Appeal No.: CH-2021-000097

Neutral Citation Number: [2021] EWHC 1866 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

ON APPEAL FROM THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS INSOLVENCY AND COMPANIES LIST (ChD)
DEPUTY ICC JUDGE PASSFIELD

Rolls Building
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Fetter Lane, London
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Date: 1 July 2021

BEFORE:

MRS JUSTICE BACON

BETWEEN:

LAKATAMIA SHIPPING COMPANY LIMITED

Appellant

- and -

(1) HSIN CHI SU (ALSO KNOWN AS NOBU SU) (THE BANKRUPT) (2) THE INSOLVENCY SERVICE ADJUDICATOR (3) THE OFFICIAL RECEIVER

Respondents

SJ Phillips QC, Brad Pomfret and **James Goudkamp** for the Appellant
Ashley Underwood QC for the First Respondent
Katie Longstaff for the Joint Trustees in Bankruptcy of the First Respondent

Hearing date: 1 July 2021

Approved Judgment

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MRS JUSTICE BACON:

1. This appeal raises the issue of the interpretation of the phrase "has had a place of residence" in section 263I(2)(b) of the Insolvency Act 1986.

2. In outline the question is whether the courts have jurisdiction to declare the first respondent Mr Su bankrupt, in circumstances where his presence in England and Wales during the past three years has been involuntary and the product of various court orders restraining him from leaving as well as committal orders leading to Mr Su's imprisonment in HMP Pentonville from March 2019 to April 2020, and where it is said that his presence at various other addresses during that period has been only temporary or transient.

Background

3. The background to the appeal is rather lengthy and commenced with a contract entered into in 2008 between the appellant Lakatamia and Mr Su, who is a dual citizen of Japan and Taiwan. Mr Su defaulted on the contract and Lakatamia brought proceedings against him in the Commercial Court, resulting in two judgments finding against Mr Su in late 2014 and early 2015. In June 2015 the Court of Appeal dismissed Mr Su's application for permission to appeal.

4. Mr Su failed to discharge any of the judgment debts and is now indebted to Lakatamia for a sum of over US$60 million, including interest and numerous unsatisfied costs orders.

5. In January 2018, Popplewell J made an order requiring Mr Su to surrender his passports and remain in the jurisdiction of England and Wales until he had given disclosure on his assets and attended a hearing as to those assets. At the time Mr Su was not in the jurisdiction. However, on 10 January 2019 he landed at Heathrow on a flight from Taipei, apparently intending to stay overnight before flying on to Germany. As he disembarked, he was detained pursuant to the order of Popplewell J and had his passports confiscated.

6. A few days later he attempted to leave on a ferry to Belfast, but was arrested, and was brought before Commercial Court on 16 January. On the same day he was served with a committal application for contempt of court.

7. From 16 January to 21 February Mr Su stayed at different hotels, including several weeks at the InterContinental Hotel in London. From 21 February to 29 March 2019 he stayed at the Cromwell Apartments, which are serviced apartments in Cromwell Road, Kensington and Chelsea, which Mr Su rented through the website Booking.com.

8. On 29 March 2019 Mr Su was committed to HMP Pentonville for 21 months for ten counts of contempt of court, which included his attempt to flee the jurisdiction after being served with the order of Popplewell J. On 11 March 2020 he was committed for a further four months for further contempts of court. Two applications for permission to purge his contempts were dismissed, first by Jacobs J in November 2019 and secondly by Foxton J in April 2020.

9. Mr Su was released from prison on 9 April 2020 having served half of the two sentences imposed. He was, however, unable to leave the jurisdiction because on 30 January 2020 Waksman J had made an order prohibiting him from leaving the jurisdiction on his release from prison until he had given evidence regarding his assets at a hearing under CPR Part 71. Mr Su therefore initially stayed with a friend at Virginia Water in Surrey for a few weeks until 20 April 2020. Since then he has been living in a flat in Maida Vale, the lease of which appears to be owned by a fellow contemnor who was his cellmate in HMP Pentonville.

10. Meanwhile, on 4 July 2020 Mr Su submitted a bankruptcy application and on 8 July 2020 a bankruptcy order was made by the Insolvency Adjudicator. On 28 September 2020 Lakatamia applied for an order annulling the bankruptcy order, and on 20 February 2021 Lakatamia applied for summary judgment on its annulment application on the basis that the Insolvency Adjudicator lacked jurisdiction to make the bankruptcy order.

