"BANKRUPTCY PETITIONS AND CARRYING ON BUSINESS"

When is a debtor carrying on business for the purposes of s.265(2)(b)(ii) of the Insolvency Act 1986?

***Durkan v Jones* [2023] EWHC 1359 (Ch.)**

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This article summarises the latest judicial discussion on the place of residence and the meaning of carrying on business for the purposes of the Insolvency Act 1986. In particular, how carrying on a letting business in respect of one residential property might be sufficient. Also, this case is a useful example of the court rejecting manifestly incredible evidence without any cross-examination.

Introduction

1. Mr Durkan was appointed the liquidator of Long Compton Project Limited (the Company) in March 2019, of which the debtor (Mr Jones) was a former director; Mr Durkan brought proceedings for challenging various antecedent transactions (including repayment of a substantial director's loan account) and obtained judgment in March 2022 for just over £1.2M.

2. With the permission of the court, Mr Jones was served with a bankruptcy petition outside of the jurisdiction in the USA in August 2022. The grounds of the petition were that Mr Jones had a place of residence and/or was carrying on business in this jurisdiction in the three years prior to presentation of the petition, pursuant to s.265(2)(b)(i) and (ii) Insolvency Act 1986. Mr Jones contested both grounds, contending that he had lived outside the jurisdiction since 2018 and did not carry on business here.

3. Mr Durkan decided not to cross-examine Mr Jones, who did not appear at the hearing, but was represented by solicitors and counsel. As to this Deputy ICC Judge Baister commented as follows:

> *"3. A curious feature of this case is that the petitioners have elected not to cross-examine the debtor on his written evidence. An order of ICC Judge Prentis of 6 December 2022 records the parties' having agreed that cross-examination was not required. This is unusual. The debtor flatly denies that he has had or has a place of residence in the jurisdiction or has carried on business here in the relevant period. [Counsel for the debtor] points out that,* ***in the absence of cross-examination, his client's evidence as to those (and other) matters should be accepted at face value****, particularly since much of it stands unchallenged. In support of that he relies on Coyne and Hardy v DRC Distribution Ltd and Foster [2008] EWCA Civ 488, [2008] BPIR 1247 and Wilkinson v Commissioners of Inland Revenue [1998] BPIR 418. In the former Rimer LJ said, at para 58:*
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> > *"As regards the need for oral evidence, [counsel for the debtor] reminded us that it is well-settled practice that if a court finds itself faced with conflicting statements on affidavit evidence, it is usually in no position to resolve them, and to make findings as to the disputed facts, without first having the benefit of the cross-examination of the witnesses. Nor will it ordinarily attempt to do so.* ***The basic principle is that, until there has been such cross-examination, it is ordinarily not possible for the court to disbelieve the word of the witness in his affidavit and it will not do so. This is not an inflexible principle: it may in certain circumstances be open to the court to reject an untested piece of such evidence on the basis that it is manifestly incredible****, either because it*

is inherently so or because it is shown to be so by other facts that are admitted or by reliable documents.""

The Grange

4. Mr Jones was the registered proprietor of a property known as The Grange along with his wife, Mrs Jones. Interestingly, Mrs Jones was also made bankrupt albeit on her own petition in August 2021 shortly after Mr Durkan obtained a substantial judgment against her two months' prior in respect of her conduct as a director of the Company.

5. Mr Jones contended that pursuant to a trust deed dated in 2014, he only had a 5% beneficial interest in The Grange, but that he had nevertheless disposed of that by way of deed entered into in June 2022 (some 3 months after the £1.2 m judgment was obtained against him). It was common ground that The Grange had been tenanted for several years, but that the tenants had left at some point in early 2022. Mr Jones insisted that he had no dealings with The Grange, no interest in it and was not the landlord of it.

