Neutral Citation Number: [2022] EWHC 744 (Ch)

Case No: CH-2021-000002

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

Rolls Buildings, Fetter Lane
London, EC4A 1NL

Date: 31/03/2022

Before:

THE HONOURABLE MR JUSTICE ROTH

- -

Between:

HRH PRINCE HUSSAM BIN SAUD BIN ABDULAZIZ AL SAUD	**Appellant**
- and -	
MOBILE TELECOMMUNICATIONS COMPANY KSCP	**Respondent**

- -
- -

John Wardell QC and Andrew Shaw (instructed by **Millbank Solicitors**) for the **Appellant**
Stephen Moverley Smith QC (instructed by **Pillsbury Winthrop Shaw Pittman LLP**) for the **Respondent**

Hearing date: 15th March 2022

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Approved Judgment

corrected pursuant to CPR rule 40.12

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE ROTH

Mr Justice Roth:

Introduction

1. This appeal concerns service of a creditor's bankruptcy petition out of the jurisdiction. The petition was presented on 21 February 2020. By his order of 14 December 2020, Deputy ICC Judge Schaffer refused an application to set aside permission to serve the petition out of the jurisdiction which had been granted, ex parte, by ICC Judge Jones on 17 March 2020. His reasons are set out in his full, unreserved judgment (the "Judgment"). Permission to appeal was refused on the papers but following an oral hearing renewing the application, Marcus Smith J granted permission to appeal on two of the eight grounds of appeal put forward.

2. The petitioning creditor is Mobile Telecommunications Company KSCP, a company based in Kuwait. The debtor is HRH Prince Hussam Bin Saud Bin Abdulaziz Al Saud, who is a member of the Saudi royal family and resident in Saudi Arabia. Like the Judge below, I shall refer to them for convenience as the Creditor and the Debtor.

3. The background to the petition can be shortly stated. The Creditor was the successful claimant in arbitration proceedings held in London under an agreement with a London arbitration clause. The total amount awarded to the Creditor was US$817 million.

4. No part of that sum has been paid. Instead, the Debtor revived proceedings in Saudi Arabia, where he is resident, to seek to undermine the arbitration award and avoid enforcement. That led to the Creditor obtaining an anti-suit injunction in the High Court requiring him to discontinue the Saudi proceedings within 7 days. He failed to do so and on 10 August 2018, Jacobs J held that the Debtor was in contempt of court and sentenced him to 12 months, imprisonment (from the date of his apprehension).

5. Various awards of costs have been made against the Debtor in those High Court proceedings that total £639,874.65. That sum was the subject of a statutory demand served on the Debtor, which forms the foundation of the bankruptcy petition.

Jurisdiction and the test for service out

6. The grounds of jurisdiction for a creditor's bankruptcy petition are set out in s. 265 of the Insolvency Act 1986 ("IA 1986"). This provides, insofar as relevant:

> "(1) A bankruptcy petition may be presented to the court under section 264(1)(a) only if –
>
> (a) the centre of the debtor's main interests is in England and Wales, or
>
> (ab) the centre of the debtor's main interests is in a member State (other than Denmark) and the debtor has an establishment in England and Wales, or
>
> (b) 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 petition is presented, 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."

7. The Creditor here relies on s. 265(2)(b)(i). It does not suggest that the Debtor has been ordinarily resident in England and Wales but contends the he had, at a time within the three years prior to the petition, a place of residence in England and Wales. The essential question in this appeal is whether the Judge applied the right test and criteria in upholding permission to serve out of the jurisdiction on this ground.

8. As I have stated, the decision under appeal concerns service out of the jurisdiction not the determination of the bankruptcy petition itself. Judge Schaffer, like Judge Jones, decided the question whether the Debtor had the requisite place of residence on the balance of probabilities: see the Judgment at [25] and [61]. However, I raised with Counsel the question whether that is the correct standard to apply in the light of the 2020 Insolvency Practice Direction ("PD"), which states at para 5.2:

> "Subject to the court approving or directing otherwise, CPR Part 6 applies to the service of court documents both within and out of the jurisdiction."

