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Cases Alerter

At-a-glance cases provided by **Gatehouse Chambers**

City Gardens Ltd v DOK82 Ltd [2023] EWHC 1149 (Ch)

Facts

The respondent ('R') contracted to provide the appellant ('A') with goods for a property development, A's payments for which would be refundable if the development did not proceed. The development did not proceed, and the parties executed a Memorandum of Understanding ('MoU') acknowledging that R was indebted to A in a principal sum (defined as £200,000 and £119,785 in different clauses) and that A owed R's shareholder ('J') £80,215. The MoU contained a 'longstop date' for repayment, and an obligation for A to prepare monthly statements *'setting out all movements on the Debt in respect of that month and confirming any balance outstanding'* (the 'Statements Clause'). The MoA was governed by Hong Kong ('HK') law, and gave HK courts exclusive jurisdiction.

A presented a winding up petition after the longstop date, relying on the debt of £119,785.

The District Judge dismissed the petition, finding that the debt was genuinely disputed on substantial grounds.

A appealed on four grounds:

(1) The exclusive jurisdiction clause did not prevent the court from considering whether the debt was disputed, and was not relevant to that process.
(2) The fact that the MoU was governed by HK law did not establish a genuine and substantial dispute.
(3) The court should have considered whether the debt was disputed on genuine and substantial grounds and concluded that it was not.

Ground 4 was not relevant in light of concessions by R.

Held

Whilst the MoU gave HK courts exclusive jurisdiction to determine disputes, the English court ought to determine whether there is a genuine and substantial dispute at all (*per BST Properties Ltd v Reorg-Apport Penzugyi RT* [2001] EWCA Civ 1997).

R bore the burden to assert and prove that HK law was different to English law, and did not do so. HK law would be presumed identical to English law.

The appeal court could determine the issue *de novo*, rather than remitting the case. R has not raised a sufficiently clear case that compliance with the Statements Clause was a condition precedent to the debt falling due. The principal debt of £119,785 clearly gave credit for the £80,215 owing to J. A conceded that R raised an arguable cross-claim, but it did not reduce the debt below the winding up threshold.

Appeal allowed on grounds 1-3; order winding up R substituted for first instance order.

Re Great Annual Savings Company Ltd [2023] EWHC 1141 (Ch)

Facts

This case concerned the application for sanction of a restructuring plan (the 'Plan') under Part 26A of the Companies Act 2006 (the 'Act'). There were two issues:

(1) whether the Great Annual Savings Company Ltd (the 'Company') could show that, *inter alia*, HMRC would not be any worse off under the Plan than they would be under the relevant alternative ('Condition A' of s 901G of the Act);
(2) whether the court should exercise its discretion in favour of the sanction.

Held

The application was refused by Adam Smith J.

(1) Condition A was not satisfied:
   i) A creditor was not obliged to file expert evidence if it wished to contend that valuation evidence relied on by the Company was wrong. The relevant enquiry was whether the Company had discharged the evidential burden of showing that HMRC would not be any worse off under the Plan. The valuation evidence estimating the recovery for book debts with a headline value of £18.2m of between £0 and £509k was based on a number of reductions where the underlying reasoning was *'rather thin and unconvincing'*. For this reason the Company had not discharged the evidential burden.
   ii) The benefits to HMRC flowing from future tax revenues payable by the Company should the Company succeed were too remote from the Plan to be relevant in applying the no worse off test.
(2) The judge would have declined to exercise his discretion to sanction the Plan in any event:
   i) Its operation was unfair: it involved a serious imbalance in the way the anticipated benefits of the restructuring were to be allocated. One of the relevant comparisons concerned the existing interests of the secured creditor and shareholders/connected party creditors on the one hand and HMRC on the other. This comparison showed that HMRC was materially disadvantaged.

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ii) Whilst there was nothing objectionable, in principle, about reordering priorities that would otherwise apply in an insolvency (the Plan proposed that certain creditors would take priority over HMRC's preferential debts), the reordering had to be justified and was not so justified in this case.

