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2015/005826

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

IN THE MATTER OF MAURICE MULDOON – PETITIONING DEBTOR

Master Kelly

Introduction

[1] This is a cross-border insolvency case in which the petitioner seeks a bankruptcy order in Northern Ireland on foot of his own petition. The petition was presented by him on 15th January 2015. Unusually, the petition took a very long time to be heard. There were various reasons for this, but it was mostly due to the fact that at the earlier stages of the proceedings the petitioner appeared as a litigant in person before opting to avail of legal representation. This, together with other factors such as compliance with the court's directions and the availability of the parties (including the court) meant that this case only came on for hearing on 16th February 2016 and 18th April 2016. At those hearings the petitioner was represented by Mr McCausland.

[2] According to the petitioner's statement of affairs, he is indebted to creditors in the sum of around €2.6m. That indebtedness arises mostly from onerous property debt in the Republic of Ireland, but personal guarantees are also involved. These guarantees were given by the petitioner on behalf of one of his companies, Cantec North East Ltd. Cantec North East Ltd went into Examinership in the Republic of Ireland in or about January 2011. Mr Barry Forrest, an Insolvency Practitioner both in Northern Ireland and the Republic of Ireland, was appointed Liquidator of the company. He subsequently advised the petitioner regarding his personal insolvency in his capacity as a Personal Insolvency Practitioner ("PIP") in the Republic of Ireland. The petitioner discloses no significant debts and no assets in this jurisdiction.

Background

[3] As at 15th January 2015 (this being the relevant date) the petitioner was 46 years old. He was recently divorced from his wife, Katie, with whom he has 4 children. As

at 15th January 2015 the children were then aged between 11 and 16. They continue to live with their mother in the former marital home at 25 Bailis Manor, Athlumney, Navan Co. Meath. According to the petitioner, he maintains a close relationship with his children. He says that he sees them often and plays a significant part in their lives. His current partner, Anna Maher, is also from the Republic of Ireland. As at the date of presentation of the petition, the petitioner and Ms Maher had a young baby. They now have two children. It is the petitioner's case that he lives with Ms Maher in a rented home at 4, Kilbroney Court, Rostrevor.

[4] Until 26th September 2014, the petitioner was the managing director of Cantec Office Solutions Ltd ("Cantec"), a company which he formed and owned, and which is still based in Navan, County Meath. The petitioner asserts that he had to sell Cantec as part of the terms of his divorce.

[5] The general business of Cantec is that of office supplies, but it also trades as Click.ie ("Click"). Although Click is also in the business of office supplies, its commercial focus is more on technology, and it conducts its business from 12 retail outlets located throughout the Republic of Ireland. Therefore, Cantec as a company would be more recognisable to third parties in the form of Click. During his time as managing director of Click, the petitioner established himself as a businessman of some repute in the Republic of Ireland, and his knowledge and expertise in technology was occasionally sought by media for public broadcast.

[6] The petitioner's case is that following the sale of Cantec, the new owners have retained him as a self-employed consultant, on fixed term contracts, for a monthly consultancy fee of €3,300 plus expenses. He contends that the purpose of this consultancy is to facilitate a "smooth transition of the business to the new owners". This requires him not only to be on site in the premises of Cantec in Navan but also to visit all 12 Click outlets twice a month (in other words, most days). He hopes that relationship will continue into the future.

The relevant legal principles

[7] While the petitioner discloses no significant debts and no assets in this jurisdiction, the High Court in Northern Ireland does have international jurisdiction to make a bankruptcy order on foot of his petition if satisfied (among other things) that the centre of his main interests ("COMI") as at 15th January 2015 lay in its jurisdiction. It is the petitioner's case that his COMI moved from the Republic of Ireland to Northern Ireland (and thus in the jurisdiction of this court) by virtue of his moving his habitual residence from the Republic of Ireland to Northern Ireland. This

judgment follows an examination of the Centre of Main Interests ("COMI") which took place over the two days mentioned in the opening paragraph hereto.

[8] Article 3(1) of the EC Regulation 1346/2000 on Insolvency Proceedings ("the Regulation") provides:

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

Recital 13 of the EC Regulation provides guidance as to where the COMI is located in the following terms:

> "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."

Thus there are two parts to the test. The first is the factual question of where the debtor conducts the administration of his interests on a regular basis. The second is the question as to whether that place is transparent, and ascertainable by third parties, in particular creditors and potential creditors of the debtor (**Eurofood IFSC Limited case C-341/04; [2006] Ch. 508.)**.

