Neutral Citation Number: [2023] EWHC 312 (Ch)

Claim No: BR-2022-000154

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

7 Rolls Building
Fetter Lane, London

Date: Tuesday, 31 January 2023
Start Time: 10.01 Finish Time: 11.22

Before:

DEPUTY ICC JUDGE CURL KC

- -

Between:

MOBILE TELECOMMUNICATIONS CO KSCP

Petitioner

- and -

HRH PRINCE HUSSAM BIN SAUD BIN ABDULAZIZ AL SAUD

Debtor

- -

- -

STEPHEN MOVERLEY SMITH KC (instructed by **Pillsbury Winthrop Shaw Pittman**) for the **Petitioner**
JOHN WARDELL KC and **ANDREW SHAW** (instructed by **Millbank Solicitors**) for the **Debtor**

- -

APPROVED JUDGMENT

- -

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DEPUTY ICC JUDGE CURL KC:

1. Two applications connected with a bankruptcy petition presented on 1 June 2022 came before me for directions on the afternoon of 25 January 2023. The petitioner is Mobile Telecommunications Company KSCP ("MTC"). The debtor is HRH Prince Hussam Bin Saud Bin Abdulaziz Al Saud ("debtor"). For reasons that will become apparent, I will refer to that petition as the "Second Petition". The parties were represented, as they appear to have been throughout this matter, by Mr Moverley Smith KC for the petitioner MTC and by Mr Wardell KC with Mr Shaw for the debtor. The whole of the hearing on 25 January 2023 was occupied with the parties' submissions, and I was forced to reserve judgment. To avoid jeopardising the effectiveness of a one-and-a-half day listing of the Second Petition on 21 and 22 February 2023, the parties required judgment as soon as possible, and I am accordingly delivering this reserved oral judgment on the morning of 31 January 2023.

2. The two applications in issue are, firstly, an application by the debtor made on 2 August 2022 ("Second Set Aside Application") to set aside an order granting permission to MTC to carry out substituted service of the Second Petition made by ICC Judge Prentis on an ex parte basis on 19 July 2022 ("Second Service Order"); and, secondly, a renewed application for leave to serve out of the jurisdiction and by alternative means made on 12 August 202 ("Renewed Service Application").

3. I shall deal briefly first with the Renewed Service Application. This was made by MTC to address a point raised by the debtor that Judge Prentis was not entitled to make an order for substituted service without having first made an order for service out of the jurisdiction. MTC makes clear that it does not accept that the debtor's point is a good one, but it contends that in any event the Renewed Service Application renders the point academic. Mr Wardell did not dissent from that at the hearing and I did not hear any further submissions on the Renewed Service Application beyond those I have just summarised. I need say no more about it today.

4. The hearing before me concerned argument about what directions should be made on the Second Set Aside Application. The context of the dispute over directions on the Second Set Aside Application is that the debtor resists the Second Petition on the ground that this court does not have jurisdiction to make a bankruptcy order against him.

5. Section 265 of the Insolvency Act 1986 provides, insofar as relevant, as follows:

> "Creditors petition: debtors against whom the court may make a bankruptcy order.
>
> (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."

6. MTC relies on the jurisdictional gateway in section 265(2)(b)(i), namely that at any time in the period of three years ending with the day on which the petition is presented, the debtor has had a place of residence in England and Wales. The debtor contends that that condition is not satisfied and he has not had a place of residence in England and Wales during that time.

Directions Sought

7. MTC seeks the following directions. Firstly, MTC seeks a direction that the debtor may not rely on any of the witness statements filed on his behalf in support of the Second Set Aside Application. There are eight such statements and three exhibits at tabs 15 to 25 of the hearing bundle filed between 2 August and 14 November 2022. The debtor has made two of those statements. His mother HRH Princess Noorah Bint Abdullah Fahad Al-Damir has made one statement dated 13 September 2022, which is a particular focus of the issue on the Second Set Aside Application and the Second Petition. I shall refer to this proposed direction as the "Witness Statement Direction".

8. It is submitted by MTC, in brief summary that I will expand upon in due course, that the debtor may not rely on these statements (which I will refer to as the "New Evidence" to distinguish this evidence from evidence the debtor has filed in the past and without intending to connote anything other than that) because the question of whether or not the debtor had a place of residence in England and Wales at any time during the three years ending on the day on which the Second Petition was presented (being 1 June 2022) has already been determined and there exists an issue estoppel in MTC's favour. Secondly, and only if I decline to make the Witness Statement Direction, MTC seeks a direction for the cross-examination of the makers of those witness statements at the hearing of the Second Set Aside Application. I shall refer to that proposed direction as the "Cross-examination Direction".

