

Neutral Citation Number: [2023] EWHC 2205 (Ch)

Case No: BR-2022-000016

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT LIST (CHANCERY DIVISION)
IN BANKRUPTCY
IN THE MATTER OF NICHOLAS WALLIS
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
London
EC4A 1NL

Date: 7 September 2023

Before :

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE RAQUEL
AGNELLO KC

BETWEEN:

LFC HORKSTOW LTD

Petitioner

-and-

NICHOLAS WALLIS

Respondent

Ms Chelsea Carter (instructed by Andrew Jackson Solicitors LLP) for the Petitioner
Ms Wendy Parker (instructed by Locke Lord (UK) LLP) for the Respondent

Hearing date: 26 May 2023

JUDGMENT

Introduction and background facts

1. This is the hearing of the bankruptcy petition presented by the Petitioner against Mr Nicholas Wallis ('the Debtor') on 12 January 2022. The main issue before me relates to whether as at the time that the bankruptcy petition was presented, the Debtor's centre of main interest (COMI) was in England and Wales with an important second issue relating to service of the statutory demand. In so far as on the relevant balance of probabilities, I am not satisfied that the Debtor's COMI was in England and Wales, then the petition must be dismissed on jurisdictional grounds. This is agreed between Counsel acting on behalf of the Petitioner and the Debtor. I will start with a brief summary of the relevant background before turning to the main issue and the legal principles.
2. The debt which forms the subject matter of the petition arises from the terms of a settlement agreement annexed to a Tomlin which was entered into between the Petitioner, the Debtor and Secured Housing Action Rental Enterprise Limited. (SHAREL). Under the terms of the settlement agreement dated 22 January 2015 (being the same date as the Tomlin order) SHAREL agreed to pay the sum of £55,000 inclusive of any costs or VAT in certain instalments which were set out in the agreement. Clause 3.2 states that if payment is not made by SHAREL in relation to any of the three instalment payments due, the Debtor agreed to pay the relevant instalment or the outstanding payment to the Petitioner. Interest accrued on the relevant sum outstanding. On 17 February 2015, a payment in the sum of £10,000 was made but, according to the Petitioner, no further payments have been made under the terms of the settlement agreement. The Debtor asserts that a further £10,000 has been paid and I will deal with this later in this judgment.

3. On 14 December 2020, the Petitioner, the Debtor and SHREL entered into a standstill agreement suspending the time for commencing any claim arising out of or connected with the settlement agreement until the earlier of, service of proceedings by any party in connection with the dispute, or 21 January 2022.
4. On 23 November 2021, the Petitioner signed a statutory demand against the Debtor claiming the sum of £53,318.91 under the terms of the settlement agreement. According to the Petitioner, this was served in accordance with the Insolvency proceedings practice direction. No application was made seeking to set aside the demand and on 12 January 2022, a bankruptcy petition was presented to the court. The Debtor filed a notice of opposition on 14 October 2022. The matter came before the court for directions before it was listed for a full hearing on 26 May 2023. There is evidence filed by both sides. Neither party made an application for cross examination. As I observed at the hearing, that was somewhat surprising in that generally, on issues relating to COMI, a direction for cross examination is generally sought and obtained from the court. For current purposes this means that unless I am satisfied that someone's evidence as set out in a witness statement is inherently incredible, I am unable to reject it or part thereof.
5. For the purposes of this judgment references to provisions in a statute will be to the Insolvency Act 1986 unless otherwise stated. Equally reference to Insolvency Rules will be to the Insolvency Rules 2016.

Grounds of opposition

6. The grounds of opposition are as follows:-
- (a) The Demand was not served on the Debtor as required by r. 10.2 of the Insolvency (England and Wales) Rules 2016 (“**IR 2016**”);
 - (b) The Debtor’s centre of main interest is France, not England;
 - (c) There is a genuine triable issue as to whether the Petitioner agreed to provide the Debtor with “credit” within the meaning of the Consumer Credit Act 1974 (“**CCA**”), and in doing so created a credit agreement which does not comply with the requirements of the CCA and is therefore unenforceable;
 - (d) The Petition debt is time-barred and therefore the Debtor has a complete defence/opposition;
 - (e) The Petition debt is overstated by £10,000.00, and as a result the claim for interest is also overstated.
7. As stated above, the submissions concentrated on two of the grounds, being the issue of service of the statutory demand and the issue of the Debtor’s COMI. As to the other grounds, I will dispose of the other grounds which were set out in the Notice of Opposition but which Ms Parker, acting on behalf of the Debtor, did not seek to take actively any further beyond what was set out in her skeleton.
8. In relation to the issue pursuant to the Consumer Credit Act 1974, in my judgment, there was a complete lack of evidence before me relating to the underlying proceedings which resulted in the settlement agreement. The grounds of opposition rely on *CFL Finance Ltd v Laser Trust [2021] EWCA Civ 288*, but the evidence fails to provide any details as to the underlying claim and whether