Sch 4 to Insolvency (England and Wales) Rules 2016 ("the Insolvency Rules") makes clear that a bankruptcy petition is a court document for this purpose.

9. Both Mr Wardell QC for the Debtor and Mr Moverley Smith QC for the Creditor accepted that in the light of this the principles under CPR Part 6 apply to permission to serve out a bankruptcy petition. I think that must be correct. The 2020 Insolvency PD contrasts in this respect with the 2014 Insolvency PD, where para 6.7 stated:

> "CPR 6.36 and 6.37(1) do not apply in insolvency proceedings."

Moreover, rule 7.51A of the Insolvency Rules had provided that CPR Part 6, paras 6.30 to 6.51 did not apply in insolvency proceedings. However, rule 7.51A has been revoked and both that revocation and the change in the 2020 Insolvency PD from the 2014 Insolvency PD are clearly deliberate.

10. In these circumstances, the parties agree that the approach which the Court must apply in determining whether the grounds of jurisdiction for service out are satisfied is that which applies under CPR Part 6, albeit that the grounds for a bankruptcy petition are those set out in s. 265 and not in PD 6B to the CPR.

11. It is well established that the standard of proof which has to be satisfied to show that the claim falls within one of the heads of jurisdiction is not the balance of probabilities but the lower standard of "a good arguable case". This standard applies both where the issue going to jurisdiction will also be an issue at trial and where it will not be. The correct approach to determining those jurisdictional requirements has been the subject

of recent consideration by the Supreme Court and the Court of Appeal. In *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, Lord Sumption, referring to the explanation of "good arguable case" test in terms of finding that "one side has a better argument on the material available", set out the position as follows, at [7]:

> "What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."

Those dicta were approved by the Supreme Court in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34.

12. The Court of Appeal has made observations on the operation of these three limbs in *Kaefer Aislamientos SA v AMS Drilling Mexico SA* [2019] EWCA Civ 10. Green LJ (with whose judgment Davis and Asplin LJJ agreed) said this with regard to limb (ii), at [78]:

> "Limb (ii) is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "*reliably*" can. It recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. The Court is not compelled to perform the impossible but, as any Judge will know, not every evidential lacuna or dispute is material or cannot be overcome. Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with "*due despatch and without hearing oral evidence"* …."

13. That is accordingly the approach to be applied, which brings service out of the jurisdiction in insolvency proceeding in line with the principles applicable in other court proceedings.

The Judgment

14. The Judge had before him witness evidence for the Debtor comprising two witness statements by partners in different firms of solicitors, one acting for the Debtor and the other for the Debtor's family, and a very late witness statement, made the day before the hearing but which was admitted in evidence, from the Debtor's wife. The Creditor placed considerable reliance on a witness statement made by the Debtor's mother, Princess Noorah Bint Abdullah Fahad Al-Damir, dated 3 September 2018 in separate proceedings brought by the Creditor seeking charging orders on various London properties. There was no evidence at all from the Debtor himself, something which the Judge regarded as incomprehensible. The Judge commented, at [30]:

> "It leaves a considerable evidential gap when there are issues as to visits, assets and dealings in this jurisdiction."

There were four witness statements for the Creditor, all by a partner in its solicitors.

15. Parts of the Judgment are devoted to the allegation that there was a failure of full and frank disclosure by the Creditor in the ex parte application and the question whether the Debtor has assets in the jurisdiction. The Judge found against the Debtor on both those issues and they form no part of this appeal.

16. As regards place of residence, the Judge summarised very briefly the submissions for the Debtor at [43]. He recognised that the relevant period for which the Court had to determine whether the Debtor had a place of residence in England and Wales was February 2017-February 2020 ("the Relevant Period"). He accepted that the Debtor had not returned here since March 2018 but added, "that is hardly surprising given that were he to do so, he would have been imprisoned for contempt": Judgment at [45].