9. Both directions are resisted by the debtor. The debtor does not seek any further directions on either the Second Set Aside Application or the Renewed Service Application, save that they be listed for final hearing.

Background

10. I turn now to the factual background. I take this as briefly as possible, although it must be gone through in a certain amount of detail, given that MTC's position turns on what has happened in litigation between it and the debtor in earlier proceedings.

11. On 23 December 2015, MTC obtained an arbitration award in its favour against the debtor for US $527 million. That award has not been satisfied and, with interest, it is said now to be US $817 million. An antisuit injunction was granted on 18 May 2018 in this jurisdiction against the debtor on the application of MTC. The debtor was held in contempt of that injunction on 10 August 2018 and was committed to prison for 12 months. That order remains outstanding and the debtor has not served his sentence. As a consequence of those English proceedings, costs awards were made in MTC's favour.

12. On 4 June 2019, MTC sought a charging order over a flat at 24 York House in Kensington ("York House"), the legal owner of which was Princess Noorah, the debtor's mother. At that time, the debtor paid the council tax due on York House. In the course of contending that the debtor had no beneficial interest in that property, despite his paying the council tax, the debtor's mother's solicitors (Withers LLP) wrote a letter to MTC's solicitors dated 14 August 2019. Withers said:

> "We deal first with 24 York House as that property has been held for the longest time. The sole legal and beneficial ownership of 24 York House is with the defendant's mother, Princess Noorah. 24 York House has been her London home for more than 40 years and continues to be so. The lease was originally purchased by her with her own money. The same applies to the lease extension and the premium paid for it.
>
> Until the other London properties were purchased, 24 York House was the only property in London owned by the family and, therefore, **Princess Noorah has allowed various family members, including the defendant, to reside and stay there from time to time**. That does not, of course, create a beneficial interest in it. **It is quite natural for a mother to let her son live in a property which she owns**. The fact that loans may have been taken out by the defendant and secured against 24 York House also does not mean that he has a beneficial interest. In any event, they have all been discharged. The AP1 that you exhibit was completed by solicitors acting for the lender and was incorrect. Paying the council tax does not mean that a person has beneficial interest. There can be many reasons why it is expedient for a person to assume responsibility. **In this case, it was so that the defendant had an address in London**." (emphases added)

13. Soon afterwards, on 3 September 2019, the debtor's mother made a witness statement which included at paragraph 6 the following:

> "24 York House is a substantial apartment and has room for family members to stay and **reside there with me**. This is what has happened over the years. **This has included the defendant, his wife and my grandchildren**. It has also enabled them 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 back accounts, etc. For this reason, family members, including the defendant, have been registered as liable to pay the council tax from time to time. That does not mean that they have had a beneficial interest in 24 York House at any time. They have not. I am the only person who has had the beneficial interest in 24 York House." (emphases added)

14. This material speaks for itself in its clarity on the question of the debtor's right to reside at York House. At the time, no bankruptcy petition had been presented.

15. On 21 February 2020, MTC presented a bankruptcy petition for the costs of the English proceedings ("First Petition"). MTC relied, as it relies to ground jurisdiction on the Second Petition, on the gateway in section 265(2)(b)(i) of the Insolvency Act 1986. This required MTC to satisfy the court that the debtor had had a place of residence in England and Wales in the three-year period ending with the day of presentation, i.e., in the period from 22 February 2017 to 21 February 2020 ("First Relevant Period"). ICC Judge Jones granted permission on 17 March 2020 on the ex parte application of MTC to serve the First Petition out of the jurisdiction with a provision for substituted service ("First Service Order"). The debtor applied to set aside the First Service Order on 7 April 2020 on the basis that the debtor had not had any place of residence in England and Wales in the first relevant period ("First Set Aside Application").

16. On 14 December 2020, Deputy ICC Judge Schaffer heard and dismissed the First Set Aside Application. A transcript of Deputy ICC Judge Schaffer's ex tempore judgment is in the bundle.

17. The debtor appealed the order refusing to set aside the First Service Order. Roth J heard that application on 15 March 2022, and handed down a reserved judgment on 31 March 2022 ([2022] EWHC 744 (Ch), [2022] BPIR 1001). Roth J found that the Deputy Judge had wrongly applied the evidential standard of balance of probabilities in his judgment. His Lordship held that the approach that the court must apply in determining whether the petitioner had established a ground for service was that which applies under CPR Part 6, with the consequence that the standard of proof was the lower standard of good arguable case, rather than that of balance of probabilities. Given that misdirection at first instance, Roth J undertook the application of the test to the facts afresh on appeal. Having done so, Roth J upheld the order below and refused to set aside the First Service Order.

