Inside story: Bankruptcy tourist flies into strong judicial headwinds

This month's Inside Story is brought to you by Stefan Ramel (stefan.ramel@guildhallchambers.co.uk), Barrister-at-Law, Guildhall Chambers, Bristol, England, UK

In recent years, England and Wales has attracted a steady stream of nationals from other European Member States (first German, then Irish, now, apparently, Latvian) wishing to take advantage of the 'debtor-friendly' British personal insolvency regime. That is to say, discharge from bankruptcy after one year; all (well, almost all) debts erased, a chance to start again after 365 days. Times, however, are changing.

The senior insolvency first instance Registrar in the English Courts sounded the death knell of 'sham' bankruptcy tourism in his decision in *Re Eichler (No 2); Steinhardt v Eichler* [2011] BPIR 1293. The importance of the decision lies in two postscript paragraphs which are to be found at the very end of the judgment. As a result of those two paragraphs, the current practice of the English Courts (all, or almost all, English Courts, even those outside the principal cities), when faced with a case of an individual who wishes to obtain his own bankruptcy, and who has recently moved to England, is to impose two novel and additional requirements on the debtor.

Firstly, the debtor must file in Court evidence (including supporting documents) that his centre of main interests is, indeed, in England. Secondly, he or she must notify their creditors of the fact that they have swapped jurisdictions, and that they are seeking their own bankruptcy. By shaking the creditor tree in that way, the clear intention of the Court is to stir creditors into action *before* a bankruptcy order is made, and, if applicable, to provoke an adversarial argument before the judge hearing the petition as to where the debtor's COMI is located.

As a result, the English law reports have been enriched by reported cases where 'domestic' creditors (i.e. Irish, such as NAMA, or German, typically financial institutions) have come to the English courts to challenge a debtor's assertions as to their habitual residence. See, for example: *O'Mahony v National Irish Bank* [2012] BPIR 1174 *O'Donnell v the Governor and Company of the Bank Of Ireland* [2012] EWHC 3749 (Ch) [2013] BPIR 509. A bankruptcy tourist may now find that they encounter strong judicial and/or creditor resistance to an English bankruptcy order. For example, the author is engaged in a number of cases before the English Courts where a debtor's assertions as to his jurisdiction have been challenged by creditors; some of those cases will lead to trials running into several days of evidence to be given by the debtor in the witness box. Nowadays, if a suspected bankruptcy tourist's creditors seek to challenge a COMI change, the debtor can expect to have to

justify his habitual residence in England in the face of cross-examination by a creditor.

Lest it be thought that suspected bankruptcy tourists who got in early and have obtained their bankruptcy orders already are safe, it is worth noting that creditors (or the insolvency trustee) retain the right to challenge a bankruptcy order, on jurisdictional grounds, many years after it was made: s.282 of the Insolvency Act 1986. Importantly, there is no time limit/limitation period for such challenges. The law reports have been swelled with a number of recent and successful challenges based on jurisdictional grounds: *Sparkasse Hilden Ratingen Velbert v (1) Benk (2) The Official Receiver* [2012] EWHC 2432 (Ch) [2012] BPIR 1258 and *Schrade v Sparkasse Lüdenscheid* [2013] BPIR 911. Again, the author can say that, from his own practice, it is now not uncommon for non-English creditors, mainly financial institutions such as banks, to apply to challenge English bankruptcy orders.

The upshot of the above is that it is now considerably harder for a bankruptcy tourist to make their debts disappear by obtaining an English bankruptcy order. False COMI changes are now likely to be found out, whether before, or in some cases after, the making of a bankruptcy order.

Having said all of that, as it stands, the EC Regulation does not prohibit COMI changes; indeed the English Courts have held that a debtor is free to relocate his COMI, even on the eve of insolvency: *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, [2005] 1 WLR 3966. The harder, more intellectually challenging question is (at least, from a legal standpoint), what is wrong with the debtor who ‘plays the game’: the individual who has no intention of moving indefinitely to England and Wales, but who is prepared to spend (and to genuinely spend; i.e. really living and working in a jurisdiction other than their ‘home’ jurisdiction) 6 months, 9 months, a year, of their lives in England and Wales, but who has every intention, once bankruptcy is achieved, and debts are released, of returning to their ‘home’ country. The EC Insolvency Regulation is, as is now well known, the subject of a process of reform driven by the European Commission; members of INSOL Europe have and are contributing to this process. Who knows whether, once the ‘new’ Insolvency Regulation has seen the light of day, it will still be possible to indulge in bankruptcy tourism (see, for example, proposed new recital 12a). Interesting times lies ahead. Watch this space.

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