Case No: 143 of 2018
Neutral Citation Number: [2019] EWHC 2701 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
CHANCERY APPEALS (ChD)

Manchester District Probate Registry
Manchester Civil Justice Centre
Ground Floor
1 Bridge Street West
P.O. Box 4240
Manchester
M60 9DJ

BEFORE:

THE HONOURABLE MR JUSTICE BARLING

BETWEEN:

DAVID GEORGE CHARLTON	**APPELLANT**
- and -	
FUNDING CIRCLE TRUSTEE LIMITED	**RESPONDENT (1)**
JOANNE WRIGHT	**RESPONDENT (2)**

Legal Representation

Ms Eleanor Temple (instructed by Kuits Solicitors) on behalf of the Appellant
Mr Philip Currie (instructed by DTM Legal LLP) on behalf of the First Respondent
Mr Arnold Ayoo (instructed by Farleys Solicitors) on behalf of the Second Respondent

Judgment

Judgment date: 6 June 2019
Transcribed from 14:04:44 until 15:05:18

Reporting Restrictions Applied: No

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice."

Number of folios in transcript 88
Number of words in transcript 6,336

The Hon. Mr Justice Barling:

Introduction

1. This is an application for permission to appeal, with the appeal to follow immediately if permission to appeal is granted. However, as usual, I have heard all the submissions that counsel wish to make on the appeal before determining the question of permission. The Appellant, David George Charlton, is represented by Ms Temple of counsel. The First Respondent, Funding Circle Trustee Limited, is represented by Mr Currie of counsel, and the Second Respondent, Joanne Wright, who is the Trustee in bankruptcy of the Appellant, is represented by Mr Ayoo of counsel.

2. The Second Respondent did not make submissions on the substantive issues, taking a neutral stance. Mr Ayoo was present simply in order to protect the Second Respondent's position on costs and to make such submissions on that issue as may be appropriate, depending on the outcome of the proposed appeal.

3. The proposed appeal is from a decision of Deputy District Judge Watkins, made on 27 July 2018, by which she dismissed the Appellant's application, made pursuant to section 282(1)(a) of the Insolvency Act 1986, to annul a bankruptcy order made against the Appellant on 11 January 2017, and his application for a review and rescission of that order, pursuant to section 375 of the 1986 Act.

4. The basis of the application to annul etc. was that the court lacked jurisdiction to make the bankruptcy order because the Appellant was a) not domiciled in England and Wales, b) not resident in England and Wales at any time within the period of three years ending with the presentation of the petition and c) not carrying on business within England and Wales at any time within that period, pursuant to section 265(2) of the 1986 Act.

Relevant legislation

5. Section 282 provides, so far as relevant:

> "(1) The court may annul a bankruptcy order if it at any time appears to the court --
>
> (a) that, on any grounds existing at the time the order was made, the order ought not to have been made"

Section 375 provides, so far as relevant:

> "(1) Every court having jurisdiction for the purposes of the Parts in this Group may review, rescind or vary any order made by it in the exercise of that jurisdiction."

Section 265 provides, so far as relevant:

> "(1) A bankruptcy petition may be presented to the court under section 264(1)(a) only if . . .

(b) The centre of the debtor's main interest is not in a member state of the European Union which has adopted the EC 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 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."

It is common ground that here, the three year period referred to in section 265(2)(b) is the period from 28 June 2013 to 28 June 2016 when the petition was presented.

Brief background

6. The Appellant was one of two directors and one of four shareholders in a company incorporated in England and Wales called Aversion Limited. At some point in about February 2014, the Appellant and his co-director, Dr Resendez, provided a personal guarantee to the First Respondent in respect of a loan to the company arranged through the First Respondent at that time. As a result of a default by the company, the Appellant incurred a debt of over £50,000 on the guarantee. This debt was the basis of the bankruptcy petition by the First Respondent. The company itself was dissolved on 18 October 2016.