18. On 24 April 2022, the debtor paid the debts claimed in the First Petition.

19. On 25 May 2022, ICC Judge Prentis refused MTC permission to amend the First Petition to include the arbitration debts in that petition.

20. As I have said, MTC presented the Second Petition on 1 June 2022. The face value of the debt claimed in the Second Petition is US $885.8 million odd which, on 31 May 2022, converted to just under £703 million.

21. Having relied once again on the gateway in section 265(2)(b)(i) in order to establish jurisdiction, MTC must satisfy the court that the debtor had a place of residence in England and Wales at any time in the three years ending with the day of presentation of the Second Petition, i.e. in the period 2 June 2019 to 1 June 2022 ("Second Relevant Period"). It will be noticed that the First Relevant Period and the Second Relevant Period overlap between 2 June 2019 (being the start of the Second Relevant Period) and 21 February 2020 (being the date of presentation of the First Petition and accordingly the end of the First Relevant Period). This sets out the context in which MTC obtained the Second Service Order on 19 July 2022 and the debtor made the Second Set Aside Application on 2 August 2022.

Test For Service Out

22. In refusing to set aside the First Service Order, Roth J explained that CPR Part 6 applies to service of a bankruptcy petition outside the jurisdiction. At paragraphs 10 and 11 of the appeal judgment, Roth J said the following:

> "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 section 265 and not in Practice Direction 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."

In this case, the issue going to jurisdiction (i.e., the ground in section 265(2)(b)(i)) will also be an issue at the final hearing of the Second Petition.

23. Roth J went on to direct himself according to the decision of the Supreme Court in *Brownlie v Four Seasons Holding Inc* [2017] UKSC 80, [2018] 1 WLR 192, and the Court of Appeal in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, [2019] 1 WLR 3514.

24. *Brownlie* deals with the evidential standard applicable to facts relevant to the availability of a jurisdictional gateway. At [4], Lord Sumption held as follows:

> "Some of the jurisdictional gateways in Practice Direction 6B merely require that the claim should be of a particular character. For example, it is a claim for an injunction regulating conduct within the jurisdiction. Others, including gateways 6(a) and 9(a) on which Lady Brownlie relies, depend on the court being satisfied of some jurisdictional fact. A relevant contract must, for example, have been made or breached in England, or relevant damage sustained there. There are two closely related problems about this. The first is a legal one, namely that none of the law's established evidential standards satisfactorily meets the case. The second is a practical one, namely that some jurisdictional facts, for example the existence of the contract said to have been made or breached in England, may be in issue at trial if the case is allowed to proceed, when they will in all probability be determined on fuller material than is likely to be available at the interlocutory stage. The same is true of the more general requirement that if it proceeds the claimant should have a reasonable prospect of success."

25. In that passage, Lord Sumption identified what he saw as the "problem" of being satisfied of some fact at the jurisdictional stage when that fact may well be live at trial. I mention this in order to emphasise that there is nothing unusual about the factual basis relied on to establish jurisdiction being live again at trial or other final hearing. That will not always be the case, but it is not unusual for it to be so.

26. Lord Sumption (with whom Lord Hughes agreed) went on to clarify the evidential standard for establishing a good arguable case on jurisdiction. His Lordship reviewed the authorities, including the decision of the Court of Appeal in *Canada Trust Co v Stolzenberg (No. 2)* [1998] 1 WLR 547.

27. Lord Sumption cited at [7] of *Brownlie* the following passage from Waller's LJ judgment in *Canada Trust* at 555:

> "'Good arguable case' reflects . . . that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e., of the court being satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction."

28. Having cited Waller LJ, Lord Sumption then continued at paragraph 7 of *Brownlie*:

> "When the case [that is the *Canada Trus*t case] reached the House of Lords, Waller LJ's analysis was approved in general terms by Lord Steyn, with whom Lord Cooke of Thorndon and Lord Hope of Craighead agreed, but without full argument [2002] 1 AC 1, 13. The passage quoted has, however, been specifically approved twice by the Judicial Committee of the Privy Council: *Bols Distilleries BV (trading as Bols Royal Distilleries) v Superior Yacht Services Ltd* [2007] 1 WLR 12, paragraph 28, and *Altimo Holdings*. In my opinion, it is a serviceable test, provided that it is correctly understood. The reference to 'a much better argument on the material available' is not a reversion to the civil burden of proof which the House of Lords had rejected in *Vitkovice*. 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. I do not believe that anything is gained by the word 'much', which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

29. That approach (i.e., the three limbs from *Brownlie* just referred to) was subsequently approved by a unanimous Supreme Court in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, [2018] 1 WLR 182 at [9].

