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(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

IN THE MATTER OF ANTONIO MACARI

Debtor/Petitioner

HORNER J

Introduction

[1] Antonio Macari (“the Appellant”) appeals against the decision of Master Kelly that his application for self-adjudication as a bankrupt in Northern Ireland be dismissed on the grounds that the applicant had not satisfied the court that his centre of main interests (“COMI”) is in Northern Ireland.

Background Information

[2] The appellant is aged 49 years having been born in Dublin on 13 November 1967. For some years he ran a fish and chip shop in Drimragh in Dublin. He also had a property interest in restaurant premises in Maynooth. Unfortunately, he borrowed unwisely at the height of the property boom. He has a debt due to the Bank of Scotland in excess of €900,000 with no prospect of repayment. There are other trade creditors, including Silvio Rabbitte & Sons Ltd.

[3] The applicant married Lisa Borza on 27 February 1989. They have one daughter, Alessia who is over 21 years of age. She is a model and lives in Rome. The appellant was divorced on 3 May 2007. The divorce proceedings and the division of property which followed were rancorous and acrimonious. The appellant claims that the residual ill-will towards him from his former wife was in large part responsible for him fleeing the Republic of Ireland and moving to Northern Ireland.

[4] The appellant says that:

- (a) He has no property interests in the Republic of Ireland at all.
- (b) He has no business interests in the Republic of Ireland at all.
- (c) He lives in Northern Ireland at 199 Dernawilt Road, Roslea, Co Fermanagh, which he leases from a Mr Patrick Freedman.
- (d) He has his own national insurance number in Northern Ireland.
- (e) He is in receipt of benefits in Northern Ireland.
- (f) His medical care is provided for in Northern Ireland and he is registered with Dr Leary in Lisnaskea.
- (g) His dentist also lives in Northern Ireland where he receives treatment.
- (h) He has a bank account in Northern Ireland with Danske Bank.

[5] There were a number of problems with the evidence presented to the Master. In particular there was a failure to adduce satisfactory and consistent objective evidence that he had any permanent interests to be administered in Northern Ireland. There was no cogent evidence of a stable link and a degree of permanence in the Northern Ireland forum.

[6] It was also apparent to the court that:

- (a) There was no rent book as required by law for premises which are leased.
- (b) Also, there was no lease or written tenancy agreement or licence agreement in respect of those premises.
- (c) There was also an Antonio Macari on Facebook who ran a fish and chip shop in Dublin and whose photographs bore a marked resemblance to that of the applicant.
- (d) The applicant's main creditor, the Bank of Scotland, still believed in August 2015 that the applicant resided in Dublin as per its bank statement.

[7] I heard oral testimony from the applicant which convinced me that the person bearing the same name and a resemblance to the applicant and who ran a café in Dublin, was his cousin who is of a similar age. The applicant also told the court that he had moved to Northern Ireland permanently and that he had no intention of returning to the Republic of Ireland. In fact he says that effectively he has cut all

commercial and administrative ties to the Republic of Ireland. He told me that his electricity was on a meter and that is why he had no utility bills. He had a pay as you go mobile phone. He had since told all his creditors that he was living in Northern Ireland.

[8] Further evidence was given by his sister. She explained that the 'Macari' connection was involved in catering in a substantial way in the Republic of Ireland. She told the court that the appellant's indebtedness had caused the family considerable embarrassment and that his move to Northern Ireland was in part due to this.

[9] I also received the following documents:

- (a) A rent book.
- (b) A document evidencing his payment of rates in respect of the premises north of Ireland.
- (c) His national insurance number.
- (d) A further affidavit from the appellant confirming that the Bank of Scotland do know that the applicant now resides in the north of Ireland.
- (e) A letter from one of his main trade creditors, Silvio Rabbitte & Sons Ltd, confirming their knowledge as to his move out of the Republic of Ireland and their assurance that they would not be opposing his application for bankruptcy in this jurisdiction.

Legal Principles

[10] Council Regulations (EC) 1346/2000 of 29 May 2000 on Insolvency Proceedings and which is binding on all member states including the United Kingdom and Ireland, provides at recital 14 of the preamble as follows:

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

[11] Paragraph 13 of the recital reads as follows:

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

[12] Article 3(1)(2)(3) of the Regulation reads as follows:

“International Jurisdiction

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

2. Where the centre of a debtor’s main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2, shall be secondary proceedings. These latter proceedings must be winding-up proceedings.”

[13] There is no definition of COMI. It has an autonomous meaning. Paragraph 75 of the Virgos-Schmit report which provides useful guidance when interpreting the Regulations states:

“The concept of **centre of main interests** must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”

[14] The legal principles for determining an individual’s COMI were helpfully summarised by His Honour Judge Purle QC sitting as a High Court judge in Velbert v Benk, the Official Receiver [2012] EWHC 2432 (Ch) when he said at paragraph 19:

“The legal principles for determining an individual’s COMI were not seriously disputed. They were summarised ... as follows:

- (a) an individual's COMI is where he can be contacted; this will normally be his habitual place of residence (see Geveran Trading Co v Skjevesland [2003] BCC 209;
- (b) a person's COMI must have an element of permanence (see Official Receiver v Mitterfellner [2009] BPIR 1075 at paras 5 and 6);
- (c) the COMI must be ascertainable by third parties (see Shierson v Vlieland-Boddy [2005] 1 WLR 3966, at 3985F);
- (d) an individual is free to re-locate his COMI, even on the eve of insolvency; what a court must determine on the facts is whether the change in COMI is one of substance or a mere illusion (see Shierson, at 3986A)."

Decision

[15] Unlike the Master I had the benefit of hearing the appellant and his sister. A further affidavit has been filed setting out additional facts. I have also seen the rent book. I have a letter from one of his main creditors acknowledging his move to Northern Ireland. I now have confirmation from the Bank of Scotland that it is alert to his new habitual residence. I am reasonably certain that if all this information had been made available to the Master then she is likely to have reached a different conclusion.

[16] The court must be vigilant in preventing forum shopping. It is the duty of all practitioners in what is effectively an ex parte application to bring all the relevant information, good and bad, relating to the issue of COMI before the Master at first instance if they propose to commence bankruptcy proceedings in Northern Ireland.

[17] In light of all the evidence before me I conclude:

- (a) The applicant's habitual place of residence is in Northern Ireland.
- (b) This has been his place of residence for the past 18 months, and I am satisfied that it will remain his place of residence in the foreseeable future.
- (c) His Northern Ireland address is ascertainable by third parties.
- (d) The move north of the border by the appellant was a move of substance and not an illusion simply to allow him to take advantage of the different insolvency regime in Northern Ireland.

Conclusion

[18] In the circumstances and for the reasons which I have given I am going to allow the appeal. I make no order as to costs. I emphasise the importance to practitioners of ensuring that all facts are laid before the Master at the first instance. Although this court has received additional information subsequent to the application to the Master, it did so with considerable hesitation. It would be entirely wrong to assume that such an approach will be taken in other cases. These will necessarily be dealt with on a case by case basis, but this court may well decline to receive information on an appeal which was available but which was not placed before the Master. This judgment should operate as a clear warning to all those seeking to invoke the insolvency jurisdiction of the bankruptcy court in Northern Ireland to ensure that all the relevant information which is reasonably available is given to the Master at first instance. If this is not done, then their client may have to bear the consequences on any subsequent appeal.