there was merit in the defence and counterclaim so as for me to be able to form any judgment whatsoever relating to whether there is a bona fide issue relating to the agreement being caught pursuant to the Consumer Credit Act 1974. Accordingly, in my judgment, this ground of opposition has not been established and fails.

9. In relation to the limitation period issue, the Debtor seeks to argue that time does not stop running for limitation purposes by the presentation of the petition and therefore, the claim is now statute barred. In my judgment, this point lacks any merit. The real question is, in my judgment, whether at the date which the petition was presented, the debt was time barred. The Debtor does not assert that to be the case and it is clear in my judgment that the debt was not time barred as at the date of presentation of the petition. (see further *Mittal v RP Capital Explorer Master Fund* [2014] BPIR 1537 and *Ridgway Motors(Isleworth) Ltd v ALTS Ltd* [2005] 1 WLR 2871). Accordingly, this ground of opposition is also rejected.
10. Finally, the ground relating to the payment in cash of a further £10,000 takes the Debtor nowhere. The petition sought the sum of £53,318.91 so a deduction of £10,000 leaves a significant sum outstanding. I do not need to consider the evidence relied upon by the Debtor, which consists essentially of a bare assertion as to the payment of a further £10,000, as this ground would not result in the dismissal of the petition. I will turn to the two issues which dominated the hearing before me.

Service of the Statutory Demand

11. Rule 10.2 IR 2016 states that a creditor must do all that is reasonable to bring the statutory demand to the debtor's attention and, if practicable, in the particular circumstances, serve the demand personally. Ms Carter, on behalf of the Petitioner, asserts that in the circumstances, the Petitioner did do all that was reasonable to bring the statutory demand to the attention of the Debtor. The settlement agreement as well as the standstill agreement, dated 2015 and 2020 respectively both state that the Debtor's address was 37 Avenue Close, Avenue Road, London NW8 6DA ('the Property'). Accordingly, it is unsurprising that the Petitioner sought to serve at the address it had for the Debtor.

12. The Debtor asserts that he has lived in France since 2018. I will come back to this statement when I deal with the issue of COMI, but for present purposes, it is noteworthy that this statement directly conflicts with the standstill agreement which is dated December 2020 and which states that the Debtor's address is the Property. Moreover, at the time that the standstill was agreed and thereafter executed, the Debtor was legally represented. The Debtor provides no explanation, and neither do his solicitors who were acting for him at the time, as to why an address, which on the Debtor's case, was not his address in December 2020, was used in the standstill agreement.

13. As Ms Carter noted, at no point after the execution of the standstill agreement in December 2020, did the Debtor or his solicitors indicate a change of address. In my judgment, this is important because clause 10.1 of that agreement provides for such notification of change of address. On 6 December 2021, prior to the service of the Demand, the Petitioner's solicitors emailed the Debtor's solicitors a copy of

the Demand (which stated that address of the Debtor as being at the Property) and asked them to confirm whether the Debtor was still alive (they had been informed that he was seriously ill earlier that year) and if so, whether they were acting for him and his current address. The Debtor's solicitors confirmed that he was alive and that they would take instructions. The reply provided was, in my judgment, somewhat unsatisfactory. These were the same solicitors who had acted for the Debtor throughout and, in particular, they had acted for him when the standstill agreement was signed. Whether or not the solicitors knew that the Debtor was asserting that he had moved to France and/or that the address provided in the standstill agreement was no longer valid, there was a failure by the solicitors to reply properly to the Petitioner's solicitors. There does not appear in the evidence before me, to be any further email which provided a reply to the issues raised beyond the one referred to above. In my judgment, the reply provided was such that the Petitioner was entitled to rely upon the address which was set out in the standstill agreement in circumstances when opportunities had been given, both under the terms of the standstill agreement as well as in the correspondence between the solicitors to change the address, but no other address or information was provided. The Debtor asserts that the Petitioner was aware that he lived in France. In my judgment, the evidence does not establish this point. It is in any event disputed by the Petitioner who asserts that its knowledge is that it was aware that the Debtor had received medical treatment in France and was at some stage convalescing there. Moreover, for the purposes of service, the test is whether the Petitioner has done all that is reasonable. The Debtor himself provided an address in the standstill agreement and failed to notify that a different address should be