30. The three limbs from *Brownlie* were referred to in some detail by the Court of Appeal in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico S A de CV* [2019] EWCA Civ 10, [2019] 1 WLR 3514. Green LJ (with whom Asplin LJ and Davis LJ agreed) addressed in *Kaefer* the first limb in *Brownlie* (i.e., the need to show a plausible evidential basis for the application of a relevant jurisdictional gateway) at [73] as follows:

> "It is in my view clear that, at least in part, the Supreme Court confirmed the relative test in *Canada Trust*. This is plain from the express endorsement of that test in *Brownlie*, and nothing in *Goldman Sachs* detracts from that analysis, but

> on the contrary operates upon the basis that *Brownlie* was correct. The reference to 'a plausible evidential basis' in limb (i) is hence a reference to an evidential basis showing that the claimant has the better argument. It is perhaps relevant that in the Court of Appeal in *Brownlie*, Arden LJ expressly linked the formulation of Waller LJ in *Canada Trust* with a concept of relative plausibility: at paragraph 23. The use of 'plausibility' as a guiding relative principle in *Brownlie* and in *Goldman Sachs* was not therefore a novelty plucked from a jurisprudential void."

31. Green LJ then said this at [76] on limb (i):

> "In expressing a view on jurisdiction, the court must be astute not to express any view on the ultimate merits of the case, even if there is a close overlap between the issues going to jurisdiction and the ultimate substantive merits: see for example per Waller LJ in *Canada Trust* at page 555F, Teare J in *Antonio Gramsci Shipping Corporation v Recoletos Ltd* at paragraph 39, and Aikens LJ in *JSC Aeroflot Russian Airlines v Berezovsky* at paragraph 14."

32. Further, on limb (i), Green LJ referred at [77] to the reference to the need to show "much" the better case from the *Canada Trust* case, and held:

> "Next, the adjunct 'much' in the *Canada Trust* formulation must be laid to rest. This was the view expressed by a variety of judges prior to *Brownlie* and the word was, rightly in my view, deemed superfluous in *Brownlie* by Lord Sumption. There is no discernible logic for saying that jurisdiction arises if the claimant, having established that it has the better case (relatively), then has to proceed upwards and onwards *and* show that it has 'much' the better case. A plausible case is not one where the claimant has to show it has 'much' the better argument."

33. Next, Green LJ dealt with limb (ii) of the *Brownlie* test (i.e., the onus on the court to overcome evidential difficulties if it reliably can). Green LJ said this 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 dispatch and without hearing oral evidence': see per Lord Steyn in the House of Lords in *Canada Trust* at paragraph13, and per Lord Rodger of Earlsferry in *Bols* at paragraphs 27 and 28."

34. Finally, Green LJ turned to limb (iii) of the *Brownlie* approach (i.e., what happens when the court is unable to form a decided conclusion on the evidence before it and cannot say who has the better argument). At [79] and [80], Green LJ explained the appropriate course as follows:

> "The relative test has been endorsed 'in part' because limb (iii) is intended to address an issue which has arisen in a series of earlier cases and which has to be

> grappled with but which as a matter of logic cannot satisfactorily be addressed by reference to a relative test: see for example *Antonio Gramsci* [2012] 2 Lloyd's Rep 365, paragraphs 39 and 44-48, per Teare J citing *WPP Holdings Italy Srl v Benatti* [2007] 1 WLR 2316, paragraph 44 ('WPP') per Toulson LJ. This arises where the court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument.
>
> What does the judge then do? Given that the burden of persuasion lies with the claimant, it could be argued that the claim to jurisdiction should fail since the test has not been met. But this would seem to be unfair because, on fuller analysis, it might turn out that the claimant did have the better of the argument and that the court should have asserted jurisdiction. And, moreover, it would not be right to adjourn the jurisdiction dispute to the full trial on the merits since this would defeat the purpose of jurisdiction being determined early and definitively to create legal certainty and to avoid the risk that the parties devote time and cost to preparing and fighting the merits, only to be told that the court lacked jurisdiction. In *Antonio Gramsci* and in *WPP*, the court recognised that a solution had to be found. In *WPP*, at paragraph 44, Toulson LJ stated that the court could still assume jurisdiction if there were 'factors would exist which would allow the court to take jurisdiction', and in *Antonio Gramsci*, at paragraph 48, Teare J asked whether the claimant's case had 'sufficient strength' to allow the court to take jurisdiction. The solution encapsulated in limb (iii) addresses this situation. To an extent, it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof, it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits."

