlled process in relation to which the court has wide powers, exercisable for the purpose of the insolvency process as a whole, which are not limited to those conferred expressly by the relevant legislation. There are non-statutory elements in the law of bankruptcy, such as the principle in *Ex p James* LR 9 Ch App 609, even though these may result in an application of assets which is not strictly in accordance with legal rights and obligations. There is also scope for the court to direct that things be done (or not done) in apparent conflict with express provisions of the legislation. Clearly if the Act said in terms that the court could make a certain kind of order only in given circumstances, it would be a very strong construction to hold that it could do so in other circumstances as well.” (my underlining for emphasis). 82. Nevertheless, wide as the jurisdiction is, I cannot consider invoking it without hearing argument. The answer to the question, “why apply for abatement”, therefore, is: Mr Jones has not delivered up the assets of the bankruptcy estate in his possession or under his control; to date the Trustees have been unable to realise the bankruptcy estate without that delivery up; they have been advised that they will not be able to do so having been unable to obtain recognition; they have no funds; the bankruptcy serves no purpose; whilst the creditors subject to this jurisdiction are prohibited from taking steps of recovery against Mr Jones, in practice those in Europe will not be; it has been concluded that it is in the interests

of creditors for the order to be made; and no creditors object with one creditor supporting the application.

83. Mr Jones on the other hand wishes the Order maintained. This will continue the protection and rehabilitation from which he currently benefits in this jurisdiction, albeit having taken no steps to address “the real problem” or to protect his position in Austria. To achieve that wish, the first matter raised on his behalf is one of jurisdiction. F2) Jurisdiction Dispute - The Court’s Discretion 84. To decide whether to annul a bankruptcy order, the Court must be satisfied that the order ought not to have been made. It can be argued, for example, as in this application, that it ought not to have been because the statutory requirements that must be established before an order can be made were not satisfied. Where, as here, the conclusion is that the statutory requirements were met, it can be argued in the alternative, as in this application, that the Court ought not to have exercised its discretion to make a bankruptcy order. If the Court decides the order ought not to have been made applying that discretion, the Court still has a discretion whether to annul.
85. Mr Jones’ challenge to jurisdiction addresses the discretion a Court has when making a bankruptcy order. It is submitted (see paragraph 12 above) that there is no such discretion when the application to annul concerns an Adjudicator’s decision. The essence of the argument (as set out above) is: “None of the points now raised (even if established on the facts) would have entitled the adjudicator to have refused, under the statutory scheme, to decline to make the order. Accordingly, none of them can constitute grounds that enable the Court now to annul the bankruptcy.” a)
86. Whilst there is a simple answer to this, it is best to start with some important background: First, the discretion itself: Exercise of that discretion requires the Court to consider whether a bankruptcy order will benefit creditors. One example of this, arising in the context of a foreign debtor, is the case of *JSC Bank of Moscow v Kekhman and others* [2015] EWHC 396 (Ch), [2015] 1 W. L. R. 3737: i) Mr Kekhman had been able to claim jurisdiction to present his own petition pursuant to sections 264(1)(b) and 265(1)(b) of the Insolvency Act 1986, as then drafted, only because he was personally present in the country on the day of presentation. The application before Morgan J. was by a creditor seeking annulment on the ground that the order ought not to have been made applying the Court’s discretion because the order would not benefit creditors of a debtor whose assets were based outside the Court’s jurisdiction. The Judge explained the principles, long established by judicial practice, applicable to the exercise of the discretion in the context of a foreign debtor: “Where a bankruptcy order is sought in relation to a foreign debtor, pursuant to sections 264 and 265 of the Insolvency Act 1986, ... it has to be proved to the courts satisfaction that (i) the debtor has a sufficiently close connection with England and Wales, which does not go to the court’s jurisdiction but is relevant to its exercise because the court will be concerned as a matter of international comity not to exercise its jurisdiction in an exorbitant way; (ii) there is a reasonable possibility of benefit resulting from the making of a bankruptcy order, in determining which the court will consider any possible benefit to the petitioner and others,