7. The bankruptcy petition, as I have said, was presented on 28 June 2016 and the bankruptcy order was made against the Appellant on 11 January 2017. The First Respondent had obtained leave to serve the petition outside the jurisdiction in Australia, the Appellant having apparently emigrated there with his wife and family in November 2012. The application to serve out was based on the First Respondent's assertion that the Appellant had carried on business in England and Wales within the previous three years. That allegation relied, first, on the fact that he had been a director of the company until it went into administration in July 2015, and, second, on the fact that the Appellant had given a personal guarantee to the First Respondent whose lending platform was based in England and Wales.

8. Although those were the grounds of jurisdiction relied upon, it was also noted in the witness statement of Mr Harris, the First Respondent's solicitor, made in support of the service out application, that the Appellant's nationality was British and his country of residence was the United Kingdom. This was supported by exhibiting to the statement filings in Companies House of the company's annual return received as at 26 October 2014, which recorded under the heading "Company Director" that the Appellant's "usual residence" was the United Kingdom. This document was referred to by the Deputy District Judge in her judgment, as I shall describe when I deal with the First Respondent's cross-appeal.

9. The bankruptcy order was made in the absence of the Appellant. The Second Respondent was appointed as his trustee in bankruptcy with effect from 22 August 2017. On 1 May 2018, the Appellant issued his application for annulment of the order on the ground that the Court had had no jurisdiction to make it. As already

stated, the Deputy District Judge dismissed the application on 22 July 2018, and the Appellant's notice and grounds of appeal seeking permission to appeal against that decision were lodged on 16 August 2018. On 4 April 2019, the First Respondent lodged a respondent's notice and grounds of cross-appeal. The First Respondent seeks to uphold the decision of the Deputy District Judge for the reasons she gave and on the additional ground that she was wrong to reject the First Respondent's argument that jurisdiction also existed because the Appellant had a residence in England and Wales in the relevant three year period.

The judgment below

10. In an admirably succinct judgment, the Deputy District Judge reached conclusions as follows.

    1. The Appellant was not domiciled in England and Wales on the date on which the petition was presented and was not otherwise resident in England and Wales within the relevant period of three years. (No issue in this appeal arises on the question of domicile, but the Deputy District Judge's conclusion on residence is disputed by the First Respondent in the cross-appeal.)

    2. Being a director of a limited company is not sufficient to establish the carrying-on of business. (I do not understand this to be a contentious proposition.)

    3. The provision of a personal guarantee is not sufficient to prove the carrying-on of a business. (Again, this does not appear to be contentious.)

    4. The Appellant had consulted potential investors in the company but did not enter into a transaction to sell his shares in the company

    5. The Appellant had been exploring all the options open to the company, which may or may not have included the sale of the Appellant's shares.

    6. The discussion by the Appellant of a possible sale of his shares was analogous with a shopkeeper's attempts to sell its products.

    7. A shop which makes no sale but has a "For Sale" sign up is carrying on business.

    8. On balance, entering into discussions and attempting to sell one's shares was sufficient here to amount to carrying on a business and trading.

    On this basis, the learned Deputy District Judge dismissed the annulment application and refused permission to appeal.

The tests for permission to appeal and on appeal

11. The test for permission to appeal is well known and is set out in CPR 52.6 as follows:

    ". . . permission to appeal may be given only where –

    (a) the court considers that the appeal would have a real prospect of success; or

(b) there is some other compelling reason for the appeal to be heard."

The test for allowing an appeal is:

"(3) The appeal court will allow an appeal where the decision of the lower court was --

(a) wrong; or
(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

The appeal

12. I propose to deal first with the challenge to the Deputy District Judge's conclusion that the Appellant was carrying on a business in England and Wales in the relevant period as a result of his discussions with potential investors. The original assertion that the Appellant was carrying on business in the jurisdiction, as made in the application to serve out of the jurisdiction, was not based on this ground, as I have explained. The only evidence about this came from the Appellant himself. The Appellant's witness statement of 1 May 2018 states as follows in paragraph 14(b):

> "Following Dr Recendez resigning as director of the company on 1 February 2015, I took over the running of the company, including carrying out tasks such as instigating a stabilisation plan, recruiting members of staff, seeking to raise investment for the company, seeking insolvency advice on behalf of the company, appointing the joint administrators and assisting the administrators in trying to source a buyer of the company's business and/or assets out of the administration.'