35. That sets out the essentials of the test for jurisdiction that the court will apply to the Second Set Aside Application. I shall refer again to the approach in *Brownlie* and *Kaefer* later in this judgment.

36. I turn now to the submissions on the two directions sought by MTC. Despite the fact that MTC was the petitioner and that it was MTC who sought the directions, the parties had agreed between themselves that Mr Wardell should go first for the debtor and Mr Smith should respond for MTC. Accordingly, I address the submissions in the same order in which I heard them.

Witness Statement Direction

37. As I have mentioned, MTC contends that the Second Set Aside Application is subject to an issue estoppel between MTC and the debtor arising from the dismissal of the First Set Aside Application. For that reason, MTC seeks a direction excluding the New Evidence at the hearing of the Second Set Aside Application. The debtor resists that.

38. Mr Wardell went first to the classic statement of the requirements of res judicata at paragraph 1.02 of *Spencer Bower and Handley on Res Judicata*, fifth edition:

> "Elements of Res Judicata Estoppel

> 1.02 A party setting up a *res judicata* as an estoppel against his opponent's claim or defence, or as the foundation of his own, must establish its constituent elements, namely that:
>
> (i) the decision, whether domestic or foreign, was judicial in the relevant sense;
> (ii) it was in fact pronounced;
> (iii) the tribunal had jurisdiction over the parties and the subject matter;
> (iv) the decision was:
> (a) final;
> (b) on the merits;
> (v) it determined a question raised in the later litigation; and
> (vi) the parties are the same or their privies, or the earlier decision was *in rem*."

39. Mr Wardell contends that there is no estoppel arising from the decision in the First Set Aside Application because it does not satisfy the requirements either of subparagraphs (iv)(a) or (v), i.e., it was neither final in the necessary sense, nor did it determine a question raised in later litigation.

40. The paragraph from *Spencer, Bower and Handley* just cited applies both to cause of action estoppel and to issue estoppel. It is an issue estoppel that is relied on in this case. *Spencer Bower and Handley* explains that an issue estoppel may concern an issue either of fact or law. At paragraph 8.04, it states:

> "The determinations which will found an issue estoppel may be of law, fact, or mixed fact and law."

41. Mr Wardell then referred me to *Desert Sun Loan Corporation v Hill* [1996] 2 All ER 847 which was a decision of the Court of Appeal about issue estoppel. *Desert Sun* concerned a party's attempt to rely upon matters contained in a judgment from Arizona to establish an issue estoppel in English proceedings. There was no suggestion before me that the fact that the previous decision relied on in *Desert Sun* was of a foreign court is material for present purposes; see paragraph 1 of paragraph 1.02 of *Spencer Bower and Handley*.

42. The facts were that the plaintiffs sought to enforce in England the judgment they had obtained in Arizona. The defendant denied that the proceedings had been properly served on him, because the attorneys in Arizona who had purported to accept service had not been authorised to do so on his behalf. The plaintiff said the defendant was barred by a ruling of the Arizona court from raising that issue in England. Evans LJ (with whom Stuart-Smith LJ and Roch LJ agreed) explained the relationship between the requirement for a final determination and interlocutory hearings. At 854F:

> "Issue estoppel–English law.
>
> Issue estoppel has a long history, in England as well as other common law countries (see *Spencer Bower and Turner: The Doctrine of Res Judicata* (2nd edition 1969) page 150), but it is usually thought only to have achieved authoritative recognition in English law by the House of Lords decision in *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No. 2)* [1966] 2 All ER 536. It is an off-

shoot of what has been called 'cause-of-action estoppel' (see *Thoday v Thoday* [1964] 1 All ER 341 at 352).

The principle is that an issue of fact or law which necessarily was concluded in favour of one party in the foreign proceedings cannot be reopened in further proceedings between the same parties here. *Dicey and Morris* page 467 states as follows:

> 'For there to be such an issue estoppel, three requirements must be satisfied: first, the judgment of the foreign court must be (a) of a court of competent jurisdiction, (b) final and conclusive, and (c) on the merits; secondly, the parties to the English litigation must be the same parties (or their privies) as in the foreign litigation; and, thirdly, the issues raised must be identical. A decision on the issue must have been necessary for the decision of the foreign court and not merely collateral.'"