the legitimate aspirations of all potentially affected persons, the effect of making the order and of not making the order and all other relevant considerations; and (iii) one or more persons interested in the distribution of assets are persons over whom the English court could exercise jurisdiction (post, paras 56, 59, 61–63).” ii) Whilst it used to be a requirement that there must be assets in the jurisdiction to administer, that has been superseded by the test of benefit (see *Re Latreefers Inc* [2001] BCC 174 for which the benefit included investigation of potential causes of action relied upon to establish a reasonable possibility of benefit if the order is made). iii) In all cases, however, the court may exercise its discretion to decide not to make a bankruptcy order if it is just and equitable to do so because there are no assets and an order will be pointless or futile as a result. Even then, there may be other benefits to justify a bankruptcy order. For example, to enable an investigation into the bankrupt’s affairs or benefits to the debtor which persuade otherwise. There may also be benefits to the debtor sufficient to still cause the Court to make order. (see *Re Crigglestone Coal Co* [1986] 2 CH 327, CA referred to by Chadwick J., as he then was, in *Bell Group Finance (Pty) Ltd (In Liquidation) v Bell Group (UK) Holdings Ltd* [1996] BCC 505 and *JSC Bank of Moscow v Kekhman* (above)). b) Second, the statutory regime which came into force on 6 April 2016 by amendment to the Insolvency Act 1986 by the Enterprise and Regulatory Reform Act 2013 enabled debtors to apply for their own bankruptcy through an administrative system overseen by adjudicators. This was addressed in great detail by Chief Registrar Baister, as he then was, in *Budniok v The Adjudicator, Insolvency Service* [2017] BPIR 521 from which the following can be noted for these purposes: i) The purpose of transferring debtor petitions to an administrative application system is to “free up court resources to deal with matters which do not require judicial input, and to improve the accessibility of bankruptcy by facilitating the introduction of a flexible, electronic application process for debtors” thereby avoiding an inefficient use of court time (see “the Explanatory Notes to the Enterprise and Regulatory Reform Act”, para 481 and the “Impact Assessment” of 7 August 2012 prepared by the Insolvency Service). ii) It being an administrative decision, the scheme requires an order to be made without the application of a discretion if the requirements of section 263K(1) of the Insolvency Act 1986 are met. 87. 88. iii) The scheme provides only the debtor with a right of review or appeal (section 263N of the Insolvency Act 1986). The answer is apparent from that background: Parliament has decided that creditors should not participate within the administrative scheme, not least because the administrators will and should not have the power to decide matters of litigious dispute. Nevertheless, creditors can still apply for the remedy of annulment. Parliament chose not to include any provision within the scheme that would affect the application of section 282 of the Act. It applies to bankruptcies resulting from an Adjudicator’s decision. The power to annul does not raise issues of review or appeal. It requires the Court to make its own decision exercising its statutory powers when deciding whether the order ought not to have been made and, if so, whether to exercise its discretion to annul. In both those circumstances and absent any amendment to the Act to alter the application of section 282, the Court can annul a bankruptcy order on the ground that the order ought not to have been made because the discretion to refuse a bankruptcy order conferred on the Court ought to

be applied. Any other answer would ignore the purpose of the administrative regime, the statutory scheme introduced by amendment, its construction and the absence of amendment to section 282. It would require Parliament to have decided to abandon the Court's discretionary power and its settled practices for an administrative system designed to reduce the burden upon the Court and to improve accessibility without having made any express or implied reference to that abandonment within its amendment of the Insolvency Act 1986. It would require Parliament to exclude creditors from pursuing the interests of their class by challenging the bankruptcy through annulment. Just one example out of many potential examples is needed to illustrate that this would not occur without express statutory provision: As seen above, the power ensures in the case of foreign petitioners that the principles of international comity are complied with. Yet the result of the submission would be abandonment of this important protection for bankruptcies resulting from the debtor's application alone. Obviously, that would not occur without express wording. There is no such wording. Parliament left section 282(1)(a) with the unfettered, broad wording: "ought not to have been made". 89. The submission, if correct, would also mean that Parliament would have limited "the thesis that bankruptcy is a court-controlled process" (Donaldson v O'Sullivan (above) at [41] That too would not occur without express wording. Express wording would also be needed, I suggest (although it has not been the subject of submissions and I do not specifically rely upon it) if Parliament intended to limit the Court's extremely wide, inherent jurisdiction to control the bankruptcy process (see paragraph 81 above). In any event I do not accept this challenge to the Court's jurisdiction. There is a discretion to apply. F3) Application of the Court's Discretion – Case Law Guidance

90. Whilst each case turns on its own facts, the approach of Morgan J. in *JSC Bank of Moscow v Kekhman* (above) is instructive, although noting that principles may change over time. He noted that the Court will not make an order that is pointless and will ask whether there is a reasonable possibility of a benefit resulting from a bankruptcy order, whether to debtor or creditor. Similarly, the Court will address any disadvantages or unfairness when deciding whether to make the order. Mr Justice Morgan observed that in the context of a foreign debtor, the factors will include its worldwide effect, the purposes and consequences of an order, and any practical difficulties that may arise preventing effect being given to those purposes. Whilst all circumstances are relevant, focus should normally be on the creditors with consideration being given to an orderly realisation and a parri passu distribution in contrast to a "free-for-all". The main purpose of a bankruptcy was to avoid a "free-for-all" (citing *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] 1 WLR971, para 12). 91. In the case of *JSC Bank of Moscow v Kekhman and others* (above), Morgan J. considered the debtor's liability under a personal guarantee to which English law applied to be a sufficient connection because a bankruptcy would lead to the discharge of that liability. He observed that it was not the law that there had to be assets within the jurisdiction. Looking at the question of benefit and detriment, including to the debtor (whether petitioner or not), and applying the law in principle: discharge of his debts worldwide was (in principle) a significant benefit resulting in rehabilitation and gave effect to an "important part of the