used. This is particularly important when the standstill agreement related to the Petitioner being able to bring proceedings against the Debtor. This is important on the facts of this case where the same solicitors were acting on behalf of the Debtor, where the Debtor expressly asserted that his address was the one set out in the standstill agreement and despite the terms of the standstill agreement, no other address was provided.

14. According to the evidence of the process server, Ms Elizabeth Schmidt dated 21 December 2021, she attended the Property on 10 November 2021 to serve the Debtor and there was no answer. She returned on 20 December 2021 and attended the porter's office but there was no reply. On 13 December 2021, she returned and met with someone who said there was no one at the property and that it was being re decorated. However she also met with the porter, 'Jezin' who confirmed that the Debtor received all mail sent to him there. On 2 December 2021, the process server then posted the Demand by first class post. It is important to note that the reply to the email dated 6 December 2021 from the Debtor's solicitors had failed to provide any other address.

15. Thereafter, the Petitioner's solicitors sent an email dated the 22 December 2021 to the Debtor's solicitors attaching the Demand and the certificate of service. Although the solicitors had not expressly confirmed that they were continuing to act for the Debtor, in my judgment, this was an assumption which the Petitioner's solicitors were entitled to make. They had asked the question in their email dated 6 December 2021 and there was no statement in the 9 December 2021 reply that the solicitors were no longer acting. Instead, it stated that they would take

instructions from the Debtor. Furthermore, there was no reply to the email dated 22 December 2021 which attached both the Demand and the certificate of service. I should add that the Debtor's solicitors had expressly asked in their email dated 6 May 2021 for the Petitioner's solicitors not to copy the Debtor into emails because he was and remained unwell. There is no subsequent correspondence in the evidence before me which altered this direction from the Debtor's solicitors and this is also important in considering the steps taken by the Petitioner.

16. Ms Carter submits that in all these circumstances, the Petitioner did all that was reasonable to bring the Demand to the Debtor's attention. She submitted that the solicitors would have or should have forwarded the Demand to the Debtor when they received the Demand via email on 22 December 2021. She noted that the Debtor did not produce evidence relating to whether the Debtor's solicitors passed on the Demand or not.

17. Ms Parker submitted that the evidence showed misleading statements in the certificate of service because of the contents of an email dated 14 December 2022 from Ms Christine Pinkney at the office of the process server, PB Process Servers UK. There is no witness statement from Ms Pinkney. I do have the witness statement of Ms Schmidt, who, as I have set out above, was the actual process server. The 14 December 2021 email stated that a neighbour had confirmed that the Debtor has moved abroad to France and that the property has been sold. The email also stated that the Porter had informed the process server that the Debtor did not live in the property and that he now lived in France. In his witness statement dated 16 December 2022, Mr Gezim Shabani states that he told a

woman towards the end of 2021 that the Debtor lived in France but that he keeps his mail there for him to collect. The statement does not assert that the process server was informed that the Debtor has not collected the letters which have been retained for him by the Porter. There was no direction given for the cross examination of the process server. I do not accept that the statement provided by Ms Schmidt is in some way inherently incredible so that it can be rejected by me.

18. The test is not whether all steps have been taken to bring the Demand to the attention of the debtor. The evidence demonstrates that post left at the Property was being collected and retained for the Debtor. This needs to be placed in the context that the Debtor expressly provided this address in the standstill agreement and failed, in so far as he asserts he has no address in England and Wales, to notify the Petitioner of another address. The Debtor's solicitor failed to reply properly to the email dated 6 December 2021 and furthermore also failed to reply to the subsequent email dated 22 December 2021 which attached both the Demand and the certificate of service. I accept the submission made by Ms Carter that the solicitor could have and should have forwarded the Demand to the Debtor. The evidence of the Debtor is completely silent on this issue.