17. At [47] the Judge referred to the judgment of Chief Registrar Baister in *Reynolds Porter Chamberlain LLP v Khan* [2016] BPIR 722 ("*RPC v Khan*") and summarised four factors which were there held to be of relevance for the place of residence test. And he then referred to the Court of Appeal case of *Re Brauch* [1978] Ch 316. The Judge quoted the following passage from the judgment of Goff LJ (at 335A-B):

> "I think it may be possible to find that the debtor had a dwelling house in England although he was not in fact in occupation of it at any time during the year. If it be established that he had a dwelling house to start with but he happened to be away throughout the year for a temporary purpose but with intent to return, it may be that on the facts of a particular case one could find he had a dwelling house, but the more there is actual occupation, the easier it is to reach the conclusion that there was a dwelling house, and the shorter the actual occupation, the more difficult it becomes."

18. However, the Judge noted that *Re Brauch* was decided under the Bankruptcy Act 1914 ("BA 1914"), where the test was whether the debtor had "a dwelling house" in the jurisdiction. He proceeded to cite from the judgment of Millett J (as he then was) in *Re MC Bacon Ltd* [1990] BCC 78 at 87, to the effect that cases decided under the old law cannot be of assistance when the language of the statute has completely changed, and that the task of the court is to interpret the current statutory language. He then said this, at [51]:

> "With that in mind the change from "had a dwelling house" to "has had a place of residence", adds a layer of flexibility to this court where in my judgment such residence is of a more temporal nature and is sufficient to meet the jurisdictional test. The omission of early authorities not cited to ICC Judge Jones is not critically material".

19. The Judge held that the inquiry to be conducted is fact specific and found that the Debtor "had permission to stay in the family home at any time", referring to the evidence of

the Debtor's mother in the charging order proceedings that he could "stay and reside" there with her. It is clear from this that by "the family home" the Judge was referring to the apartment at 24 York House in Kensington, which belonged to the Debtor's mother. The Judge rejected as improbable the hearsay evidence from the Debtor's solicitor (which was said to derive from the Debtor's wife) that the Debtor had no right to stay in *any* of the London properties in the Relevant Period, in the absence of any evidence to that effect from either the Debtor or his wife: Judgment at [54].

20. At [55] the Judge said that he took into account the four factors he had derived from *RPC v Khan* and held that he would reach the same conclusion as was reached by Judge Jones in the light of the further evidence before him. He set out his conclusion on place of residence at [56]:

> "Looking at the facts in this case, ICC Judge Jones found that the debtor de facto has had a place of residence in the three years before February 2020 and I see nothing before me on the evidence to gainsay his findings and to set aside that decision. The Debtor has had a right to stay in the family home by his mother in the relevant period. There is no evidence from his mother to the contrary. The fact he did not exercise that right is not sufficient to disengage the test and the mother has offered no evidence that this right was at any time **in the relevant period** withdrawn. That is critical. The Debtor did in fact stay at one of the family homes in February 2018, I assume, if it was required, with the consent of his mother. Indeed, I would also have noted that the Debtor was registered for council tax up to December 2019 which could, without any further explanation, show some evidence of a place of residence." [emphasis in the original]

The reference there to the stay in February 2018 was, in the light of the evidence, to another property, 1 Phillimore Terrace, which was also in Kensington and was purchased in 2016 with funds provided by the Debtor's mother with the intention that it should be used by her grandchildren and their families.

The Appeal

21. Two grounds of appeal were advanced at the hearing by Mr Wardell on behalf of the Debtor:

    i) the Judge erred in distinguishing *Re Brauch* on the basis that it was decided under the old law and in holding that a more flexible approach applies because of the change in statutory wording from "dwelling house" to "place of residence"; and

    ii) the Judge was wrong in failing to consider the degree of control which the Debtor exercised over the property: in particular, it cannot be his place of residence if he did not exercise de facto control over the occupancy of the property.

22. In the Notice of Appeal, the Debtor had sought to advance six other grounds of appeal. However, permission was granted to pursue only these two grounds.