[9] Factors of which the court must have regard when assessing COMI are as follows:

> (i) An individual's COMI is to be determined as at the date of the request to open main proceedings i.e. the date of presentation of the bankruptcy petition. (**Re Staubitz-Schreiber**). In this case that is 15th January 2015.

> (ii) The concept of the centre of main interest is peculiar to the Regulation. Therefore, it has an autonomous meaning and therefore must be interpreted in a uniform way, independently of

national legislation. (**<u>Eurofood IFSC Limited</u> case C-341/04; [2006] Ch. 508.)**

(iii) There must be a relationship of mutual trust between the respective Member States and the court must in every case satisfy itself by way of examination whether it has jurisdiction to open main proceedings (**Re: <u>Eurofood</u>).**

(iv) COMI must be identified by reference to criteria which is both objective and ascertainable by third parties. **<u>(Interedil Srl v Fallimento Interedil Srl and Another [2011] BPIR 1639</u>**. A debtor may not hide or conceal his COMI. (**<u>IBRC –v- Sean Quinn [2012] NICh 1)</u>**

(v) An individual's COMI is, in the case of professionals, deemed to be the place of professional domicile and for natural persons in general, deemed to be the place of their habitual residence, unless there is proof to the contrary. (**<u>Re Staubitz-Schreiber at [62] &[64]</u>**).

(vi) The presumptions of COMI may be rebutted. The factors to be taken into account by the court include, in particular, all the places in which the debtor pursues economic activities and all those in which it holds assets, insofar as those places are ascertainable by third parties. (**<u>Eurofood</u>)**

(vii) The administration of the debtor's interests on a regular basis means that the court must look for the place where the debtor conducts the management, organisation and control of his interests. The court must also look at whether there is a "quality of presence", "a degree of continuity" a "stable link with the forum" and a "degree of permanence". (**<u>Stojevic –v- Official Receiver [2007] BPIR 141</u>)**

(viii) The concept of habitual residence must not be confused with ordinary 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)**

(ix) A change in a debtor's personal circumstances may not necessarily amount to a change in the debtor's COMI. **(Shierson –v- Vlieland-Boddy)**

(x) A debtor's expression of intention to live (or work) permanently in a jurisdiction does not necessarily indicate a change of COMI that would be ascertainable to third parties. Similarly, private arrangements as to future plans would not be apparent to third parties. (**O'Donnell -v- Bank of Ireland [2012] EWHC 3749 (Ch**)

(xi) any logical analysis of centre of main interest must include a global account of the interaction of a debtor with creditors and how the debtor has behaved in running up the debt. (**O'Donnell -v- Bank of Ireland ([2013] IEHC 395)**

(xii) The burden of demonstrating the location of his COMI rests with the debtor and where a debtor invokes the insolvency process by self-petition, he comes under a duty of full and frank disclosure to the court of all relevant matters. (**IBRC –v- Sean Quinn** and **ACC Bank Plc –v- McCann 2013 NIMaster 1)**

(xiii) There is a legitimate public (and press) interest in cases of Irish citizens moving to the UK with a view to taking advantage of the liberal bankruptcy regime there, and the desirability of scrutinising the decision to make bankruptcy orders. (**Times Newspapers Limited and Michael McNamara [2013] ALL ER (D) 121)**

[10] The Court of Appeal in **Shierson v Vlieland-Boddy [2005] EWCA Civ 974, [2005] 1 WLR 3966** addressed the more vexed question of the movement or change

of COMI from one jurisdiction to another. The reasoning of Chadwick LJ summarised at para [55] of the judgment provides guidance:

> (1) A debtor's centre of main interests is to be determined at the time that the court is required to decide whether to open insolvency proceedings (i.e. the date of presentation of the petition per **<u>Staubitz-Schreiber</u>**<u>).</u>
>
> (2) The centre of main interests is to be determined in the light of the facts as they are at the relevant time for determination. **<u>But those facts include historical facts which have led to the position as it is at the time for determination</u>**. (my emphasis)
>
> (3) In making its determination the court must have regard to the need for the centre of main interests to be ascertainable by third parties; in particular, creditors and potential creditors. It is important, therefore, to have regard not only to what the debtor is doing but also to what he would be perceived to be doing by an objective observer. And it is important, also, to have regard to the need, if the centre of main interests is to be ascertainable by third parties, for an element of permanence. The court should be slow to accept that an established centre of main interests has been changed by activities which may turn out to be temporary or transitory.
>
> (4) There is no principle of immutability. A debtor must be free to choose where he carries on those activities which fall within the concept of 'administration of his interests'. He must be free to relocate his home and his business. And, if he has altered the place at which he conducts the administration of his interests on a regular basis – by choosing to carry on the relevant activities (in a way which is ascertainable by third parties) at another place – the court must recognise and give effect to that.