11. The summary judgment application was heard and dismissed by Deputy ICC Judge Passfield on 1 April 2021 and it is against that order that the present appeal is brought. It is being heard on an expedited basis in circumstances where the main annulment application has been listed to be heard on 21–22 July 2021.

12. It should also be noted that whatever the outcome of the present appeal Mr Su continues to assert that he should be allowed to leave the jurisdiction. As a dual Japanese/ Taiwanese national he was permitted to remain in the UK for up to 90 days without a visa. That period has long since expired, and it is common ground that he has no right to remain in the country nor does he have any right to rent a property or work in the UK, or to access the NHS. He only remains in this country pursuant to the January 2020 order of Waksman J.

13. On that basis, on 7 December 2020 Mr Su applied for an order varying the order of Waksman J to permit him to leave the jurisdiction. That application was dismissed on 21 January 2021, but permission to appeal was given by the Court of Appeal and the appeal is due to be heard on 14/15 July 2021. In the interim period Mr Su made a further application to vary the order of Waksman J on 24 March 2021. That was dismissed on 15 April by Sir Michael Burton, who ordered that Mr Su be prohibited from leaving the jurisdiction until 31 July 2021. No appeal has been brought against that order.

Section 263I of the Insolvency Act 1986

14. The disputed issue turns on section 263I of the Insolvency Act 1986, which establishes the insolvency adjudicator's jurisdiction to make a bankruptcy order. It provides in material part as follows:

> **"Debtors against whom an adjudicator may make a bankruptcy order**
> (1) An adjudicator has jurisdiction to determine a bankruptcy application only if-
> (a) the centre of the debtor's main interests is in England and Wales, or

> (b) the centre of the debtor's main interests is not in a member state of the European Union which has adopted the EU Regulation, but the test in subsection (2) is met.
>
> (2) The test is that-
>
> (a) the debtor is domiciled in England and Wales, or
>
> (b) at any time in the period of three years ending with the day on which the application is made to the adjudicator, the debtor-
>
> (i) has been ordinarily resident, or has had a place of residence, in England and Wales, or
>
> (ii) has carried on business in England and Wales."

The judgment below

15. Before the deputy judge it was common ground that Mr Su was not domiciled in England and Wales. Mr Su said, however, that he had been ordinarily resident or had had a place of residence in England and Wales during the three years prior to his bankruptcy application pursuant to section 263I(2)(b)(i).

16. In addition, the day before the hearing before the deputy judge it appears that Mr Su's solicitor filed a one-page note contending that Mr Su had carried on business in England and Wales in the relevant period for the purposes of section 263I(2)(b)(ii), on the basis that he had been a director of a UK limited company prior to its dissolution on 16 April 2019.

17. The judge rejected that submission on the basis that there was no evidence whatsoever on this point in the three witness statements filed by Mr Su for these proceedings, and the judge was not willing to consider a late argument made by way of submissions from counsel.

18. As to the question of whether Mr Su was "ordinarily resident" in England and Wales, the judge noted from the moment when Mr Su arrived in England to the moment when he applied for a bankruptcy order to be made against him he was subject to restrictions that prevented him from leaving the jurisdiction, or was physically incarcerated in prison. The evidence also showed that Mr Su had attempted to leave the jurisdiction both through his attempt to get on a ferry to Belfast and subsequently by applying to lift the restrictions keeping him in the jurisdiction. In those circumstances, the judge considered that Mr Su was in England and Wales involuntarily and was therefore not ordinarily resident in the jurisdiction.

19. The judge did, however, decide that Mr Su had a place of residence in England and Wales during the relevant period, which he said must necessarily mean something different from having a place of ordinary residence. While the judgment did not make clear exactly which of Mr Su's addresses were considered to be his place of residences, paragraph 55 of the judgment recorded the submissions of Mr Su's solicitor as having been that Mr Su was resident at HMP Pentonville, followed by a stay at his friend's property in Surrey, and subsequently his occupation of the flat in Maida Vale. It appears, therefore, that the judge considered that Mr Su had a place of residence in the jurisdiction on the basis of one or more of those locations.

The parties' arguments

20. Lakatamia now appeals against the judge's finding that Mr Su had a place of residence in England and Wales in the three years prior to his bankruptcy application. In particular, Mr Phillips QC for Lakatamia said that during the period in question Mr Su was restrained by orders of the court from leaving the jurisdiction such that his presence here was involuntary; that incarceration in HMP Pentonville cannot in any event be regarded as a place of residence; and that Mr Su's subsequent occupation of properties of his friends in Surrey and Maida Vale was temporary and precarious and had none of the hallmarks of residence.