Ground 1: *Re Brauch*

23. The Judge appears to have held that he was not bound by *Re Brauch* because it was decided under the BA 1914 whereas the present case arose under the IA 1986, so that cases under the old law were no longer of assistance. I consider that Mr Wardell was correct in submitting that this is the clear inference from the Judge's citation of the passage from the judgment of Millett J in *Re MC Bacon Ltd* which otherwise would have been irrelevant.

24. To that extent, I think that the Judge fell into error. *Re MC Bacon Ltd* was a case concerning a voidable preference under s. 239 IA 1986, which replaced s. 44(1) BA 1914. Millett J pointed out that the wording of the provision in the new Act was very different from its predecessor, involving what he described as "radical departures" from the old law. He said, at 87C:

> "Every single word of significance, whether in the form of statutory definition or in its judicial exposition, has been jettisoned."

It was in that context that Millett J expressed his protest, quoted here by the Judge, against using cases under the BA 1914 as an aid to interpretation of the new provision.

25. However, the position as regards s. 265(2)(b) is very different. Apart from the significant change of extending the reference period from 12 months to three years, the only change is the substitution of the expression "place of residence" for "dwelling house." In particular, given that in *Re Brauch* the Court of Appeal indicated that for a person to have a dwelling house he or she does not need to have a legal or equitable interest in the property, I accept Mr Wardell's submission that there is no substantive distinction between the two expressions, and that the change was probably made simply in order to use a more modern term: the concept of a "dwelling house" in the BA 1914 had indeed been derived from the Bankruptcy Act 1883. I note that in *RPC v Khan*, Chief Registrar Baister relied on *Re Brauch* to derive the principles that he articulated (and to some of which the Judge here indeed referred) without any suggestion that *Re Brauch* was no longer fully binding.

26. I accept Mr Wardell's argument that whether or not cases under the BA 1914 are relevant to a question under the IA 1986 depends on the degree to which the relevant provision under the new law follows the old. See *In re Akkurate Ltd* [2020] EWHC 1433 (Ch) at [46]-[48], where Sir Geoffrey Vos C held that a decision of the Court of Appeal under the BA 1914 remained binding for a question of construction of a provision of the IA 1986 "which is in materially the same terms." Accordingly, in my judgment, *Re Brauch* continues to retain its precedential effect when addressing the meaning of "place of residence" under s. 265. That is consistent with *Skjevesland v Geveran Trading Co Ltd* [2002] EWHC 2898 (Ch), where Judge Howarth, sitting as a High Court judge, followed *Re Brauch* when considering the application of s. 265.

27. It is important therefore to consider what *Re Brauch* decided on this point. That was not a service out case but a jurisdictional challenge to a bankruptcy petition where the debtor, who did not have an English domicile, worked much of the time from an office in London, often staying overnight, sometimes with friends and sometimes in hotels. He was the lessee of a house in London occupied by the mother of his son whom he

visited there. The Court of Appeal dismissed an appeal from the registrar's decision finding that there was jurisdiction over the debtor on the basis that during the relevant 12-month period the debtor had "ordinarily resided", "carried on business" and had "a place of business"[1] in England within the meaning of s 4(1)(d) BA 1914. Any of those grounds was sufficient to dispose of the case. But the registrar in the decision under appeal had not accepted that the debtor also had a dwelling house in England and that conclusion was challenged by a respondent's notice. Goff LJ addressed that further ground fairly briefly at the end of his judgment. First, as I have already observed, he doubted that for a property to constitute a dwelling house for the purpose of the section it was necessary for the debtor to have a legal or equitable interest in it: he said that he could not see why a licensee should not be held to have a dwelling house. He then made the observations about the relevance of actual occupation, quoted by the Judge here and set out at para 17 above. And he concluded his discussion of this issue as follows:

> "In my judgement, here again one has to look at all the facts and see whether or not they do lead to the conclusion that within the relevant year the debtor had a dwelling house in England. In the present case it is pointed out that whilst the debtor was not in fact in residence at 51, Connaught Street for any part of the year, he had installed the mother of his son there, and it appears for the evidence that he did at least go to see her there and may well have stayed nights, although whether he ought to be regarded as her guest or she as his might be a somewhat difficult question. I do not think, however, that we really can reach a conclusion from these matters. The registrar said the petitioning creditors fail because they know so little. In my judgement, that is a correct appraisal of the situation in this case. In my view, there is insufficient evidence upon which to form a conclusion whether or not the debtor had a dwelling house within the meaning of the section, and, in my judgment, therefore the respondents' notice fails."