> (5) It is a necessary incident of the debtor's freedom to choose where he carries on those activities which fall within the concept of 'administration of his interests', that he may choose to do so for a self-serving purpose. In particular, he may choose to do so at a time when insolvency threatens. **In circumstances where there are grounds for suspicion that a debtor has sought, deliberately, to change his centre of main interests at a time when he is insolvent, or threatened with insolvency, in order to alter the insolvency rules which will apply to him in respect of existing debts, the court will need to scrutinise the facts which are said to give rise to a change in the centre of main interests with that in mind. The court will need to be satisfied that the change in the place where the activities which fall within the concept of "administration of his interests" are carried on which is said to have occurred is a change based on substance and not an illusion; and that that change has the necessary element of permanence (my emphasis).**

[11] Thus, where, as in this case, the court is presented with a request to open main proceedings based on a recent change of COMI, the court must first consider whether there are grounds to suspect forum shopping (bankruptcy tourism). The **Shierson** case is clear that if the court has reason to believe that a debtor has sought deliberately to change his/her COMI in order to avail of a more favourable regime, the court must scrutinise the facts and satisfy itself that the change of COMI is based on substance (rather than illusion) and that it has the necessary element of permanence. Secondly, even if the court is so satisfied it must then consider whether there is evidence to rebut whichever the relevant presumption of COMI applies (**Eurofood**).

Grounds to suspect forum shopping

[12] On this first issue, and for reasons I shall now explain, I am satisfied that there are grounds to suspect forum shopping in this case. To begin with, the petitioner was aware that he was insolvent, or threatened with insolvency, in January 2011 (per section 11.1 of his statement of affairs). In June 2012, some 18 months later, he claims

that he moved his COMI to Northern Ireland by moving his habitual residence here. At this point in time, the insolvency rules which applied in the Republic of Ireland were still up to 12 years as opposed to one year in this jurisdiction.

[13] Secondly, in or about 12th November 2013, more than a year after his alleged change of COMI to Northern Ireland, the petitioner consulted Mr Forrest in the Republic of Ireland regarding his personal insolvency. As previously stated, Mr Forrest is an insolvency practitioner in both Northern Ireland and the Republic of Ireland. He has offices in both jurisdictions.

[14] On 12th November 2013, Mr Forrest wrote to one of the petitioner's main creditors. In his letter he states:

> "Further to our meeting with Maurice, please be advised that I am now acting for Maurice Muldoon in relation to his personal debts. After having reviewed his finances, it is clear that other than putting a Debt Settlement Agreement (DSA) with Bank of Ireland in place, he has no other option open to him than to go bankrupt whether it is in this jurisdiction or the UK."

The letter goes on to set out a proposal before concluding:

> "If you are in agreement with the above proposal then I will apply to the Court for protection and contact all his other creditors and get the Debt Settlement Agreement in place."

A number of material facts arise here:

(1) A DSA is a statutory remedy within the Republic of Ireland's Personal Insolvency Act 2012. Therefore the reference by Mr Forrest to "the Court" refers to the Court in that jurisdiction;

(2) A DSA is analogous to the Individual Voluntary Arrangement procedure governed by the Insolvency (Northern Ireland) Order 1989. The relevant court for that procedure is the High Court in Belfast;

(3) Both of the aforementioned statutory processes are insolvency proceedings and thus subject to the Regulation;

(4) A debtor can only have one COMI.

[15] I consider that these facts raise a number of issues which undermine the credibility of the petitioner's evidence for present purposes. The first issue is the question of why the petitioner retained Mr Forrest as a PIP in November 2013 in the Republic of Ireland, as opposed to retaining him as a licensed Insolvency Practitioner in Northern Ireland, if, as he alleges, he had moved his COMI to Northern Ireland in June 2012. The petitioner was unable to explain this. The second issue is the question of where the petitioner's COMI was located when Mr Forrest wrote his letter in November 2013. I am satisfied, given the particulars of that letter that both Mr Forrest and the petitioner were asserting that the petitioner's COMI was then in the Republic of Ireland - despite the petitioner's claim for the purposes of these proceedings that it had moved to Northern Ireland more than a year before.

[16] The third issue is that the petitioner in his affidavit evidence refers to a perceived stigma regarding bankruptcy. At paragraph 3 of his affidavit of 12th June 2015 the petitioner states:

> "I appreciate that bankruptcy should not be seen as having failed but notwithstanding that, it still carries a stigma, particularly within the business community."