policy of English bankruptcy law". The balance to this for creditors would be the benefit of having the estate administered in accordance with the statutory waterfall and avoiding a debt recovery free-for-all, although relief from the pressure of creditors is also a benefit for the bankrupt. The Judge noted, however, that whether such benefit would occur in practice needed to be addressed. In that case discharge of a significant quantum of debt through available assets was considered of significant benefit to the bankrupt even though a very large foreign debt and assets within Russia remained. He also noted that rehabilitation in this country but not abroad may or may not be of benefit on the facts. Investigations within the jurisdiction are a potential benefit to creditors, probably not to a bankrupt. 92. In addition, the Judge concluded that it is not contrary to the principles of comity for an English court to make an order which will be effective in England and in jurisdictions which choose under their law to recognise it, but which will be wholly ineffective in a jurisdiction which under its law refuses to recognise it. It is not contrary to the principles of comity for an English court to make an order which will be effective to discharge the debtor's liability under a contract which the parties have agreed should be governed by English law and which is the subject of an English jurisdiction clause. The Judge explained: "The extent of the caution or the hesitation with which a court should proceed is reflected in the rules as to comity to which I have referred. Those rules are to be conscientiously applied by the court to the case before it. If, having done so, the court finds that the case has a sufficient connection with this jurisdiction and that an order would be of benefit to relevant persons, then it is not necessary to withhold an order, certainly not on the basis of comity, out of some sense of hesitancy." 93. Viewing the benefit to creditors of an orderly and fair distribution, the Judge appreciated that it may be unfair to make a bankruptcy order when in practice this may create inequality between creditors within and without this jurisdiction, the latter being able to enforce elsewhere. In his case the concern was the inability to enforce in Russia. As to that, on the facts of the case, he said this: "[128] So far as the theoretical consequences of a bankruptcy order in this case are concerned, there is no problem. All creditors can prove. All proving creditors are entitled to a distribution. Any proving creditor who has enforced against assets in Russia will have to bring the value of the realisation into the pot. All bankruptcy debts will be discharged. However, this will not be the position in practice. The creditors who are owed £86m under the English law guarantee cannot sue to recover that sum outside England and Wales and Mr Kekhman will be discharged from that liability. Other creditors may choose not to prove in the bankruptcy but instead to obtain judgment in Russia and to attempt to enforce against Mr Kekhman's assets in Russia. In relation to the creditors who pursue a free-for-all in Russia, some will do better than others and they will therefore not be treated equally. However, the free-for-all which cannot be prevented in Russia is not itself a good reason for declining to make a bankruptcy order and thereby allowing a free-for-all worldwide ...

[130] I can see that the difference between the theoretical effect of a bankruptcy order and its practical effect might produce inequality between creditors in some circumstances. An example would arise from a variation of the facts of this case. Assume that Mr Kekhman's

insolvency was not so extreme and that if all the assets were gathered in and all the creditors proved, that a creditor would receive a dividend of 50 pence in the pound. Assume then that most of the debts are governed by English law, and the English court has exclusive jurisdiction, but most of the assets are in Russia. If the only proving creditors were those whose debts were governed by English law, and if the trustees only realised the assets in England, the dividend might then only be 5 pence in the pound. That would mean that those debts would be discharged in return for a dividend of 5 pence and the other creditors could pursue the assets in Russia without competition from the creditors whose debts are governed by English law. However, this problem does not in practice arise in this case, save possibly to a minimal extent. On the material available on 5 October 2012, the total debts were £316m and the total assets were of the order of £5m. Even ignoring all bankruptcy expenses, the maximum dividend on those figures would be about 1.5 pence in the pound. The creditors whose debts were governed by English law were some £86m and the assets available to the trustees might be virtually nil or perhaps a little more. With potential dividends of those likely amounts, I do not think that this inequality of treatment of creditors should be given any real weight in this case. 94. The references above to the difference between theory and practice are to be borne in mind for this judgment. They include the need to address in the context of paragraph 93 above: the sums in issue and the facts concerning or relevant to the bankrupt and the creditors; the potential effect of a bankruptcy order; the benefits to the bankrupt of discharge and rehabilitation; whether the creditors will benefit or suffer detriment from an order; and fulfilment of the main purpose of a bankruptcy. F3) Factors to Consider for the Application when applying the Discretion