21. Mr Underwood QC, appearing for Mr Su, did not positively contend in this appeal that HMP Pentonville was a place of residence. Nor did he contend that Mr Su "resided" as such in any of the places that he occupied since his arrival in England. Rather, his submission was that the statutory language "has had a place of residence in England and Wales" has to be interpreted as meaning no more than that the debtor had entitlement, which could be a license or moral entitlement rather than a legal entitlement, to occupy a place that was capable of being described as a place of residence of someone, whether or not the residence was that of the debtor.

22. On that basis Mr Underwood contended that Mr Su had places of residence at the InterContinental Hotel, the Cromwell Apartments, the friend's house in Surrey and the current flat in Maida Vale. All of those premises, he said, were places in which somebody was capable of residing, and where Mr Su had some sort of entitlement to stay.

23. In addition, Mr Underwood suggested in his skeleton argument that I should take into account the submission made to the deputy judge that Mr Su had carried on business in the jurisdiction through his directorship of a company registered and trading in the UK. Regardless of the evidential status of that material, he submitted that it would be wrong to give summary judgment if there was material disclosing an issue to be tried. In the course of argument today, however, he accepted that since no respondent's notice on this point had been filed it was not open to him to take this point. I therefore need say no more about that issue.

Discussion and conclusions

24. On the basis of the submissions made before me today the appeal comes down to a very short point of statutory construction: does the test of having a place of residence in section 263I simply mean, as Mr Underwood submitted, that the debtor should have had an entitlement of some sort to occupy a place that is capable of being described as someone's place of residence or does it require an assessment of the quality of the residence of the debtor, as Mr Phillips submitted?

25. On that point I have no hesitation in rejecting Mr Underwood's submission. In the first place, it is not supported by the statutory language. As set out in section 263I(2), the test is that "the debtor … has had a place of residence". On the plain meaning of those words, therefore, the residence must be that of the debtor not someone else. Mr Underwood's construction effectively asks the court to rewrite the statutory language and replace the concept of residence with one of mere occupation. But that is not the wording used in section 263I.

26. Secondly, Mr Underwood's construction is not supported by any authority whatsoever. Mr Underwood referred me to the judgment of Chief Registrar Baister in *Reynolds Porter Chamberlain v Khan* [2016] BPIR 722 in which the judge considered both the concept of ordinarily resident and the alternative test of having a place of residence for the purposes of section 263I. At paragraph 26 of that judgment the Chief Registrar summarised some of the applicable principles, noting in particular that having a place of residence is a *de facto* situation rather than a matter of legal right such that a licensee may have a place of residence; that a moral claim to premises may be sufficient; that the premises may also be occupied by others; and that it is possible to have a dwelling house without being in occupation during the relevant period.

27. Nothing in that summary, however, remotely suggests that a debtor may have a place of residence where the debtor has not in fact ever resided, but which is the residence of a third party which the debtor is temporarily occupying with the permission of that third party.

28. Thirdly, Mr Underwood's construction would diminish the test in section 263I to complete triviality, in a way that would make no sense in the context of the statutory provision. As Mr Phillips pointed out, the primary jurisdictional test under section 263I is that the centre of the debtor's main interests should be in England and Wales. As a derogation from that test, jurisdiction is established where one of the four conditions in section 263I(2) is satisfied, namely that (1) the debtor is domiciled in England and Wales, (2) the debtor has during the relevant three-year period been ordinarily resident in England and Wales, (3) the debtor has had a place of residence in England and Wales during that period, or (4) the debtor has carried on business in England and Wales during that period.

29. The conditions of domicile, ordinary residence and carrying on business all connote a degree of substantiality and continuity of the connection of the debtor with the jurisdiction. By contrast, on Mr Underwood's case a debtor could invoke the jurisdiction of the Insolvency Adjudicator simply on the basis that they had permission to occupy the residence of a third party for some period of time during the three years preceding the bankruptcy application, no matter how fleeting and transient that occupation was – and indeed on Mr Underwood's submission irrespective of whether the debtor even did occupy those premises at all. That would be an absurd result that would render effectively nugatory the jurisdictional test in section 263I of the Insolvency Act.