But as the petitioner does not carry out any business activities of note in Northern Ireland he can only be referring to the business community in the Republic of Ireland.

[17] The fourth issue is that there is no apparent, logical or practical reason for the petitioner to have allegedly moved his habitual residence to Northern Ireland. He has no obvious or stable links to the jurisdiction. However, the opposite is the case in the Republic of Ireland. The petitioner has 4 children still residing in the family (and former marital) home in Navan. He describes a close relationship with his children and it is clear that he maintains continuing and regular involvement in family life and routine there.

[18] The fifth issue is the question of his main economic activities. It is argued that these consist of a consultancy firm apparently trading under the name of MM

Consultants from 4 Kilbroney Court, Rostrevor. But there are two main obstacles to accepting that proposition. First, there is no objective evidence that such a business exists. For example, there is no evidence that the petitioner operates a business bank account in Northern Ireland, has an accountant here, keeps books and records here or holds appropriate insurances here. And, apart from one short term temporary consultancy contract with Opus Retail Solutions in Belfast, the petitioner conducts no business activities in this jurisdiction.

[19] The sixth issue is that as a self-employed business consultant the petitioner has only one client. That client is his own former business: Cantec/Click. If, as he avers, his consultancy role is to facilitate a "smooth transition of the business to the new owners", then it follows that he must remain a key figure in the day-to-day running of Cantec/Click, except that he now conducts those activities on a self-employed basis. In other words, on the balance of probabilities he is performing the same type of role for Cantec/Click as he did when he was managing director, except that he is now doing so as a self-employed individual. I find this to be a material fact in the case.

[20] Finally, even if the petitioner had moved his business interests to Northern Ireland, he possesses no establishment in this jurisdiction which would be ascertainable to third parties. Not only that, he is expressly prohibited from conducting any form of business activities under the terms of his residential lease for 4 Kilbroney Court, Rostrevor. I also find these to be material facts in the case.

[21] By retaining such close connections with his own former businesses – particularly Click - it is difficult to see how third parties would not continue to closely associate the petitioner with those businesses, regardless of what background change may have taken place in the organisational structure. In any case, it is clear on the petitioner's own evidence that in order to facilitate the smooth transition of business he refers to, he would be required to carry out his self-employed economic activities in the Republic of Ireland regularly, if not daily. Accordingly, it seems unlikely that an objective observer would perceive any real change in the petitioner's interests in those businesses, or how he conducted them. Furthermore, if the petitioner was, somehow, conducting the organisation, management and control of those interests from 4 Kilbroney Court, that was in no way ascertainable to third parties.

[22] Following on from that, in addition to his self-employment with Cantec and Click, the petitioner has an interest in the following assets:

- Apartment 30 Hampton Rise Mill Lane, Navan, County Meath;

- Apartment 81, Block C Academy Square, Navan, County Meath;
- C46 Bailis Manor, Navan, County Meath;
- Unit 9 Hampton Rise, Mill Lane, Navan, County Meath;
- 3 Oakwood Retirement Village, Co. Roscommon.
- An interest in a syndicate known as UK Serviced Land Co-Operative which purchased land in the UK for development purposes in May 2007.

[23] While the petitioner's indebtedness primarily flows from onerous property in the Republic of Ireland, he nevertheless retains a legal interest in those properties. Accordingly, his legal and financial obligations in respect of those properties continue and they are still economic interests in that jurisdiction. Therefore between his self-employed role in Cantec/Click and his property interests, it is clear that the petitioner's main economic interests lie in business activities in the Republic of Ireland.

Consideration

[24] The burden of demonstrating that the centre of main interests lies within a particular jurisdiction falls upon the party so contending. In this case it is for the petitioner to show that the Northern Irish Court has jurisdiction over him within the meaning of the Regulation. In **Shierson v Vlieland-Boddy** Longmore LJ (at paragraphs 70-73) suggested (obiter) that the standard of proof may be that of a good arguable case. However, Sir Martin Nourse, at paragraph 75 of the judgment emphasised that the case had been argued throughout on the footing that the standard of proof to be applied was that of the balance of probabilities and not good arguable case. He went on to say that:

> "… it must be doubtful whether an English Court could apply the lower standard to the main insolvency proceedings without obtaining a ruling of the European Court of Justice to that effect".

No such ruling has, hitherto, been sought.

[25] In order to successfully argue that his COMI has moved to Northern Ireland, the petitioner must first satisfy the court that on the balance of probabilities the two parts to the test per recital 13 are met in Northern Ireland. He must also do so by reference to criteria that is objective and ascertainable to third parties, particularly creditors and potential creditors. In other words, transparency is a material factor in assessing COMI, and mere assertions from the debtor such as "I conduct the administration of my interests from etc…'.and 'I consider Northern Ireland to be my home, and I have no intention of returning to the Republic of Ireland etc…' fall outside these criteria.