28. Orr LJ agreed with Goff LJ's judgment and Buckley LJ stated simply:

> "I agree with the registrar and Goff LJ in thinking that the evidence is insufficient to establish that the debtor had a dwelling house in England, but I think there was sufficient evidence to justify the finding that within the relevant period he resided in England."

29. Mr Moverley Smith, appearing for the Creditor, submitted that in view of the Court's conclusions upholding jurisdiction on other grounds, this section of Goff LJ's judgment was *obiter*. Whether or not that is technically correct, it was clearly a substantive discussion of the interpretation of the statutory term and accordingly should be followed. Indeed, Mr Moverley Smith did not in any way seek to dissent from the proposition in *Re Brauch* that the more the debtor was in actual occupation of the property, the easier it is to find that it was their dwelling house, and vice versa. I do

[1] The reference to having "a place of business" was not retained in s 265 IA 1986, but that is not material for present purposes.

not regard Goff LJ's observation that it was unclear whether the debtor there may have stayed in the property that he owned (as lessee) as the guest of the mother of his son who was living there or whether she was there as his guest as establishing a rule that if a person's occupancy of a property is as a guest of someone else, the person cannot be said to have a place of residence in the property. In my judgment, what *Re Brauch* makes clear is that the determination depends on all the evidence and is very much a matter of fact and degree.

30. Mr Moverley Smith submitted that even if the Judge may have been wrong in his approach to *Re Brauch,* he did not in fact act inconsistently with that judgment. I think there may be some force in that, but in view of the Judge's further comment about the change of wording as between s. 4(1) BA 1914 and s. 265(2) IA 1986 adding "a layer of flexibility" to the statutory test, when I have held that there was no material change in meaning, I think it is necessary for this court to approach the application of the test on the facts of this case afresh.

Ground 2: de facto control

31. Mr Wardell referred to a number of cases where he submitted that expressions close to or amounting to de facto control were used in determining that the debtor had a dwelling house or place of residence.

32. In *In re Hecquard* (1889) 24 QBD 71, decided under the 1883 Act, the debtor was a Frenchman resident in Paris but had rented furnished rooms in a property in London. In concluding that this constituted his dwelling house Lord Esher MR noted (at 74) that the debtor was to have "the exclusive and absolute use" of those rooms.

33. In the *Skjevesland* case, Judge Howarth referred to the evidence regarding a London flat which had been leased by a Swiss company and where the debtor's son was living but where he would stay when he came over from Switzerland. Before he planned to come over, the debtor would call his son who would move out for the short period involved to enable the debtor (often with his wife) to stay there. Judge Howarth held that a moral claim to a property in a family context is sufficient for the statutory test, and in dismissing the appeal found that it was open to the registrar to conclude that the debtor there "called the tune in regard to the flat."

34. In *RPC v Khan*, the Chief Registrar dealt with both ordinary residence and having a place of residence, noting that there was overlap between the factors relevant to the two concepts although the concepts were distinct. He summarised at [26] some principles which he derived from the prior authorities:

> "(1) Having a place of residence is a de facto situation rather than a matter of legal right (*Skjevesland* paragraph 50 and the passage from *Brauch* there cited). So a licensee may have place of residence (*Brauch* 334).
>
> (2) A moral claim to premises may be sufficient (*Skjevesland* paragraph 52).
>
> (3) The person concerned may well have to phone to make arrangements to occupy because others use the premises as well

> as him but this is no obstacle to a finding of having a place of residence (*Skjevesland* paragraph 53).
>
> (4) It is possible to have a dwelling house without being in occupation in the relevant period *(Brauch*, 335) but the greater the occupation the more likely the finding; but not perhaps if the relevant property has been abandoned (*Nordenfelt* and *Brauch*, 335).
>
> (5) Living in a place with one's family as a tenant in rooms makes those rooms a dwelling house (*Hecquard* 74)."