19. In my judgment, the Petitioner has complied with the relevant rules. The Petitioner has done all that is reasonable to bring the statutory demand to the Debtor's attention. Not only was the Demand left at an address which was supplied to the Petitioner in a standstill agreement and was at no stage modified or altered by the Debtor or his solicitor, but the Process Server states that the Porter informed her that the post was collected for the Debtor by the Porter. Moreover,

the Debtor's solicitors were served via email both in early December 2021 and late December 2021 with the Demand. At no stage did the solicitors assert during this period or indeed after this period that they were no longer acting for the Debtor. In all those circumstances, I am satisfied that service has been properly effected pursuant to the Rules.

COMI

20. Article 3(1) of the Recast Insolvency Regulation (EU) 2015/848 states:-

“The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. That presumption shall only apply if the individual's principal place of business has not been moved to another Member State within the 3 month period prior to the request for the opening of insolvency proceedings.

In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the 6-month period prior to the request for the opening of insolvency proceedings.”

21. Ms Carter submitted that as at the date of the petition, 12 January 2022, being the relevant time, the Debtor was exercising an independent business or professional activity in England and therefore there is a presumption that his COMI is in England and Wales as his principal place of business. The Petitioner relies on the litigation between the Debtor and SHAREL. Initially, Ms Carter also relied upon

the business interests of the two companies, being Secured Housing Action Rental Enterprise Limited and London Leicester Properties Limited as being the business interests/activities of the Debtor himself situated in England and Wales. After the hearing, at my invitation, she considered further this point and did not maintain that submission. That is, in my judgment, correct bearing in mind *Zvonko Stojevic v Komercni Banka AS [2006] EWHC 3447(Ch)* and in particular paragraphs 44-58.

22. As to the Debtor's submission that his COMI has been France since 2018 because he has been habitually resident there since 2018, Ms Carter relied upon the following to rebut this point. Overall, she submitted that the evidence submitted and relied upon by the Debtor to establish his COMI is in France based on habitual residence was weak. The Debtor relied upon the Property being owned by his parents and not him and that he only used it for correspondence from time to time. He asserted that he lived in France and had done so since 2018 in a property owned by his wife. He submitted documentation which appeared to show that he insured his car in France in December 2020 and that his dogs have French passports. His mobile phone is an English one with an English plan. Ms Carter submitted that the Debtor was born in England and Wales and she submitted he was domiciled in England and Wales and had operated businesses in England and Wales. She submitted that it could be presumed that his income source at the time of the presentation of the Petition was the two UK registered companies. She submitted that the Debtor was registered with a doctor in England and Wales and

that the evidence presented by the Debtor effectively was insufficient to have validly shifted his COMI to somewhere other than England and Wales.

23. In her witness statement dated 24 January 2023, Ms Alexandra Erika Dorothy Wallis, his wife, states that the Debtor is financially dependent upon her and that she bought the property in France where they live. She asserts that they went to live there in 2018. She states that during lockdown she worked remotely from there. She states that during December 2020, the Debtor rented an apartment in Malta for the purpose of operating his business from there. She states that she and the Debtor lived in the apartment in Malta ‘from time to time’ and that they both have Maltese residency permits. These have been exhibited as has the tenancy agreement for the apartment in Malta. She then states that the Debtor’s businesses have not prospered for various reasons. She states that she owns a house in London and she stays there when she comes to England to work. In my judgment, it is clear from a consideration of all the evidence that the Debtor does stay in the property in London owned by his wife and has been treated for medical issues in London. He is registered with a doctor in London and has been treated in London.

24. The Debtor also relies on a series of witness statements in support of his habitual residence being France. Mr Anders Ladefoged, the retail manager of the Dynamic Supermarket in Villeneuve Loubet states in his witness statement dated 19 January 2023, that the Debtor has been a very regular customer of the supermarket and comes in nearly every week since Christmas 2018. In his witness statement dated 11 January 2023, Mr Claude Lamasuta, the President of the Tenants Association at 629 Avenue Jean Marchand, Villeneuve-Loubet , states that he

lives next door to the Debtor and that he has lived there prior to 2018, when the Debtor and his wife moved in. He states that the apartment complex is like a small village and that he frequently sees the Debtor around. Docteur Bernard Cavaliero states in his witness statement dated 12 January 2023, that he has been the Debtor's doctor in France since 2012. He states that he has seen the Debtor over the last five years and that in January 2022, he diagnosed his heart failure at the apartment. The Debtor had heart surgery which was carried out in 2022. In her witness statement dated 12 January 2023, Ms Marie Suzanne Karam, estate agent in Villeneuve-Loubet , states that she sold the apartment to the Debtor's wife in 2018. She states that she rents a parking space at the apartment complex and that she sees the Debtor most weeks and that they socialise and have dinner together. Mr Raoul Vanderwerf states in his witness statement dated 12 January 2023, that he is the manager of the Villa Marina Restaurant in the Port of Baie des Anges(Villeneuve Loubet) and that the Debtor is a regular customer of the restaurant since 2018 and additionally that he has delivered meals to his apartment when he has been too ill to attend the restaurant.