[26] Thus the first question which arises, particularly in view of the matters I have already set forth, is the question of what probative value may be placed on the petitioner's evidence that he is habitually resident in Northern Ireland.

[27] The petitioner has submitted a considerable body of supplementary documentation in support of that claim. However, having analysed that documentation, I have reached the conclusion that it is not of sufficient weight to support his claim that he is habitually resident in this jurisdiction for the purposes of the Regulation. For example, it is in the nature of rental agreements that they lack a degree of permanence. Equally, evidence that a property is rented is not the same as evidence that it is occupied. Difficulties also arise with documents such electoral roll evidence and evidence of registration with health care providers because they are not always significant for the purposes of the two part test per recital 13. Additionally, this type of documentation does not necessarily assist the court in assessing COMI because it can also be present in instances of temporary residence, part-time residence, or even no residence. Accordingly, the court's assessment of COMI involves a question of law and fact in every case. Each case turns on its own individual facts (including individual historical facts) and what the court may consider to be a relevant fact, or a fact sensitive, in one case may be irrelevant in another.

[28] There are, in my view, a number of impediments to accepting the petitioner's claim of habitual residence in Northern Ireland. First, there is no obvious, logical or practical reason for the petitioner's alleged move to Northern Ireland especially when his main economic interests and strong family ties are clearly in the Republic of Ireland.

[29] Secondly, I could ascertain no evidence that the petitioner has any life or routine going on in Northern Ireland, or that any residence of his in the property in Kilbroney Court has a degree of permanence. Nor could I ascertain any quality of presence in Northern Ireland. The only objective evidence which suggests a physical presence in this jurisdiction is occasional bank card usage. Some of these card

transactions are for trifling amounts - an issue which was put to the petitioner in the course of his oral evidence. His response was that he uses his card for "everything". But I find that explanation unconvincing. If the petitioner did, indeed, use his card for "everything", an equal if not greater number of transactions would be shown to take place in the Republic of Ireland where, logically, he must spend most of his time. After all, his self-employment activities are exclusively performed in the Republic of Ireland; he travels to each of the 12 Click outlets (which are to be found "as far as the west of Ireland") twice a month; and 4 of his children are there. I also observe that absent from the petitioner's evidence is travel expenditure consistent with continuous and considerable travel between jurisdictions. Also absent from the petitioner's evidence is evidence of expenses received from Cantec in addition to his monthly consultancy fee. The invoices put in evidence to the court are silent on this. Thirdly, there is the absence of any obvious let alone stable links to this jurisdiction, past or present and the evidence throughout is bereft of the hallmarks of permanence. Fourthly, there is the credibility issue already outlined regarding the petitioner's dealings with Mr Forrest. Finally, the petitioner did not notify his creditors of any change in his circumstances until he wrote to them all in or about 28th March 2014 advising them that he had moved to Rostrevor despite having allegedly done so almost two years earlier.

Conclusion

[30] Taking all those matters into account, I am led to conclude that the petitioner has, at best, a very tenuous link to this jurisdiction. Accordingly, I am unable to accept that the petitioner is habitually resident in Northern Ireland for the purposes of the Regulation.

[31] Even if I had erred in reaching that conclusion, the petitioner's position in my view would be no different. This is because the test in recital 13 is a two part test and <u>both</u> parts should correspond to the jurisdiction in which the proceedings are brought. In this case, the petitioner's main economic interests lie in business activities which are located and conducted in the Republic of Ireland on a regular basis. Therefore the factual question in the first part of the test is met in the Republic of Ireland regardless of whether or not the petitioner is habitually resident in Northern Ireland. In any event the petitioner is not permitted to conduct business activities from the residential property in Rostrevor. He therefore lacks an establishment in Northern Ireland to conduct the administration of those interests.

[32] Following on from that, I find that any alleged move of the petitioner's COMI to Northern Ireland was in no way ascertainable to creditors or potential creditors. This is because the petitioner's letter to creditors in March 2014 only disclosed for the first

time a change of address, not a change of COMI. Moreover, there is no evidence that between June 2012 and March 2014 the petitioner engaged with his creditors from that address. For all of those reasons, even if the petitioner is habitually resident in the Rostrevor property he cannot in my judgment meet both parts of the test per recital 13 in Northern Ireland on any logical analysis. I find therefore that the petitioner's COMI is not in the jurisdiction of this court.