95. Mr Jones was entitled to apply for a bankruptcy order because of domicile. Nevertheless, the Court when deciding whether the Order ought not to have been made should also weigh the fact that his centre of main interests was and nearly all his assets were in Austria. Based on the facts determined above, the long-established principles applied to foreign debtors, identified by Morgan J. in *Bank of Moscow v Kekhman* (above) and quoted in paragraph 79(a) (i) above (sufficient connection; benefit; and interest), need to be considered for the purposes of the Application. It is plain Mr Jones had a sufficient connection with this jurisdiction despite an absence of anything more than assets of little relative value (noting *JSC Bank of Moscow v Kekhman* (above) at [108]). Domicile was one element supporting that conclusion and another the continuing connection through his children. In addition, and importantly, many of his creditors were resident within the jurisdiction and their debts subject to English law. There is also no issue over the third element, interest of persons within the jurisdiction. It too is met. 96. As to the third element, issues of benefit and detriment to Mr Jones and to his creditors, and when addressing the discretion generally, based on circumstances at the date of the Order it would be appreciated by the Court that: a) a) The application for bankruptcy was inaccurate because Mr Jones did not have a beneficial interest in the former matrimonial home in this country. The only assets within the jurisdiction were two, relatively small potential causes of action. His main assets were in Austria including the property in Tux. Whilst in principle those assets would form part of

the bankruptcy estate, Austria would not recognise foreign bankruptcies founded on domicile as opposed to the place of the centre of main interests (a fact ascertainable at the time from, amongst other sources, The Insolvency Service's official guide entitled "Crossborder Insolvencies: Recognition and Enforcement in EU Member States."). b) c) d) e) As a result, future trustees seeking to realise the bankruptcy estate would be reliant upon Mr Jones complying with his statutory duty to deliver up his bankruptcy estate (sections 312 and 333 of the Act) or need to find other means for its recovery or to rely upon creditors to recover it with the permission of and subject to such terms as prescribed by the Court. A significant number of Mr Jones' unsecured creditors were situated in this jurisdiction and their debt resulted from commercial relations agreed under English law. They were the majority creditors by value. The unsecured creditors situated abroad could prove in the bankruptcy whether their contracts were based on foreign law or not. A bankrupt's discharge from debts or liabilities will occur irrespective of the proper law of the contract or other cause of action. His main creditors in Austria, the banks, were secured. In principle the bankruptcy was binding upon all creditors including those abroad and would prevent all of them taking action to recover their debts from Mr Jones' assets without permission (section 285(3) of the Act). In practice (subject to any unidentified Austrian law to the contrary) the absence of recognition would mean creditors outside the jurisdiction could still take steps to recover their debts in Austria whether by individual action or by seeking a collective, creditors' insolvency remedy. They could gain an advantage over creditors within the jurisdiction unless and until the Trustees gained possession or control of the bankruptcy estate. They could continue to enjoy a benefit afterwards too assuming in the absence of recognition that Austrian law would not prevent them recovering their debts from future assets. Whilst those facts/outcomes do not raise issues concerning a potential breach of international comity, they draw attention to Austria being the most convenient jurisdiction for an insolvency remedy. However, a bankruptcy order discharging Mr Jones' debts arising under English law would not be contrary to the principles of comity. 97. In addition, as a matter of common law, the Court would appreciate that debts will not usually be discharged by insolvency proceedings in a foreign jurisdiction unless it is in accordance with the proper law of the obligation or the creditor has participated in the foreign insolvency in the context of the distributive share of assets.

98. Whilst submissions have not been made concerning the "UNCITRAL Model Law On Cross-Border Insolvency", the Court would also have appreciated the application of the Model Law in this jurisdiction should recognition of insolvency proceedings in Austria be sought together with the fact that Austria, as with all but four EEC countries did not adopt that law. The Model Law includes the right to commence proceedings under British law and upon recognition of a foreign insolvency provides an automatic stay of individual actions or proceedings concerning the debtor's assets (etcetera) under Article 20(1)(a) and (b). There is also the right to apply for extended relief under Article 21(1)(a) and (b). 99. Specifically, as to reasonable possibility of benefit and detriment of bankruptcy when deciding whether an order ought not to have been made, bearing all those features and the general

circumstances at the date of the Order in mind: a) b) c) d) Mr Jones could have pointed at the date of the Order to the following: In practice in this jurisdiction, but only in principle outside, the Order meant he could draw a line between existing and future creditors. So far as this jurisdiction was concerned, he could proceed with his life without the burden of existing debt, albeit subject to ownership of his bankruptcy estate having passed to the Trustees for the benefit of the unsecured creditors. He was entitled to ask for that result by reason of his insolvency and domicile and to seek implementation of the policy of rehabilitation. He could have observed that bankruptcy would enable his affairs to be investigated by trustees or the benefit of creditors if there was cause to do so, including for pursuit of the potential causes of action he had identified in his bankruptcy application. If he co-operated and delivered up the bankruptcy estate, from the perspective of this jurisdiction the Order would prevent a European-wide, creditor "free-for-all" and in any event would prevent a free-for-all for creditors within this jurisdiction. On the other hand, the creditors could have pointed to the significant differences between the theoretical application of a bankruptcy order and its practical effect for unsecured creditors. Those outside the jurisdiction would not only be able to pursue recovery of their debts against assets which should be treated as part of the bankruptcy estate but also against Mr Jones' future assets unless and until insolvency proceedings in Austria started. In the meantime, those accepting the jurisdiction of the bankruptcy would receive nothing unless a means of recovering the bankruptcy estate was identified. They would be subject to section 285 IA restrictions on proceedings and remedies. They would not be able to look to future assets. As to the views of creditors, there is only one creditor, Mrs Jones, who is known to support the application to annul. There is no evidence other than implication concerning Mrs Jones that a creditor might have actively opposed a bankruptcy order had the Court been involved at the date of the Order and addressed the discretion. I have not heard submissions to the contrary but in any event, that is not surprising bearing in mind that opportunity did not arise at the date of the Order. So far as creditors might have opposed the Order, they could have pointed not only to Austria being the most convenient jurisdiction for an insolvency remedy but also to the protection Mr Jones would receive within this jurisdiction if an application for recognition was received pursuant to the "UNCITRAL Model Law On Cross-Border Insolvency".