HRH Prince Hussam Bin Saud Bin Abdulaziz Al Saud v Mobile Telecommunications Company KSCP [2023] EWHC 1144 (Ch)

Facts

The Debtor applied to set aside the order of ICC Judge Prentis permitting a petitioner to serve HRH Prince Hussam Al Saud in Saudia Arabia (the 'Debtor'). The debt was admitted leaving the only question for the court as whether the petitioner had a '*good arguable case*' (*Kaefer Aislamientos SA v AMS Drilling Mexico SA* [2019] EWCA Civ 10) that the Debtor had, at any time between 1 June 2019 and 1 June 2022, a place of residence in England and Wales ('the Residence Issue') under s 265(2)(b)(i) of the Insolvency Act 1986 – if the petitioner did, it was entitled to serve the petition outside the jurisdiction. The petitioner relied on the Debtor's mother owning a '*substantial apartment*' in London since 1976 as a family home.

In *Kaefer* it was recognised that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence – the determination of the application is an exercise in judicial common sense and pragmatism.

Equally, the Residence Issue is a question of fact and not a matter of establishing whether the Debtor has a legal right to property.

The court declined to overturn the order of ICCJ Prentis, finding (paras 101 onwards) the following matters relevant:

- The property was purchased as a family home when the Debtor was 15.
- The Debtor had lived in the apartment for periods during the 1980s and 1990s – his mother said that the Debtor and his family had stayed at the property '*over the years*', during his time as a student and afterwards with his own family.
- The Debtor's mother said that she only uses the property for 10-13 weeks a year and clearly intended it to be otherwise available for her family's use and alterations had been made to the property for that use.
- The Debtor asking permission to use the property was a '*pure polite formality*'.
- Although the Debtor was only at the property five times between 2012 and 2022 the other evidence was so strong as to satisfy the test.
- Although the Debtor had not been at the property during the relevant period, that absence was explained by the fact that he would have been arrested for contempt if he came to the UK.
- If someone has a residence but chooses to stay in a hotel because they want the amenities offered, that doesn't mean that they don't have a residence.

Town and Country Properties (GB) Ltd and Ors v Patel and Ors [2023] EWHC 1168 (Ch)

Facts

The appellants appealed against an order dismissing a winding up petition, setting aside a statutory demand and dismissing a bankruptcy petition.

The underlying debt related to investments totalling £13.8m made by the appellants in Black Capital, which they alleged was a Ponzi scheme. Black Capital was said to be a partnership between two individuals, Mr Ubhi and Mr Patel, against whom the bankruptcy orders were made.

The court at first instance had found that there was a genuine dispute on substantial grounds as to whether Black Capital was a partnership and whether Mr Ubhi was a partner (Mr Ubhi's case being that he acted as an agent for Mr Patel, who was a sole trader trading as Black Capital). A respondent's notice on behalf of Mr Patel sought to uphold the order on the additional grounds that the winding up petition was invalid under the Insolvent Partnerships Order 1994 and the sum was not liquidated.

Held

It was held in relation to the appellant's grounds of appeal that:

- There was no gap in logic in the judge's conclusion that the existence of the partnership was genuinely disputed. Although the judge found that Mr Ubhi's explanation for signing Managed Fund Agreements ('MFAs') '*as partner*' lacked credence, it did not logically follow that she ought to have rejected other evidence in favour of taking the MFAs at face value.
- The judge did not err in her evaluation of the evidence. She was entitled to take into account documentary evidence – such as an employment contract and payslips – which on their face were inconsistent with the existence of a partnership.

As to the respondent's notice:

- It was not necessary to consider the application of articles 7 and 8 of the Insolvent Partnerships Order 1994.
- The respondent was correct that there was no liquidated sum due to the appellants under the terms of the MFAs. The appellants sought the return of their capital plus any profits and losses on investment. This would need an account to be carried out to determine the amount due. Although the initial investment is ascertained, the sum claimed cannot be '*liquidated and unliquidated in parts*'.

The appellant's grounds were dismissed and the respondent's second ground was allowed. ■