43. Evans LJ then set out an extract from Lord Reid's speech in the *Carl-Zeiss-Stiftung* case taken from [1966] 2 All ER 536, 555. Lord Reid set out three reasons for *"caution"* in the application of issue estoppel, the third of which is particularly relevant to the matter before me:

> "The third reason for caution, however, does raise a difficult problem with which I must now deal. It is clear that there can be no estoppel of this character unless the former judgment was a final judgment on the merits. But what does that mean in connection with issue estoppel? When we are dealing with cause of action estoppel, it means that the merits of the cause of action must be finally disposed of so that the matter cannot be raised again in the foreign country. In this connection, the case of *Nouvion v Freeman* ((1889) 15 App Cas 1) is important. There had been in Spain a final judgment in a summary form of procedure; but that was not necessarily the end of the matter because it was possible to reopen the whole question by commencing a different kind of action, so the summary judgment was not res judicata in Spain. I do not find it surprise that the House unanimously refused to give effect in England to that summary judgment."

Evans LJ then continued at 854H:

> "The natural meaning of 'final and on the merits' is that there has been a final, as opposed to provisional, determination of the parties' substantive rights."

44. Evans LJ concluded at 858H:

> "On balance, and regarding the question entirely as one of principle, I would be prepared to hold that an issue estoppel could arise from an interlocutory judgment of a foreign court on a procedural, i.e., non-substantive, issue, where the following conditions were fulfilled: (1) there was express submission of the procedural or jurisdictional issue to the foreign court; (2) the specific issue of fact was raised before and decided by the court; and (3) the need for 'caution' recognised by Lord Reid in *Carl-Zeiss* is carefully borne in mind."

45. Lastly from Evans LJ's judgment, just before separately addressing abuse of process at 859B, Evans LJ observed:

> "It may be, therefore, that in practice the scope for a plea of issue estoppel arising out of a procedural decision and in relation to non-substantive issues will be very small."

46. Mr Wardell submits that *Desert Sun* supports his submission that MTC must fail on both the components of issue estoppel just identified, i.e., the requirement that the first decision was final, and distinctly, for it to have determined the question raised in the later litigation. In the case before the court, Mr Wardell submits, there was only a provisional determination of the First Set Aside Application and, even then, only a provisional determination of a different question, i.e., whether section 265(2)(b)(i) was satisfied for the First Relevant Period whereas the Second Set Aside Application concerns the Second Relevant Period.

47. Mr Moverley Smith's argument that there was an issue estoppel was founded on the undeniable fact to which I have already made reference that there was an overlap period of about eight-and-a-half months between the First Relevant Period and the Second Relevant Period, being from 2 June 2019 to 21 February 2020 (**"Overlap Period"**). In his skeleton argument, Mr Moverley Smith submitted between paragraphs 34 and 37:

> "34. …The definitive finding by DICC Judge Schaffer was that the debtor had permission from his mother to stay at York House at any time (see paragraph 56). On appeal, Roth J considered that that binding assessment of the evidence the debtor had chosen to put forward gave rise to a good arguable case that the debtor did have a place of residence in England and Wales.
>
> 35. Further, as is readily apparent from the fact that the finding was that the debtor had permission from his mother to stay at York House at any time, the right to reside found by the court was a right that persisted throughout the First Relevant Period, including during the Overlap Period.
>
> 36. The debtor now seeks by the 2022 Set Aside Application [i.e., the Second Set Aside Application] to invite the court to revisit the issue of residence during the Overlap Period and conclude that during that period there is no good arguable case that the debtor had a residence in England and Wales in circumstances where the court has already addressed this on several occasions and made a definitive finding to the opposite effect. As noted above, the 2022 Set Aside Application must fail if the debtor cannot succeed in relation to the Overlap Period.
>
> 37 "…In making the 2020 Set Aside Application, the debtor submitted to the court the issue of whether the debtor had a place of residence in England and Wales at any time during the First Relevant Period. The court held that, as a matter of fact, MTC had a good arguable case that the debtor did have such a place of residence during *inter alia* the Overlap Period. The evidence available for the court to reach that conclusion was that chosen by and submitted by the debtor."