The place of residence

6. As to the place of residence, Deputy ICC Judge Baister said this:

> *"5. The concept of being "ordinarily resident" and "having a place of residence" for the purposes of jurisdiction are not the same (Reynolds Porter Chamberlain LLP v Khan [2016] BPIR 722), although the same evidence and similar considerations may bear on or apply to both. With that, and the fact that I am concerned only with the "place of residence" limb of the test, in mind I turn to some of the case law and attempt to distil some of the many points that arise from it.*
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> *6. In Re Brauch (A Debtor) Ex parte Britannic Securities & Investments Ltd [1978] Ch 316, which is relevant to both issues in this case, Goff LJ held that:*
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> > *(1)* ***It was possible for a debtor to have a place of residence in the jurisdiction even though he was not in actual occupation*** *during the relevant period.*

(2) ***The shorter the period of actual occupation of premises, the more difficult it would be to hold it to be a "dwelling house"*** *(the relevant term under the Bankruptcy Act 1914).*

(3) It was ***doubtful whether a debtor had to have a legal or equitable interest in a place of residence to satisfy the test****.*

7. Re Brauch remains good law on "place of residence," there being no real difference between a "dwelling house," the expression used in the Bankruptcy Act 1914, and a "place of residence," the expression used in the Insolvency Act 1986 (see HRH Prince Hussam Bin Saud Bin Abdulaziz Al Saud v Mobile Telecommunications Company KSCP [2022] EWHC 744 (Ch), [2022] BPIR 1001).

8. The "place of residence" limb of jurisdiction was recently considered by Bacon J in Lakatamia Shipping Co Ltd v Su [2021] EWHC 1866 (Ch), [2022] BPIR 181, at paragraphs 24-26 and 36-37, from which Mr Leung derives a number of principles set out in his skeleton argument which I gratefully adopt, adapt and supplement as follows, continuing the numbering used in paragraph 6 above:

(4) ***The concepts "ordinarily resident" and "having a place of residence" are not totally separate, so that similar factors may be relevant to both tests****; but it does not follow that all factors that may be relevant to one will be relevant to the other (para 32).*

(5) The phrase ***"has had a place of residence" should be given its natural meaning*** *(para 33).*

(6) ***Regard may be had to authorities on the interpretation of the expression, even if they arose in different statutory contexts*** *(para 33).*

(7) ***The nature of a person's presence in and connection to a particular place is a relevant factor in determining residence****.*

(8) The test of "having a place of residence" requires an assessment of the quality of the debtor's residence. ***It does not simply mean that the debtor has an entitlement of some sort to occupy a place that is capable of being described as someone's place of residence*** *(para 24).*

(9) ***The residence must be that of the debtor, and not someone else*** *(para 25).*

(10) Thus, ***the residence cannot merely be the residence of a third party that the debtor is temporarily occupying with the third party's permission*** *(para 26).*

(11) In determining whether a debtor has had a place of residence in England and Wales, ***it is relevant to ask whether the putative place was a "settled or usual place of abode or home" for the debtor*** *(para 36).*

(12) Residence connotes ***"some degree of permanency, some degree of continuity or some expectation of continuity"*** *(para 37).*

(13) The ***nature of a person's presence may be a relevant factor: for example whether it was voluntary or no****t (paras 38-39).*

9... That must be right, and indeed, is very much the point I think Bacon J herself was making [in HRH Prince Hussam Bin Saud Bin Abdulaziz Al Saud v Mobile Telecommunications Company KSCP: ***much will depend on the facts of each case, in the context of which many of the factors in all the authorities may be significant, whilst others may play little or no part****."*

7. Despite Counsel for the Petitioners having *"made a reasonable fist of doing so on the limited material"*, Deputy ICC Judge Baister found that the individual factors indicating Mr Jones had a place of residence did not meet the threshold.

Carrying on business

8. As to carrying on business, Deputy ICC Judge Baister was impressed with the evidence.

9. He found that whilst this is primarily a factual inquiry, it is necessarily a mixed question of law and fact. The thrust of the evidence relied on by Mr Durkan was that Mr Jones carried on the business of property letting, namely as joint landlord with his wife of The Grange, which was let to its tenants (a Mr and Mrs Walker) in return for several thousand pounds per month.