35. On the facts, the court held that the conditions for both ordinary residence and place of residence were satisfied. The debtor there was resident in Pakistan where he had business and political interests. His children were being educated in England and he came here to visit them and also came to England frequently for business. The debtor did not himself own any property in England but he was able to stay during his visits to London in one or more flats in an apartment building in Knightsbridge that was owned by one or more companies and he received mail addressed to him at that address. The Chief Registrar stated, at [31]:

> "… it is plain from the oral evidence that the respondent was able to and did reside in one or more of the flats when he was here."

And at [40]:

> "It is of no significance that the respondent did not own the property or have a tenancy or licence agreement or anything of that kind. It is plain from his evidence that he could get a key and enter and use a flat in the building whenever he wished to. There is no evidence to suggest that he required permission to reside in or use one or more of the flats. "

36. In *PJSC VTB Bank v Laptev* [2020] EWHC 321 (Ch), ICC Judge Burton held that the debtor had two places of residence in England in the relevant period. The debtor's evidence was that he visited England only twice, for brief periods during the first year of the three year period before issue of the petition. He owned a flat in London in his sole name and that was his stated address for the purpose of his accounts with two UK banks. The second property was a substantial house in Virginia Water of which the purchase was funded by the debtor but which was held in the sole name of his then wife, with the intention that it would be her home where she would live with their children while he continued to live in Russia. It was not clear on the evidence whether the debtor and his wife had separated before or after the start of the relevant period, but after their separation the debtor, having asked her permission, stayed in the guest apartment annexed to that property. The judge held that this was because he respected her wishes but that in reality it was the debtor who "called the shots". She said (at [117]):

> "I anticipate that if he had wanted to stay in the main house, it would have been very difficult for [his ex-wife] to have

> prevented him from doing so without causing potentially serious repercussions."

37. I do not regard these cases as setting out or supporting any single or conclusive test for what constitutes a "place of residence". In particular, they do not in my view establish that de facto *control* of the property is a necessary condition. That concept does not feature in the list of potentially relevant factors set out by the Chief Registrar in *RPC v Khan* nor does it appear in the most recent authority, *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1866 (Ch), to which I return below. In my judgment, these cases are simply illustrations of the broad range of factual considerations which may be relevant in determining whether an individual has "a place of residence" in this country within the meaning of the statute. The expression should be given its ordinary meaning and the assessment depends on all the facts. Indeed, I think that *Re Brauch*, on which Mr Wardell relies for the first ground of appeal, shows that the imposition of de facto control as a necessary condition would be inappropriate. I accordingly dismiss the second ground of appeal.

Assessment

38. Before turning to consider the facts of the present case, I should refer to the recent judgment of Bacon J in *Lakatamia*, which was decided since the Judgment under appeal and on which Mr Wardell strongly relied. That concerned an application by the debtor (Mr Su) for a bankruptcy order under s. 263I of the IA 1986, but the same qualifying conditions apply under that provision as for a creditor's petition under s. 265. The facts are somewhat involved. The application was made on 4 July 2020, so the three year period commenced in July 2017. Mr Su was not in the jurisdiction at all in the first 18 months of that period. The debt arose under two English court judgments of 2014-2015, and in January 2018 the court ordered that the debtor surrender his passports and remain in the jurisdiction until he had given disclosure of his assets. The debtor came here only in January 2019, flying in from Taipei and intending to stay overnight in a hotel before flying on to Germany. However, he was detained pursuant to the 2018 order and his passports were confiscated. He nonetheless attempted to leave a few days later when he was arrested and served with a committal application. He spent the next month staying at various hotels and then for a month stayed in a serviced apartment that he rented until he was sentenced to prison for 21 months for contempt. He was released after serving half his sentence in April 2020 but was unable to leave the jurisdiction because a further court order had been made in January 2020 prohibiting him from leaving and continuing the surrender of his passports until he had given evidence regarding his assets. He therefore stayed, first, with a friend for a few weeks, and then from late April 2020 in a small flat in Maida Vale which had been leased by someone he met in prison. It was common ground that he had no right to remain in the UK nor to rent a property or work in the UK. He wished to leave the country and in December 2020 applied unsuccessfully to vary or discharge the January 2020 order.