48. In advance of Mr Moverley Smith's oral submissions, it was not entirely clear to me what was said by MTC to be the thing decided by the First Set Aside Application that was relied on as giving rise to the issue estoppel. In other words, what was said to be

the issue that the debtor is said to be estopped from raising again? The passage from Mr Moverley Smith's skeleton argument just cited runs together two different things. It refers to there having been a binding finding by Deputy ICC Judge Schaffer that the debtor had permission from his mother to stay at York House at any time in the Overlap Period (at paragraphs 34 and 35 of the skeleton argument), as well as to the court having held – "as a matter of fact", as it is put in the skeleton argument – that MTC had a good arguable case that the debtor had a place of residence in England and Wales during inter alia the Overlap Period (at paragraph 37 of the skeleton argument).

49. In my judgment, these are not the same thing, as is evident from the judgments in the First Set Aside Application.

50. I take first the judgment of Deputy ICC Judge Schaffer. The key passage for present purposes is paragraph 56:

> "Looking at the facts in this case, ICC Judge Jones found that the director 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 original)

51. As I have said, on appeal before Roth J, the judge noted that Deputy ICC Judge Schaffer had decided whether the debtor had a place of residence within the meaning of section 265(2)(b)(i) on the balance of probabilities, as had Judge Jones on the ex parte hearing of the First Service Out Application. Roth J held that the test is that of a good arguable case applying the approach in CPR Part 6 and the test in *Brownlie*. In view of the deputy judge having misdirected himself on the relevant test, Roth J decided to approach the application of the test on the facts of the case afresh.

52. Roth J referred to Deputy Judge Schaffer's earlier finding, and said the following at paragraph 42(ii) of the appeal judgment:

> "24 York House is described by the debtor's mother as 'a substantial apartment', and the debtor had permission from his mother to stay at 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."

53. This is not, of itself, a finding that the jurisdictional gateway in section 265(2)(b)(i) is satisfied. Rather, it is a finding that the debtor had permission from his mother to stay at York House at any time. Roth J weighed that fact, together with other facts, to reach

an evaluative judgment on whether or not the jurisdictional gateway in section 265(2)(b)(i) was satisfied.

54. Roth J went on to say at paragraph 42(iii) of his judgment that it was relevant that the debtor had not occupied York House at any time during the First Relevant Period. He added that the debtor would not have come to England after August 2018 since, if he came to England after that time, he would be imprisoned for contempt. There was, however, a period of 18 months in the First Relevant Period prior to that sentence for contempt, and Roth J appears to have taken that into account.

55. At paragraph 42(iv), Roth J referred to the debtor's contention that since his appointment as a regional governor in April 2017, his travelling entourage was too big in any event to be accommodated at York House. But Roth J noted that the First Relevant Period commenced two months prior to that appointment as a regional governor, meaning that there was at least this period when the travelling entourage was not an issue.

56. A feature that seems from the judgment to have impressed Roth J in particular was the fact that the debtor paid the council tax on York House down to December 2019, to which Roth J referred at paragraph 42(vi).

57. The fresh assessment of the facts in light of the correct good arguable test case led Roth J to the following conclusion at paragraph 43:

> "…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."

58. Returning now to MTC's submission, it is true that the outcome of the First Set Aside Application was an overarching conclusion covering the whole of the First Relevant Period, and that means that it is necessarily also true (as Mr Moverley Smith submits) that the Overlap Period was covered by that overarching conclusion. As a matter of logic that is right.

59. But where MTC's argument on this aspect breaks down, in my judgment, is that I cannot detect any indication in Roth J's assessment of the facts that the unappealed finding by Deputy Judge Schaffer that the debtor had his mother's permission to stay at York House throughout the First Relevant Period was decisive of Roth J's overall evaluative conclusion that the debtor had a place of residence in England and Wales at any time in the First Relevant Period. At paragraphs 34 to 37 of Mr Moverley Smith's skeleton argument to which I have made reference, MTC appears to treat that finding it as if it had been so decisive. In my judgment, these are distinct. That the debtor had permission from his mother to reside at York House at any time was one evidential feature, amongst several, that went into Roth J's evaluation of whether or not the debtor had a place of residence in England and Wales at any time during the first relevant period, but it was not the only one.