100. From the Court's perspective, an important matter to consider would have been the reasonable possibility or likelihood that the bankruptcy estate would be available to trustees either because Mr Jones would (be able to) comply with his duties of delivery up or because of some other means that did not rely upon recognition of a bankruptcy by Austria. As to that, in principle, there are potential remedies. They range from individual creditor action with permission under section 285 of the Act (including permitting them to act for the benefit of the creditors as a whole, for example, by seeking an insolvency remedy in Austria) to Mr Jones starting his own insolvency proceedings in Austria. However, the Court would want and need to know what, if anything, the creditors and/or Mr Jones intended at the date of the Order. That information would need to be assessed to consider the potential for

success, possibly with expert opinion upon Austrian law to assist. No such information was available at the date of the Order other than to the extent that compliance might be implied from Mr Jones' acceptance of the Court's jurisdiction. If Mr Jones would have said that he intended to comply with his duties, the Judge would have wanted to know further details.

101. It may be noted in that regard, as an example, that in *JSC Bank of Moscow v Kekhman and others* (above) the Judge at the first hearing of the annulment application wanted to know whether an available sum of £200,000 was to be brought into the jurisdiction for the purpose of considering whether a bankruptcy would benefit creditors. Morgan J. noted that the judge: "... did not at any stage direct that that sum be brought in. The registrar was concerned that an English bankruptcy would not benefit creditors. He expressed doubt as to whether an English order would be recognised in Russia. He considered whether notice should be given to creditors. He approached the petition on the basis that, whilst there was jurisdiction to make a bankruptcy order, there were a number of factors which needed to be clarified to enable the court to consider whether to exercise its discretion to make the order. The upshot was that the petition was adjourned so that those factors could be further considered by Mr Kekhman and his advisers.

102. Whilst non-compliance should not be automatically presumed the onus would have been upon Mr Jones as the debtor seeking a bankruptcy order to provide the information required to satisfy the Court that compliance was possible and that there was a reasonable prospect of delivery up. However, the Court would also wish to consider the views of creditors to the extent that they wished to participate whether in opposition or as interested parties. A request for further details would be made in the context of obtaining information for the purpose of deciding whether the discretion to make a bankruptcy order should be exercised. An absence of information may but would not necessarily mean the order would be refused.
103. For the purposes of this application, the decision to exercise the discretion must be made in the context of there being no evidence existing at the date of the Order to support the conclusion that the assets in Austria would be made available for the purpose of realisation and distribution. The evidence of Mr Jones in cross-examination concerning his understanding of the consequences of bankruptcy and his willingness to comply is unreliable for the reasons given and, in any event, could not be taken into consideration because it is evidence given, for the first time, after the Order was made. Nevertheless, it draws attention to three points. First, that to obtain a bankruptcy order, the onus was on Mr Jones to satisfy a Court that the discretion ought to be exercised in his favour. Second, that Mr Jones cannot suggest that his intention is evidenced by subsequent events. Third, even if it was treated as admissible evidence (identifying facts at the date of the Order) when deciding annulment, there is no factual substance or other evidence to support the assertion of the future delivery up of assets in Austria. F4) Whether to make a Bankruptcy Order - Submissions