13. In his second witness statement, the Appellant elaborates as follows:

> "I confirm that
>
> (a) I was acting in my capacity as director of the company and in keeping with my duties as director of the company when I raised concerns as to the company's financial viability and I was introduced to Keith Marshall of Duff and Phelps by the company's accountant.
> (b) I was acting in my capacity as director of the company and in keeping with my duties as director of the company when I caused the company to formally instruct Duff and Phelps to consider and evaluate insolvency exit strategies and to assist in the marketing of the business and assets of the company for sale.
> (c) I confirm that prior to the formal instruction of Duff and Phelps that I, in my capacity as director of the company, had been in discussions with potential investors/purchasers to establish whether they would be interested in investing in the company (either by way of loan and/or share sale) or interested in purchasing the business and assets of the company, either as a going concern or on an asset breakup basis, either with or without the company being in an insolvency procedure.

In this regard, I make two points:

(i) I was not the sole shareholder of the company at the time and
(ii) No terms or transaction between me and another party in respect of my shares in the company was entered into during the relevant period. I was merely exploring all the options available to the company as a result of its financial position which may or may not have involved a sale of my shares in the company. Ultimately, the only option available was a pre-pack sale of the business and assets of the company out of administration. As at the date the company was dissolved, I remained a shareholder of the company."

14. It was on this evidence that the Deputy District Judge concluded, on the balance of probabilities, that the Appellant was carrying on business in England and Wales during the relevant period. She first noted that in the light of the authorities, in particular *Gate Gourmet Luxembourg IV SARL & Anor v Morby* [2015] EWHC 1203 (Ch), a single transaction relating to a sale of shares was capable of amounting to carrying on business, but there was no such transaction here. At paragraph 21 of the judgment she said:

> "It is not clear whether there were discussions in relation to the sale of shares which may have constituted the carrying on of business"

Ms Temple points out that this last comment is, on the face of it, somewhat inconsistent with the Deputy District Judge's conclusion.

15. The Deputy District Judge went on to ask whether, on the evidence of the Appellant, there was any "dealing" or "involvement" with the shares and if there was, whether it was sufficient to show a carrying on of business in England and Wales on the balance of probabilities. In answering this question, she obtained assistance from the analogy of a shop with no customers and no actual sale taking place but where there was an attempt to sell. She considered the Appellant's words in his witness statement in this context and concluded that he had been in discussions with potential investors or purchasers to establish whether they would be interested in a share sale. This, she said, had occurred regardless of the fact that those discussions took place at the same time as discussions about investment into the company. The Deputy District Judge said she was:

> "Unable to conclude that no active effort was made by the [Appellant] to sell his shares."

That was sufficient and it was not necessary to complete the transaction. Offering items for sale in one's shop was, she said, carrying on business even if there were no customers. On that basis, the Deputy District Judge refused to annul the petition.

16. Ms Temple submitted that the Deputy District Judge was wrong to conclude as she did and that she had misunderstood the Appellant's evidence. She had not sufficiently appreciated that the context of the Appellant's exploration of all the options was the financial distress of the company and that the discussions with potential investors/purchasers were, in the Appellant's words:

> "To establish whether they would be interested in investing in the company (either by way of loan and/or share sale) or interested in purchasing the business and assets of the company, either as a going concern or on an asset breakup basis, either with or without the company being in an insolvency procedure."

In other words, any discussion of a share sale was inextricably linked to the aim of rescue by an outside investor who might wish to purchase the company, i.e. the shares, or only the assets and business of the company.