39. Mr Su's contention before the judge was that the statutory test of having "a place of residence in England and Wales" was satisfied if he had an entitlement, which need not be a legal entitlement, to occupy a place that could be described as a place of residence of someone else. Unsurprisingly, Bacon J rejected that contention, holding that the residence must be that of the debtor, and that the statutory test involves an assessment of the quality of the residence of the debtor: see the judgment at [21] and [24]-[25]. Referring to the factors summarised in *RPC v Khan*, she said, at [27]:

> "Nothing in that summary … 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."

40. That was sufficient to dispose of Mr Su's case, but Bacon J went on to set out some general comments on the correct approach to "place of residence", while stressing that this was not an exhaustive exposition. She first noted that the concepts of being ordinarily resident in the jurisdiction and having a place of residence in the jurisdiction were not the same. She drew on the interpretation of the concept of residence in other statutory contexts, and on that basis held that it is "relevant to ask whether the place was for the debtor a settled or usual place of abode or home." Referring to a revenue case, she said that residence "connotes some degree of permanence, some degree of continuity or some expectation of continuity." Fourthly, she said that the nature of someone's presence in and connection to a particular place is a relevant factor in determining residence; therefore it was relevant to consider whether the debtor's presence is voluntary or not. Applying those principles to the facts, Bacon J concluded that the presence of Mr Su in each of the properties which he occupied since he came to England in January 2019:

> "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. I respectfully agree that the factors set out by Bacon J are relevant considerations but I do not read her judgment as specifying that any of those factors are essential requirements for a debtor to be held to have "a place of residence" for the purpose of these provisions of the insolvency regime. For example, I think it is well-established that a debtor may have a place of residence in the jurisdiction although his home is elsewhere: see *RPC v Kahn* and *PJSC Bank v Laptev.* I note that the reference to "a settled or usual place of abode" is derived from a Court of Appeal decision on whether the defendant was "resident" in the jurisdiction for the purpose of s. 41(3) of the Civil Jurisdiction and Judgments Act 1982, so as to satisfy the test for domicile: *Dubai Bank Ltd v Abbas* [1996] EWCA Civ 1342, [1997] IL Pr 308. However, being "resident" in England and Wales is not the same as having "a place of residence" in England and Wales: the former is closer to the alternative test under s. 263I(2)(b) and 265(2)(b) IA 1986 of being ordinarily resident here.

42. In the light of the jurisprudence and my conclusion on Ground 1 above, I turn to consider whether the Debtor had a place of residence in England and Wales in the Relevant Period. I think the following considerations are relevant:

    i) The Debtor had stayed for several years at 24 York House in the 1980s and 1990s, while a student at LSE. Although a long time ago, Mr Wardell realistically accepted that it would have been difficult to contend that at that time the Debtor did not have a place of residence in the jurisdiction (although I do

not think that the Debtor had de facto control of the property where his mother was living).

ii) 24 York House is described by the Debtor's mother as "a substantial apartment" and the Debtor had permission from his mother to stay in 24 York House at any time. This was an express finding by the Judge that, as Mr Wardell recognised, cannot now be challenged as permission to appeal against the Judge's appraisal of the evidence was refused. The Debtor's mother says that the Debtor, his wife and their children have stayed there "over the years". It follows, in my view, that the permission which the Debtor had while a student continued after he had his own family and it appears that this was his and his mother's expectation.