104. As to the submissions for the Trustees (to be addressed insofar as necessary and appropriate as explained above): I do not consider that reliance upon Mr Jones' statement concerning his interest in the former matrimonial home in England should cause the decision that the Order ought not to have been made. On annulment the Court looks back to facts and matters known at the date of the Order and can rely upon the evidence which establishes that the original assertion was incorrect. It should reach a decision based on the correct evidence of ownership. In support of that conclusion, I note, not for the first time, that whilst this is litigation, it arises in the context of a collective remedy for the benefit of all creditors, and the decision should be made knowing the correct facts of the bankruptcy.
105. Whilst the Trustees' current position, as submitted, is that there is simply no purpose or benefit in the bankruptcy is currently correct and, as a result, they intend to seek their removal from office, it was accepted that consideration has not been given to remedies alternative to recognition. For example, to permission being granted to a creditor(s) to bring insolvency proceedings in Austria. That is unfortunate because it would address "the real problem", how to recover the bankruptcy estate. However, it is to be borne in mind, based on established authority, that trustees are not expected to carry out their duties (subject to certain exceptions) if they have no funds to enable them to do so. That is the position here and the reality is that it is for Mr Jones to fulfil his statutory obligations and to achieve the recovery of or to assist the Trustees efforts to recover the bankruptcy estate. As Ms Macro submitted: "The Trustees cannot be expected to fund and gamble on whether they can try to realise the assets in Austria by other legal means there; the advice from their Austrian lawyer was not positive (such being not straightforward and costly) and [Mr Jones] has shown himself to actively oppose and impede proceedings in Austria".
106. Ms Macro's submissions have also helpfully drawn attention to the following: Creditors may be assisted and are unlikely to be prejudiced by annulment: Mrs Jones has stated it will enable her to enforce her existing family court Judgments & costs orders. The Hague Convention (now effective in the UK) may assist other UK creditors to enforce in Austria. Austrian / EU creditors will not face the impediment of any defence by Mr Jones based on the bankruptcy (he has a history of doing so in both the Trustees' proceedings & the foreclosure proceedings). Local enforcement is possible. It is unlikely that there will be any limitation defence to claims. Most debts arose shortly before bankruptcy or time will run on demand or the claims relate to informal loans from friends (and DDJ Todd expressed doubt as to whether they would ever be enforced).
107. For Mr Jones, emphasis was placed on his willingness to reach terms with the Trustees but there is currently a lack of substance behind that stated willingness in particular bearing in mind the positive duties that Mr Jones owes under the Act. F5) Whether to make a Bankruptcy Order - Decision
108. At the date of the Order, the Court when exercising its discretion to make a bankruptcy order would have been faced with the task of balancing conflicting principles when considering benefit and detriment. On the one hand, the principle that a debtor entitled to

exercise the Court's jurisdiction should be able to draw a line upon their liabilities and enjoy rehabilitation. On the other hand, whilst bankruptcy should provide such benefits, it should also ensure a fair distribution. Creditors within this jurisdiction should not be treated unfairly by restrictions which in practice will only apply to them. For example, they should not be treated unfairly compared with creditors outside the jurisdiction who are not in practice affected by section 285 of the Act. Creditors should not be left with nominal realisations used up in costs and expenses, whilst assets remain in the possession or control of the bankrupt in a foreign jurisdiction and they are prevented from taking proceedings against him.

109. That balancing exercise was required in the context of a bankruptcy estate which at the date of the Order appeared to offer a relatively small dividend to the unsecured creditors after the deduction of costs and expenses. Assuming the valuations in Mr Jones' application were accepted, an equity of say £50,000 after costs and expenses would need to first pay costs and expenses of the bankruptcy. This Court would certainly not envisage costs of less than £20,000 even if all the work in fact carried out to seek recovery of the assets is ignored and that would probably be a significant underestimate. However, assuming a sum of £20,000 to be distributed, there were unsecured creditors of around £200,000. That would produce a dividend in the region of 10 pence in the £ (although that seems optimistic). Plainly that is small, although, for example in the case of Mrs Jones, a sum in the region of £6,000 or even £3,000 would be better than nothing. What the position would be in an Austrian insolvency is unknown.
110. Those facts concerning a relatively small recovery raise similarities with the case of *JSC Bank of Moscow v Kekhman* (above) in which Mr Justice Morgan dismissed the application for annulment. So too, the problem of an inability to obtain recognition of the bankruptcy. However, that case is not on all fours with this: a) b) In that case the exercise of the Court's discretion to make an order was justified because of the benefits to Mr Kekhman of the discharge of his debts and his rehabilitation within this jurisdiction and because the creditors would benefit from the absence of a "free-for-all". The irrecoverable assets were in Russia and in practice creditors in this jurisdiction would have no ability to recover them in any event. A bankruptcy in this jurisdiction without assets made no practical difference to them. They were not subjected to unfairness and the bankruptcy order was not opposed by the creditors. In this case Mr Jones would also obtain benefit from the discharge of his creditors in this jurisdiction and from rehabilitation. It would enable him to return to his domicile of origin with the line drawn, to be able to work here (even temporarily) without fear of claims and enforcement and, should he so wish, to have those benefits if he decided to return to live in England. However, the creditors' protection from a "free-for-all" would be at the expense of them not being able to share a dividend from the realisation of assets in a country which is part of Europe. Whilst "Brexit" causes difficulties, no-one would suggest that the creditors would have to treat those assets as being irrecoverable, as they would assets in Russia. This is a case in which the Court can and should ask whether the assets in Austria can and would be recovered in a bankruptcy rather than accept they were

irrecoverable when deciding whether an order ought not to have been made at the date of the Order. 111. In my judgment the Court when deciding whether to exercise its discretion should consider whether the conflicting principles could be reconciled at the date of the Order to achieve both the benefits to be received by Mr Jones from a bankruptcy in this jurisdiction and the benefit to his creditors of the recovery of assets for a fair distribution of the bankruptcy estate, whether by their transfer to a trustee or by achieving Mr Jones' insolvency in Austria to run alongside the insolvency in this jurisdiction. In simple terms: Mr Jones' interest was to ensure the line was drawn in this country, whilst the creditors' interest was to receive a distribution from the bankruptcy estate in accordance with the statutory waterfall to the extent possible.