17. Ms Temple also argued that the shop analogy was inappropriate and unhelpful. She submitted that a shop would likely have physical premises or an online platform, and a shopkeeper/sales agent ready to make a sale; a physical shop would have to pay business rates and possibly rent and would probably advertise. It would have made purchases in advance to attempting to sell stock; it represented a trade and a considered attempt to do business. She submitted that this was distinct from the situation here, where the Appellant, in his capacity as a director of the company, was discussing the mere possibility of selling the company's shares, which were partly owned by himself, in the wider context of considering all the options for the company to attract potential rescuers from its financial circumstances.

18. Ms Temple submitted that the analogy clearly played a major part in the Deputy District Judge's reasoning and was an immaterial and therefore an impermissible factor, which amounted to an error of law. She submitted that the jurisdictional test of carrying on business was simply not satisfied on the evidence, and the Judge had been wrong to find otherwise.

19. Mr Currie, in response, argued that the Deputy District Judge was right for the reasons she gave. He pointed out, first, that dealings with shares do not constitute the business of a limited company and, in that respect, referred to the *Gate Gourmet Luxembourg IV SARL & Anor v Morby* decision, which I mentioned earlier. He submitted that dealings with shares could only be an activity carried out in the owner's personal capacity since the owner, and not the limited company, is the only party capable of dealing with shares. Second, he submitted that a single transaction can support a finding that the debtor was carrying on a business. For that proposition, he referred to a decision of Norris J in *Barclays Bank PLC v Masters* [2013] EWHC 2166 (Ch).

20. Mr Currie submitted that the Appellant's reliance on the Deputy District Judge's shop analogy was a red herring, because regardless of that, she made the right finding for the right reasons, namely that attempting to sell one's shares was sufficient to establish carrying on a business. As to the context in which the options were said to have been explored, namely in an attempt to alleviate the company's financial distress by finding an investor or purchaser, Mr Currie submitted that the Appellant, in his evidence, had conflated his two capacities, of director and of shareholder. Although he may have been acting in both capacities at the same time, insofar as he was attempting to sell, or was exploring the sale of, his shares, he was carrying on business as a matter of law. The fact that he was doing so in the context of seeking to rescue the company did not change the nature of that part of the discussions, namely that he was carrying on business on his own account. The Deputy District Judge was therefore entitled and right so to hold.

Discussion and conclusions

21. This is not a case where live evidence was heard. Thus, insofar as inferences may be drawn from witness statements and documents, an appeal court is in as good a position as the Judge at first instance in drawing those inferences. Here, there are no documents relied upon. The only material evidence is, as I have said, that of the Appellant, which I have set out verbatim so far as material. The authorities to which my attention has been drawn do not provide any magic touchstone of what amounts to carrying on a business. They do, however, contain helpful guidance, by way of examples of cases in which the activity was or was not held to have been carrying on a business.

22. Both counsel commented on the case law, seeking to draw an analogy with the present case or to distinguish it, as the case might be. From the *Gate Gourmet Luxembourg IV SARL & Anor v Morby* (above), a decision of Mr Registrar Briggs, we learn that a share purchase agreement for the sale of a group of 13 companies at a price of £12 million represented the carrying on of a business by the vendor for this purpose, albeit only a single transaction was involved. In *Barclays Bank PLC v Masters* (above), a decision of Norris J, it was common ground that merely being a director or a shareholder of a company would not of itself suffice to establish that the individual concerned was carrying on a business. The same appears to apply to the giving of a personal guarantee, although that too was common ground and therefore not contested in *Barclays Bank PLC v Masters*.