iii) The fact that the Debtor had not occupied 24 York House at any time during the Relevant Period is clearly relevant. As the Judge observed, he would not have come after August 2018 since if he came to England he would have gone to prison to serve the sentence imposed for contempt. However, there was a period of 18 months in the Relevant Period prior to the imposition of the prison sentence and he did not occupy it then. That is a factor pointing against it qualifying as his place of residence.

iv) For the Debtor it was argued that since he was appointed governor of the Al Bahah province in Saudi Arabia he travels with a large entourage so that 24 York House was too small to accommodate them all. The thrust of the argument was that it therefore could not be his place of residence. However, he was appointed governor in April 2017, so there was a period of some two months beforehand in the Relevant Period when this was not an issue. The statute refers to having a place of residence in the jurisdiction "at any time" in the three year period, which in my view means that a period which is not *de minimis* is sufficient. In any event, if someone has a permanent place where they can stay on their visits to London, but chooses instead to stay in a hotel, e.g. because they would like the benefit of a hotel's facilities or because they are accompanied by too many friends or relations to accommodate, I do not consider that they cease on that account to have a place of residence in London. When the Debtor came to England after being appointed governor in February/March 2018 with his entourage, when 24 York House was therefore too small for them, he stayed at 1 Phillimore Terrace: see para 20 above. That was possible because a nearby property (which as I understand it similarly belonged to the Debtor's wife and three of his children) was vacant, so that they could use that to provide extra accommodation. So for a visit when 24 York House was unsuitable, the Debtor was able to use other properties belonging to his family.

v) In the Relevant Period, 24 York House was certainly not the Debtor's settled or usual place of abode or home.

vi) There is the matter of Council Tax. The Debtor was registered for Council Tax on 24 York House while a student and he continued to be so registered until December 2019. As Mr Wardell had to accept, a person does not undertake the liability to pay Council Tax on a property with which they have no connection. In general, they do so because they are either the owner or the occupier of the property, or at least have the right of occupation. The Debtor was never the owner of 24 York House. The explanation for the Council Tax position is very

unsatisfactory. There is no evidence at all from the Debtor. The Debtor's mother says that it was to enable the Debtor and his family

> "to use 24 York House as an address in the UK for various purposes such as visas, including student visas when grandchildren were studying in London, opening bank accounts etc."

Mr Wood, a solicitor acting for the Debtor's mother and wife (but not for the Debtor) says:

> "Evidence of payment of Council Tax by the [Debtor] was accepted as sufficient proof for the purpose of the visas."

This begs the question: proof of what? Obviously, it is not a requirement to be registered for Council Tax in order to obtain a visa to visit this country or to open a bank account; nor is it a requirement that your father is registered here for Council Tax to obtain a student visa. I consider that this is a significant factor pointing to this address being a place of residence of the Debtor. I note also that in the *Dubai Bank* case, although concerned with whether the defendant was "resident" in England and Wales not whether he had "a place of residence", and decided in a different statutory context, the Court of Appeal observed that the finding that the defendant was registered here for Community Charge (a predecessor of Council Tax) had been "particularly telling" in supporting the conclusion at first instance that he was resident in 2 York House (by coincidence, the same block as contains the relevant apartment in the present case): judgment at [6]. A major reason for the Court overturning the judge's conclusion was that it emerged that this was not correct: see at [9] and [16].

43. I should emphasise that none of the authorities under the IA 1986 to which I have referred were cases of service out: they all fell to be decided on the balance of probabilities. In both *RPC v Kahn* and *PJSC VTB Bank v Laptev* the debtor was cross-examined on his evidence. As the Judge emphasised, on the present application the Debtor has given no evidence at all. Applying the lower standard of proof which I have held here applies and taking all the above matters into account, I have no doubt that the Creditor has shown a good arguable case that the Debtor had a place of residence in the jurisdiction, or that it has "the better of the argument" on the material available. At the hearing of the petition, the Court will have to assess the matter on the balance of probabilities and it will be open to the Debtor to give evidence explaining matters more fully.

44. It follows that this appeal is dismissed.