112. There were two options: The first to make a bankruptcy order satisfied that the bankruptcy estate would become available for a fair distribution in accordance with that waterfall. Alternatively, to make a bankruptcy order when there was already in place or would be an insolvency remedy in Austria that the Court considered fair to creditors in all the circumstances including the consequences of the Austrian law of distribution. The two insolvencies could run independent of each other applying their own laws but with the potential for co-operation between the two jurisdictions. International co-operation is a general principle for insolvency worldwide and is broadly applied by these Courts. The first option would be preferable, but the second option would be a potential pragmatic solution if the first could not be achieved. 113. In my judgment for the purposes of deciding the Application, the Court should be keen to allow the bankruptcy to continue if Mr Jones can retain his benefits without them being outweighed by any detriment resulting for the creditors. However, this decision on the Application must be made based on the evidence available at the date of the Order. The decision whether the Order ought not to have been made must be reached knowing Austria will not recognise the Order. It must be reached without knowing whether, nevertheless, the assets in Austria can be made available for distribution pursuant to a bankruptcy order. There was no evidence at the date of the Order to establish or to support the proposition that Mr Jones would have been able to persuade the Court that the bankruptcy estate would be removed from Austria or that insolvency remedies would be obtained in Austria to protect the unsecured creditors of the requested bankruptcy.
114. The Court must decide whether the Order ought not to have been made when there was no evidence at the date of the Order addressing how the bankruptcy estate would be recovered and realised by trustees if a bankruptcy order was made. As a result, the Court must decide whether the Order ought not to have been made because whilst Mr Jones would receive benefits, there was a significant risk that the creditors would suffer the detriment and unfairness summarised within paragraph 108 above. A risk that was not mitigated or removed by any existing evidence whether concerning the likelihood of a distribution in this jurisdiction or the likelihood of an insolvency or the terms for any consequential distribution in Austria.

115. There was also no evidence available as at the date of the Order to suggest that the creditors would suffer detriment if a bankruptcy order was not made. Indeed, nor that Mr Jones would in practice. He had no assets in this jurisdiction of any significant value capable of realisation by individual creditors. There is no evidence that his rehabilitation would be of benefit in Austria. Should that alter or should Mr Jones want to return to the UK and seek rehabilitation, he could have considered applying for bankruptcy in the context of Austrian insolvency proceedings or (more likely) seek to have those proceedings recognised applying the Model Law (see paragraphs 98 and 99(d) above). 116. In my judgment the Order ought not to have been made in such circumstances. The main focus should have been on the creditors. They were facing, from their perspective, a potentially pointless bankruptcy without distribution whilst at the same time being prevented by section 285 of the Act from bringing their claims against Mr Jones in Austria. This overwhelmed the fact that Mr Jones would receive benefits from a bankruptcy order. It reflected the fact that his benefits would come with duties designed to ensure the bankruptcy estate would be available to achieve a fair, *pari passu* distribution justifying the absence of a “free-for-all”. An order ought not to have been made when, due to the future absence of recognition, there was a real risk or likelihood, which (at the date of the Order) had not been addressed by Mr Jones, that the creditors would be left “high and dry” despite those duties. In this case when assets were situated in Austria, the fact that the financial loss to the creditors might be individually small, should not lead the Court to prefer the benefits to Mr Jones when exercising its discretion. 117. In my judgment the Order ought not to have been made as a matter of discretion also because insolvency proceedings could still have been started in Austria where the assets are situated, where Mr Jones lived, worked and had his centre of main interests and where creditors within this jurisdiction could prove should they so choose (at least there is no evidence to the contrary). The insolvency could be recognised in due course within this jurisdiction under the Model Law if required. Whilst it would be appreciated that the dividend realisable from those assets, if recovered, might prove to be small (viewed at the date of the Order), the absence of a prospect of recognition of the bankruptcy under Austrian law placed the creditors at risk that only those creditors outside the jurisdiction would benefit from them. I do not consider that the relatively small value of the potential dividend at the time of the Order, whilst I have added it to the balance, should cause the Court to reach a different decision.
118. There is also a good case for concluding that the anticipated costs of a bankruptcy would be unjustifiable at the expense of the creditors without available assets from the bankruptcy estate in the circumstance of the main assets being in Austria.
119. Overall, therefore, in all the circumstances existing at the date of the Order and for the reasons set out above, I conclude that the Order ought not to have been made as a matter of discretion. That leaves the exercise of the discretion to annul. F6) The Discretion to Annul