23. That case is also authority for the proposition that it is possible for an individual who is a participator in several companies himself to carry on an independent business. As to that, see [16](h) - [22] of the judgment of Norris J. At [20] - [22], Norris J said:

> "In principle, there is no reason why a single transaction should not constitute the carrying on of business if, on the totality of the evidence that appears to be the position: see *Kenny v Conroy & Anor* [1999] 1 WLR 1340.
>
> 21. I turn to the application of those principles. What is the totality of the evidence that the debtor carried on the business of acquiring aircraft in England independently of any company since 16 May 2009?
>
> 22. Barclays led no direct evidence but relied on inference to be drawn from the transactional documents. It did not rely upon Mr Masters being resident, it relied upon his carrying on business. Mr Masters led direct evidence that he had not carried on business in England since October 2007. It is true that he led that evidence to meet a case that he was carrying on business as a tax advisor (not as an acquirer of aircraft) but he was responding to the case then made against him. A court would need to be able to draw upon very strong inferences if it was to regard as inherently unbelievable direct evidence of the nature given by Mr Masters, particularly

> when the case run against him had emerged only in a skeleton argument and was contrary to the case actually advanced in the petition ("occupation unknown") and in the proposed amended petition ("tax advisor")."

That last passage is more relevant to an issue in the cross-appeal but the reference to the need to have regard to the totality of the evidence also applies at this stage.

24. As noted earlier, I am in as good a position as the court below to assess the Appellant's evidence. However, I must also remind myself that this is an appeal and not a re-hearing and that in order to allow an appeal, it is not sufficient to hold that the appeal court would have come to a different decision. It is necessary that the court below was wrong and not entitled to find as it did. Bearing those principles in mind, I have nevertheless come to the conclusion that the Deputy District Judge did err in holding that in exploring with potential investors/purchasers the options for rescuing the company from its financial distress, the Appellant was carrying on business simply because one of the options might have involved the sale of shares in the company, including the Appellant's shares.

25. Ms Temple correctly emphasised the words in parenthesis in paragraph 9(c) of the Appellant's second witness statement, to which I referred earlier, and which the Deputy District Judge did not cite in her quotation from the evidence. In my view, if a responsible director of a financially distressed company is seeking a rescue of the business, it is difficult to see how the exploratory discussions with investors or purchasers could avoid touching on a possible transfer of shares if that is what the potential investor happens to be interested in. The evidence of the Appellant emphasises that this was the sole context in which a possible share sale would have been touched on.

26. I understand Mr Currie's submission that there can be two capacities in play, but I do not agree that the evidence here could justify a finding that the Appellant was acting *qua* shareholder rather than solely as a responsible director in the context described in the unchallenged evidence. The mere possibility that, if a purchaser wanted to buy the shares in the company, the Appellant would then have benefitted *qua* shareholder, does not, in my view, alter the position.

27. I agree with the Deputy District Judge that there is no good reason why, in circumstances where a completed transaction would constitute the carrying on of a business, an inchoate transaction or even a transaction that was simply under discussion, would not also do so, all other things being equal. It is the totality of the evidence and the context which would be material, whether the transaction was completed or not.

28. On the evidence, there are here none of the *indicia* seen in the cases where a shareholder is carrying on an independent business, and no feature is present that would not apply where a responsible director wishes to explore the options for his company as a prelude to engaging a professional insolvency practitioner. I agree with Ms Temple that the shop analogy is not helpful and may have misled the Deputy District Judge. The evidence shows a director exploring the options for rescuing a company from financial distress. It is in no way analogous to a shop with or without customers and sales. I therefore conclude that the Deputy District Judge

erred in holding that, on the evidence, the Appellant was carrying on a business in England and Wales at the material time.

The cross appeal

29. In her judgment, the Deputy District Judge held that the Appellant did not have a residence in England and Wales in the relevant period. The First Respondent's argument to the contrary was based on the filing at Companies House to which I have referred and which, as at 22 October 2014, recorded that the Appellant's "Usual residence" was the UK. It is common ground that the filing for the previous year recorded his usual residence as Australia. The Appellant's evidence to the Deputy District Judge as to his residence was mainly contained in his first witness statement. So far as the material, paragraphs 14 and 15 stated as follows:

> "(c) my address for service relating to that directorship on Companies House was Gresham House, 5-7 St. Paul's Street, Leeds, West Yorkshire LS1 2JR, this being the registered office of the company and
> (d) my nationality and country of residence relating to this directorship held on Companies House was the UK.
>
> 15. It is my respectful position that the petition has been presented contrary to the terms of Section 265 of The Insolvency Act 1986 because
>
> (a) Since November 2012, my centre of main interest has been Australia
> (b) Since November 2012, I have been domiciled in Australia and
> (c) During the period of three years prior to the presentation of the petition, namely 28 June 2013 to 28 June 2016 … I have not been ordinarily resident or had a place of residence or carried on business in England and Wales"

30. The Appellant went on, in his witness statement, to explain that in November 2012 he, his wife, and children had emigrated to Australia, and that between then and 21 December 2012 they had rented a holiday property; thereafter, until April 2015, they had rented a property known as 8 Bayfield Crescent in Western Australia, and that he had, in that period, lived there on a permanent basis with his wife and children. He exhibited copy utility bills and various other documentary material in support of that account. He then stated that in April 2015 he and his wife purchased a property known as 5 Lighthouse Parade, Mindarie in Western Australia, and that since then he and the whole family had continued to live there on a permanent basis. Again, he exhibited utility bills in his name in support.

31. He further explained that from the time of his emigration in 2012 until 19 December 2017, he had been employed by various Australian companies and had worked directly for them or on fixed term contracts as a consultant, but based in Australia or Senegal, and all for Australian clients. He exhibited copies of his Australian tax

returns in that period. He stated that during the three years relevant to this case his only income had related to the employment that he had undertaken in Australia, and that in that period he had paid tax, operated bank accounts and paid bills in Australia.

32. The Appellant also explained that between 29 November 2012, when he emigrated, and 1 February 2015, his co-director, Dr Recendez, had administered the company on a day to day basis, although the Appellant had remained a registered director and shareholder in it; that on the latter date, his co-director had resigned and thereafter, and therefore, during the relevant three year period, he had conducted the day to day administration of the company, as the sole registered director; but he disputed that that was sufficient to be carrying on a business for the purposes of the legislation in question. He pointed out in the same witness statement that the majority of the tasks that were necessary in order to conduct the administration of the company were done remotely from Australia. Then, and finally so far as relevant to this issue, he stated that the correspondence address for his directorship on Companies House records was the company's registered office in Leeds, and that that was an address solely used for the purposes of the corporate activity of the company and had never been used by him as a residence address.

33. The Deputy District Judge found at [12] of her judgment that, on the balance of probabilities, the Appellant was not domiciled in England and Wales. In so deciding, she referred to the words of Norris J in *Barclays Bank PLC v Masters* (above) to the effect that a court would need to be able to draw very strong inferences if it was to regard the direct evidence in question as inherently unbelievable.

34. In relation to the residence issue, the Deputy District Judge then continued as follows at [13]:

> "Considering then the issue of residency, similar [it appears that there is a word missing] applies. I have direct evidence in the form of a witness statement from the debtor. Whilst I have also seen other circumstantial evidence, I do not have anything strong enough to displace the direct evidence given in the witness statement, based on the balance of probabilities."

35. Mr Currie criticises this holding of the Deputy District Judge. He submits that she ought to have found that at some point in the relevant three year period, the Appellant was either ordinarily resident, or had a place of residence, in England and Wales. He submits that she was wrong to characterise the documentary evidence consisting of the filing at Companies House, as "circumstantial". It was, he submits, direct evidence that the Appellant had a place of residence in the United Kingdom and there has, he points out, never been a suggestion that the Appellant was resident anywhere in the United Kingdom apart from in England and Wales. Mr Currie stated that under section 163 of the Companies Act 2006, a director's usual country of residence within the UK is information required to be on the company's register of directors. He submitted that it was important information which should be able to be relied upon by the public. In that regard, he referred to the decision of Chief Master Marsh in *Key Homes Bradford Limited and Ors v Patel* [2014] EWHC B1 (Ch), in which the Chief Master emphasised the responsibility of a director for keeping up to date the address for service of proceedings on him as shown in the public record (see [26] of the judgment).