25. Mr Russell Sean Crump, an international yacht broker, states in his witness statement dated 11 January 2023, that he has been working with the Debtor on virtually a daily basis since 2018, 'to develop international business ventures together, in particular shipbroking focusing on dredgers for Turkmenistan plus other associated business based in and around the Mediterranean.' He asserts that he and the Debtor have opened offices in Lata and Dubai and that, 'Our operation is based in France with ventures in Bulgaria, Turkmenistan, Dubai and other

countries bordering the Mediterranean.’ This statement is based on a few wide ranging and bare assertions. The Debtor has not produced any evidence of the business ventures, no evidence of income (or losses or expenses paid in relation to these business ventures). There is beyond the bare and general assertions made by Mr Crump, no evidence by way of documentation or details of any projects whatsoever. To this extent, I agree with Ms Carter that this statement in particular is weak and too general and vague to provide the Debtor with some substantial evidence of business interests or ventures outside of England and Wales. In my judgment, the evidence relied upon by the Debtor can only really go towards habitual residence. I am not satisfied that the evidence demonstrates any business ventures or interests outside of England and Wales. Equally, there is in my judgement no evidence of any business interests or ventures in England and Wales at the relevant time.

26. There is no evidence presented by the Petitioner to rebut directly the evidence presented by the Debtor. I entirely accept that it is for me to assess the weight to give to the evidence presented and in particular, as I have already referred to above, some of the evidence is really no more than vague bare assertions of some business venture being carried out by the Debtor and Mr Crump. However, equally I do not consider that any of the witness statements filed relating to habitual residence are inherently incredible such that I can reject them or parts of them. Some of them lack detail, but taken as a whole, alongside the evidence of the Debtor, including the selective documentary evidence provided by him, there is a picture of the Debtor spending a lot of his time in France and effectively

living there. The evidence also appears to date this 'living' to 2018 and certainly more than six months before the presentation of the bankruptcy petition. There is no real evidence, in my judgment, which rebuts the evidence presented by the Debtor.

27. In my judgment, the Petitioner has failed to establish that the Debtor's COMI at the relevant time was in England and Wales. Even accepting that the Property address was provided in the standstill agreement in late 2020, the evidence also shows that post was being kept for the Debtor at the Property and not that he lived there. There is evidence of another property, being his wife's house in England where, in my judgement, it is clear that the Debtor stayed whilst in the UK, there is also a real lack of evidence relating to the time spent in England and Wales. There are no details relating to income and expenditure in England and Wales or in France. No bank statements have been produced and there have been no orders for specific disclosure of such documentation. There is evidence of the Debtor being registered with a doctor in England and Wales as well as having a UK mobile phone contract but nothing else appears to link him to England and Wales. In relation to France, there is evidence supporting him living in France and being there regularly. Whilst some of this evidence lacks certain details, I am satisfied taking the evidence before me as a whole that there is insufficient evidence before me to establish the Debtor's COMI in England and Wales on the basis of habitual residence. The evidence relating to the standstill agreement dates back to December 2020 and whilst the Debtor clearly failed to inform the Petitioner of a new address, this factor taken alongside the others does not establish that either he

had a business or profession in England and Wales at the time of the presentation of the petition or that he was habitually resident in England and Wales at that time.

28. It is clear from that evidence, which remains unchallenged that the Debtor does spend a lot of time in France at the apartment owned by his wife. There is no evidence which supports such a residency in England and Wales. The evidence relating to the apartment in Malta and the Maltese residence permits is somewhat confusing, but it does not in any event, support an habitual residence for COMI purposes in England and Wales. Considering the evidence as a whole, it establishes an habitual residence in France. Accordingly, I am not satisfied that the COMI of the Debtor was in England and Wales as at the time of the presentation of the petition and the petition therefore stands to be dismissed.