120. The discretion to annul (arising in the sequence explained at paragraph 84 above) is not limited to the facts, matters and circumstances existing at the date of the order. As Morgan J. explained in *JSC Bank of Moscow v Kekhman and others* (above): “The power to annul under section 282 is discretionary (the court may annul). Thus, even if the court is satisfied that on the grounds existing at the date of the bankruptcy order, the order ought not to have been made, the court can still decide not to annul the order. An obvious example would be where the annulment would be pointless, for example, where the circumstances were such that a new bankruptcy order would certainly be made. Another example would be where circumstances had changed following the bankruptcy order making it inappropriate to annul the order. It follows that when considering whether to exercise its discretion to annul an order which it has found ought not to have been made the court will take into account all relevant matters, including matters which have come about after the bankruptcy order was made.” (my underlining for emphasis).
121. This provides the opportunity to address the position based on current facts (although that would not have arisen if the decision was that the Order ought to have been made, which reflects the potential need for the remedy of rescission). The major change of the Tux property’s increase in value does not alter the decision. Indeed, it makes it even more important that the creditors are not unfairly treated. In principle, for the purpose of this discretion, Mr Jones could have sought to satisfy the Court that there are circumstances (both current and planned) which should mean that the bankruptcy estate will be recoverable by the Trustees. Whether or not he presented a plan to achieve that result and/or referred, for example, to any of the matters raised in paragraph 107 of the First Judgment was a matter for him. He has not sought to do so, and the position remains on the evidence before me that: the bankruptcy has realised nothing; the Trustee will apply to be removed from office; and there is nothing to suggest that the bankruptcy estate will become available.
122. In addition, none of the creditors have raised any objection to annulment or presented any reasons to suggest it would cause them individual difficulties. The one creditor who has adopted a positive approach supports the annulment and I bear in mind the matters submitted by Ms Macro (see paragraph 106 above). No detriment for creditors has been identified or relied upon.
123. For the avoidance of doubt, and in case it becomes relevant before an order for annulment takes effect, I should add: In reaching my decisions upon the exercise of both discretions, I have been concerned for the interests of creditors in that whilst there is no objection to annulment, no apparent or mentioned danger of limitation period expiry and no evidence that continuation of the bankruptcy will produce a distribution, annulment will mean they will have to take their own, individual action to recover their debts. There will be a “free- for- all” whether such action will involve proceedings in this jurisdiction and/or in Austria. Absent the evidenced likelihood of future delivery up by Mr Jones pursuant to his statutory duty, there is much to be said for a collective approach with, as one example, agreement and funding of one creditor to seek an insolvency in Austria. Subject to considering a specific application, a most important requirement, it would appear reasonable to anticipate that

permission to bring those proceedings would be granted. However, there is no indication that any creditor will wish to pursue that route. Indeed, there is silence from the creditors other than Mrs Jones, even though such steps were mentioned as guidance for the purposes of this hearing in paragraph 107 of the First Judgment. That may be 124. 125. understandable and this paragraph is not to be read as a criticism of the creditors. It may be some have written off the debt; others have their own plans; and others adopt a “wait and see” approach. I know not but I cannot base a decision on my concerns when there is nothing to suggest the concerns are held by the creditors or that the creditors will act on such concerns. I also bear in mind for the purpose of deciding whether to annul that annulment removes the stigma of bankruptcy from Mr Jones. He may be able to have the records of it removed, and he will regain the interest in the bankruptcy estate passed to the Trustees under the Act (nothing having been realised and distributed); what has been done in the bankruptcy will stand (see *Oraki v Dean* [2013] EWCA Civ 1629; [2014] B. P. I. R. 266. Whilst there is a guiding principle that the proper expenses of trustees should be paid or provided for first, this is not sought by the Trustees. In my judgment, therefore, there is no reason to exercise the discretion to decide not to annul. The only potential cause for doing so would be if either Mr Jones and/or the creditors had a realistic proposal or plan to ensure the bankruptcy estate will be delivered up to the Trustees or for this bankruptcy to run satisfactorily alongside insolvency proceedings in Austria. In other words, a solution to the “real problem”. Neither has been suggested as a possibility and an order for annulment is to be made. “The real problem” is resolved by the Trustees’ interest in the bankruptcy estate returning to Mr Jones and the creditors being able to consider pursuing their own causes of action (whether that will involve pursuing an insolvency class remedy in Austria or not). They will no longer be restrained by section 285 of the Act or be unfairly treated insofar as only creditors outside the jurisdiction would look to the assets of that estate held in Austria notwithstanding the world-wide application of the Order. G)

Conclusion

126. For the reasons set out above in my judgment: a) b) c) I reject the case that the Order ought not to have been made because Mr Jones was not domiciled in this jurisdiction and had no other grounds to enable him to apply for his bankruptcy in this jurisdiction. I am satisfied that the Court on an annulment application for a bankruptcy decided by an Adjudicator can consider whether the Order ought not to have been because the Court would have exercised its discretion not to make an order. In this case, that discretion would have been exercised and the order ought not to have been made. d) e) Whilst there remains a discretion not to annul, it should not be exercised. The Application succeeds. Order Accordingly 50

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://caselaw.nationalarchives.gov.uk/ewhc/ch/2026/319>

CASE PAGE <https://chat.esheria.ai/case-law/england-and-wales/ann-nilsson-and-anor-v-timothy-edward-jones-2026>

Prepared on 23 October 2026 · Esheria