10. The Judge found that to the extent that Mr Jones did carry on business as Mr Durkan contended, he plainly did so in the relevant period. That left the questions of: i) what exactly it was that he did and ii) whether what he did amounted to carrying on business. The Judge went on to state:

> *27. What constitutes carrying on business is hard to define. In Charlton v Funding Circle Trustees Ltd & Anor [2019] EWHC 2701 (Ch), [2020] BPIR 125 Barling J noted that the* ***authorities failed to provide a "magic touchstone of what amounts to carrying on a business"*** *but that they did contain helpful guidance in the form of examples of what had been held to amount to doing so (para 21). He went on to give some of those examples. Unfortunately none enables me to latch onto it and apply it directly to the facts of this case.*
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> *28. The term "business" is similarly elusive. I was referred by both Mr Gupta and Mr Leung to the judgment of Judge Berner in Ramsay v Revenue and Customs Commissioners [2013] UKUT 226 (TCC), [2013] STC 1764 in which he said this:*
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> > ***"[25]*** *As [counsel for HMRC] pointed out, the word 'business' has been described, by Lord Diplock in Town Investments Ltd v Department of the Environment [1977] 1 All ER 813 at 819, [1978] AC 359 at 353, as 'an etymological chameleon; it suits its meaning to the context in which it is found.' That case concerned whether a lease to a government ministry, where the premises were occupied by civil servants was a business tenancy within the meaning of then-applicable counter-*

inflation legislation. By reference to the mischief of those provisions, 'business' was construed broadly, so as to have no less wide a meaning than that applicable in covenants regarding the use of demised premises.

[26] *That construction followed from* Rolls v Miller *(1884) 27 Ch D 71, where Lindley LJ pointed out ((1884) 27 Ch D 71 at 88) that the dictionary meanings of 'business', where the word means almost anything which is an occupation, as distinguished from a pleasure, or anything which is an occupation or duty which requires attention, were not of great assistance. The word must be construed according to its ordinary sense, having regard, in that context to the object of the covenant, and in this to the purpose of the legislation."*

...30. It does seem to me that just as Roth J said that the expression "place of residence" should be given its ordinary meaning, so too the expression "carrying on business" should be construed according to its ordinary sense, having regard to the context (cf the passage from Rolls v Miller cited by Judge Berner above)."

11. Notwithstanding there was no cross-examination in this case, the Judge rejected Mr Jones's evidence on the basis that it was "*manifestly incredible*" and found that Mr Jones was involved in the letting of The Grange for three reasons:

"33....

(1) The ***debtor is named in the tenancy agreement****, albeit along with his wife. It is possible that he was not aware of it at the beginning of the tenancy, but it is plainly not the case that he has never been involved or received rent (see (3) below).*

(2) Mr Durkan gives evidence that Mr and Mrs Walker initially paid the rent on The Grange into an account held by the debtor's wife. There is strong, if not conclusive, evidence that the ***debtor received the rental income from the Walkers shortly after his wife's bankruptcy*** *(on her own application) on 20 August 2021. The instruction to take that course*

came not from the debtor but from his wife and is evidenced by a series of text messages exchanged between her and Mrs Walker shortly before the making of the bankruptcy order (in or around 8-10 August, I think – the dates are difficult to read). Thereafter, a £1 test payment was made, which was followed by at least two rent instalments. This, Mr Gupta submits, clearly shows that the debtor was collecting rent from The Grange. The debtor relies on a letter from Coutts to his wife as showing that "the account is not mine" (paragraph 44 g of his witness statement), but the fact that the letter is addressed to Mrs Charles-Jones does not bear that out: it simply indicates that she is an account holder. In any event, the debtor's assertion is at odds with his wife's message to Mrs Walker that "The account is in the name of Nicholas Jones." The debtor has adduced no documentary evidence as to who the account holders are or were.