36. Mr Currie submitted that in preferring the evidence of the Appellant to the evidence of the Companies House filing, the Deputy District Judge attached too little weight to the latter and too much weight to the dictum of Norris J in *Barclays Bank PLC v Masters.* Mr Currie pointed out that, in his evidence, the Appellant had not provided any explanation for the statement in the 2014 Companies House filing, and contended that it was incumbent upon him to do so. He also submitted that the filing represented an apparently deliberate change from the previous year, where the usual residence had been recorded as Australia, a factor noted by Mr Harris in his own witness statement. Had the Deputy District Judge not mischaracterised the contemporaneous documentary evidence as "circumstantial", she would have rejected the Appellant's evidence and found that he was resident in England and Wales at some point during the three year period.

Discussion and conclusion

37. I ask myself whether the Deputy District Judge was wrong to prefer the written evidence of the Appellant to the documentary material at Companies House, or whether she was entitled to find as she did in the light of the totality of the material before her. Although she was in no better position to draw inferences than am I, I also remind myself once more that this is an appeal and not a re-hearing. The issue is in the nature of a factual one, in contradistinction to the question of whether, on admitted facts, the Appellant could be said to be "carrying on a business" within the meaning of the legislation. Whether the Appellant had a place of residence in England and Wales during all or part of the material period, is a question of fact.

38. The position before the Deputy District Judge was as follows. There were two witness statements by the Appellant in which he explained in some detail his and his family's emigration to Australia and their subsequent arrangements for accommodation and employment there, including details of the family homes rented and purchased by them in Western Australia, and of the employment he had acquired throughout the relevant period. He also stated in clear terms in both witness statements, signed with statements of truth, that he had had no residence in England and Wales in that three year period. Also in his evidence were details of how the day to day running of the company had been undertaken by his co-director from the time of his emigration in 2012 until February 2015 when, by reason of his co-director's departure, it fell to the Appellant to administer the affairs of the company as the sole remaining director; he described how the majority of those duties were carried out "remotely from Australia".

39. As against that evidence, there is the Companies House filing of October 2014 which the Deputy District Judge considered insufficient to counteract the witness evidence of the Appellant. It is correct that what must, on the basis of the court's finding, be an error in the Companies House filing, is not really explained by the Appellant in either of his witness statements. However, it is to be noted that the filings for both 2013 and 2014 would have been made after the Appellant had emigrated to Australia in 2012 and when his co-director is said to have been conducting the day to day administration of the company. Presumably that would have included compliance with the statutory requirements for filing directors' details at Companies House. There is nothing in the evidence to suggest that the Appellant, rather than his co-director or some other employee or contractor, actually made the filing in question, although as director, the Appellant was no doubt responsible for its accuracy. I also accept that the change from Australia to the United Kingdom residence in the filings

in consecutive years would appear to have been deliberate and is also unexplained. The Deputy District Judge would clearly have been aware of this.

40. Despite the 2014 filing and despite the very able submissions of Mr Currie, I cannot conclude that the Deputy District Judge was not entitled to find the facts as she did. The authorship of the 2014 filing is not clear, and it was made at a time when the evidence indicates that someone other than the Appellant had day to day conduct of the company's affairs. The evidence of permanent emigration by the Appellant, his wife and children is detailed and unchallenged. There is no evidence of the Appellant having a place of residence at any particular location in England and Wales. On the basis of his evidence, there would be no need for him to have such, even though his evidence implies that he would have visited the United Kingdom during the relevant period.

41. In these circumstances, the Deputy District Judge's finding of fact on this point cannot be successfully impugned on appeal.

Result

42. Therefore, on the Appellant's appeal, permission to appeal is granted and the appeal is allowed. The First Respondent's cross-appeal is dismissed. I invite the parties to agree an order reflecting this judgment for my consideration. I adjourn the hearing and, in particular, I adjourn any argument on consequential matters to a future date unless the parties can agree all such matters in the meantime.