30. I therefore reject Mr Underwood's construction of section 263I. On that basis the appeal must succeed, since Mr Underwood's statutory construction point was the only point on which Mr Underwood relied to oppose the appeal.

31. Since, however, Mr Phillips' submissions as to the interpretation of the statutory language have been set out at some length in his skeleton argument and in his oral submissions today, it is appropriate for me to make some brief comments on what I consider the correct approach to be, without in any way suggesting that the following should be regarded as an exhaustive exposition.

32. In the first place, it is clear that there is a difference between the concept of "ordinarily resident" and the alternative and disjunct test of having a place of residence under section 263I. That does not mean that the two tests are wholly separate. As Chief Registrar

Baister noted at paragraph 27 of *Khan*, it may be that similar factors are relevant to both tests. But it does not follow that all of the factors that may be relevant to the assessment of whether a debtor is ordinarily resident in England and Wales will necessarily be relevant to the separate question of whether the debtor has a place of residence in England and Wales. If that were the case, then the existence of two separate tests would be meaningless.

33. Secondly, the starting point should be that the phrase "has had a place of residence" should be given its natural meaning. In that regard it is relevant to have regard to authorities on the interpretation of the concept of residence even if those authorities arise in different statutory contexts.

34. In the tax context, in *Levene v Commissioners of Inland Revenue* [1928] 13 TC 486, 505, Viscount Cave LC defined the word "reside" by reference to the Oxford English Dictionary definition of "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place". (I note that this definition remains unchanged save for the substitution of the word "home" for "abode" in the current online edition of the Oxford English Dictionary.)

35. In the more recent case of *Bank of Dubai v Abbas* [1996] EWCA Civ 1342, Saville LJ said, referring to *Levene*, that "Although this was a tax case, it is clear that the meaning given to the word in that case was its ordinary meaning, uncoloured by the fact that it was used in a revenue context". On that basis he held that a person was resident for the purposes of the relevant statutory provision in a particular part of the United Kingdom "if that part is for him a settled or usual place of abode".

36. On that basis, in determining whether a debtor has had a place of residence in England and Wales during the relevant period for the purposes of section 263I, it is in my judgment relevant to ask whether the place was for the debtor a settled or usual place of abode or home.

37. Thirdly, on the basis of the Court of Appeal's judgment in *Grace v Commissioners for HM Revenue & Customs* [2009] EWCA Civ 1082, citing with approval at paragraph 6 the summary given by Lewison J at first instance, residence: "connotes some degree of permanence, some degree of continuity or some expectation of continuity" – see (iv) of Lewison J's cited summary.

38. Fourthly, although Mr Phillips initially suggested that if a person remained involuntarily in England and Wales because, for example, they were restrained from leaving by order of the court, that would prevent that person from having a place of residence for the purposes of section 263I, by the end of his submissions, Mr Phillips accepted that this was merely a relevant factor to take into account. In my judgment, that is the correct approach. The nature of someone's presence in and connection to a particular place is a relevant factor in determining residence, as set out in (iii) of Lewison J's summary cited at paragraph 6 of *Grace*. As part of that assessment it will be relevant to consider whether the debtor's presence is voluntary or not. Beyond that, however, the assessment will turn on the facts of the particular case.

39. In the present case, it is no longer suggested that Mr Su's incarceration in HMP Pentonville amounted to residence or having had a place of residence. It does not,

however, seem to me inexorably to be the case that the fact that Mr Su was injuncted from leaving the jurisdiction meant that he was *a priori* incapable of having a place of residence in England and Wales.

40. Applying those principles to the facts of the case, as I have noted Mr Underwood accepts that the evidence does not indicate that Mr Su "resided" at any of the properties that he occupied during the period since he arrived in England in January 2019. His presence at each of them was temporary and transient with no degree of permanence or expectation of continuity. The longest period of time appears to have been spent at the Maida Vale flat, which Mr Su's own evidence describes as a "squalid little flat" that his prison cellmate allowed him to use. Mr Su says that he has very few possessions at the flat and feels like he is still living in a prison.

41. It follows that Mr Su cannot be described as having had a place of residence at any of the places that he has occupied since arriving in England for the purposes of section 263I. In concluding otherwise, the deputy judge, respectfully, in my judgment, fell into error.

42. Since the facts are essentially undisputed and there is no other basis on which it is said the matter should proceed to trial, summary judgment should have been entered for Lakatamia and the appeal should therefore be allowed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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