(3) ***The most important piece of evidence contradicting that of the debtor as to his involvement with The Grange tenancy is that he has commenced proceedings against the Walkers "for unpaid rent and damages to [The Grange] resulting from a tenancy during the period 1 March 2019 to February 2022." The sum sought in the claim form is £42,714. The claim form is supported by a statement of truth as to the facts contained therein. The debtor can only be claiming as a landlord under the tenancy.*** *He thus says one thing in this court and another in the County Court. His witness statement in these proceedings is dated 4 November 2022. The County Court proceedings must have been issued before then: Mrs Walker's acknowledgment of service is dated 7 September 2022.*

Those three points are strong in themselves: their cumulative effect is overwhelming. ***The debtor's claim to be owed rent and damages and to bring proceedings in his own name (and no other) to recover them can only flow***

***from a real or perceived entitlement**, absent any other explanation for the authority to sue."*

12. As to whether this amounted to carrying on business, the Judge said:

*35. I hesitate to attempt a definition of "business" or "carrying on business" where better legal minds have not done so. I do, however, think that as a **matter of ordinary sense the foregoing activities did and do amount to carrying on the business of letting property. I think most people contemplating activity in the form of the provision of goods or services for profit or gain (or perhaps, as Mr Gupta pointed out, some other benefit) would conclude that it amounted to carrying on business. I do. The business which the debtor carried on may not have been on a grand scale, but it has been going on, it seems, for some time, starting at about the time Mrs Charles-Jones was facing bankruptcy and continuing, it seems, even now. The monthly rent is not an insignificant amount: it is an income many people would be happy to have**.*

*36. There is another way of looking at the matter, which is to ask what the debtor was doing if he was not carrying on business. **He was not engaged in charitable work, nor was he engaged in a pastime or hobby**. Mr Leung gamely posited the possibility that he was an investor, but there is no evidential support for that, and the submission sits uneasily with the reasons the debtor advances for the purchase of the property, namely that it was to belong to his wife's parents.*

37... As I have observed, the rent paid by the Walkers was not modest by the standards of most people, and the total amount claimed in the County Court is significant. Many people carry on business as sole traders and without any corporate structure; indeed the absence of any corporate structure is, in my view, precisely an indicator of carrying on business on one's own account."

Discussion

13. This is an interesting and, hopefully, useful case in considering the necessary tests required to satisfy the jurisdictional gateway for obtaining a bankruptcy order where a person is domiciled and resident out of the jurisdiction and where the centre of the debtor's main interests is not in the jurisdiction (this was not a COMI case).

14. The concept of carrying on a business has not been judicially determined; we doubt it will be. However, the courts are willing to consider other cases as non-binding examples.

15. The concept of "business" is an ordinary word to be given its ordinary meaning, but might mean different things in different contexts, for example in tax cases.

16. The Judge turned the word "business" on its head to decipher what is not carrying on business and gave two examples: charitable work and hobbies. Even those two are interesting examples, because:

    a. It is not inconceivable that a charity with philanthropic aims might be construed as carrying on a business, whereby it seeks to create a well-known and trustworthy brand that can be sold or built on. It may not have started as a business, but it might become one? We think this is doubtful and that the Judge's example is a useful one; or

    b. Collecting certain items (e.g. postage stamps, comic books, trading cards, coins & currency, etc.) might be a hobby, but a substantial collection might eventually be sold off for good money in one batch or several tranches. Might that amount to a business at the time of sale? Again, we doubt it.

17. Context and timing is everything.

18. With that said and in stark contrast, letting a property for money does feel like a business activity, as it is plainly for financial gain or profit.

19. Whilst a clear definition of "carrying on business" has not been provided in this judgment, or earlier judgments, it is plain that the question will be determined on a case by case basis. Whilst at first blush this may appear to be frustrating, it allows for the courts to take a view on the facts of each case.

20. Furthermore, this case provides assurance to creditors that debtors cannot simply run up debts and then skip the country (and/or do so whilst overseas), whilst still carrying on business in this jurisdiction.

21. Deputy ICC Judge Baister has given permission to Mr Jones to appeal given the importance of the issue, although query whether the appellate court will provide a clearer definition for practitioners to apply in the coming years.

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