60. It is in my view impossible to know what weight was attached by Roth J to the point at 43(ii) about permission to reside at York House compared with the other factors. In carrying out his evaluative exercise, Roth J seemed to have been at least as impressed by the significance of the debtor's continuing payment of the council tax until December 2019; and coming to this matter afresh, I am not surprised by that. That feature continues to apply for the first six months of the Second Relevant Period which commenced on 2 July 2019. But, on the other hand, the reasoning of Roth J at paragraphs 42(iii) about the prison sentence imposed in 2018 and at 42(iv) concerning the presence of the travelling entourage subsequent to April 2017 would appear to be affected by the fact that the Second Relevant Period commenced on 2 June 2019, which was after the advent of both those features.

61. In oral submissions, Mr Moverley Smith made clear that MTC's case is that the thing decided by the First Set Aside Application giving rise to an issue estoppel was the court's "finding of fact", as Mr Moverley Smith put it, that the good arguable case threshold had been crossed in relation to MTC's case that the court had jurisdiction, and not the finding that the debtor had permission from his mother to reside at York House at any time.

62. In my judgment, the decision on good arguable case in the First Set Aside Application is not capable of giving rise to an issue estoppel in the Second Set Aside Application and I turn now to my reasons for that conclusion.

63. Firstly, in my judgment, the decision of Roth J was not final in the necessary sense. The decision was only that MTC had a good arguable case on section 265(2)(b)(i). There was no final determination of the point. Roth J specifically said, at [43] of the appeal judgment, that the point was still open at the final hearing of the First Petition.

64. A finding of good arguable case is, in my judgment, inherently provisional. The very words "good arguable case" impliedly assume within them that the point is going to be argued at another time. That is not consistent with a final determination. I note again what was said in *Kaefer* at [76]. The court is positively required not to decide the point finally, and "must be astute not to express any view on the ultimate merits of the case, even if there is a close overlap between the issues going to jurisdiction and the ultimate substantive merits".

65. Secondly, and even if I am wrong in my view that the decision on the First Set Aside Application was not final in the necessary sense, that decision could only ever have been final in relation to the issue that was actually determined. In my judgment, the First Set Aside Application did not establish an issue estoppel capable of justifying the exclusion of the New Evidence because the First Set Aside Application did not determine a question raised in later proceedings. The question on the First Set Aside Application was whether the debtor had a place of residence in England and Wales at any time during the First Relevant Period; the question on the Second Set Aside Application is whether the debtor had a place of residence in England and Wales at any time during the Second Relevant Period. It is impossible to assess whether Roth J's evaluation of the evidence would have had the same result had he considered the overall picture during the Second Relevant Period rather than the First Relevant Period. It is not the same question, and this is fatal to any suggestion of an issue estoppel. Although the Overlap Period is part of both of them, neither Deputy Judge Schaffer nor Roth J considered the Overlap Period in isolation. I do not agree with MTC that the

Overlap Period can safely be salami sliced away from the overall context of the First Relevant Period as a whole in the way that MTC submits.

66. Before departing from this part of the judgment, I consider there to be real linguistic and conceptual difficulties in describing a court's conclusion that a party has satisfied the test of showing that it has a good arguable case as being a "finding of fact", as MTC described the decision in the First Set Aside Application. A decision that there is a good arguable case is an evaluative judgment derived from an assessment of underlying primary facts. It is an uneasy use of language to regard it as a finding of fact in itself for the purposes of an issue estoppel. As I have already said, I note from paragraph 8.04 of *Spencer Bower and Handley* that an issue estoppel may arise not only from a finding of fact, but also from a finding on a question of law or from a mixed question of fact and law. I did not hear argument on this aspect, and so I say nothing more about it for present purposes. The issue estoppel point was advanced by MTC on the basis that the estoppel on which it relied arose from a previous finding of fact and I have approached it on that basis.

67. For the reasons I have given, I decline to make the Witness Statement Direction.

Cross-examination Direction

68. Having rejected the Witness Statement Direction, I must now consider MTC's request that I direct cross-examination of the debtor and his witnesses at the final hearing of the Second Set Aside Application.

69. Mr Wardell referred first to *Kaefer*. I have already discussed the Court of Appeal's analysis in that case of the three limbs in *Brownlie*.

70. Next Mr Wardell drew my attention to *Stokoe Partnership Solicitors v Grayson* [2021] EWCA Civ 626, [2021] 4 WLR 87 in support of his general proposition that the court will not readily direct cross-examination at the interlocutory stage. *Stokoe* concerned an application for a pretrial order for cross-examination on an application for *Norwich Pharmacal* disclosure. Bean LJ (with whom Peter Jackson LJ and Coulson LJ agreed) held at paragraph 17 that:

> "English law does not generally permit, save by consent, depositions, in other words oral interrogation of an opposing party, except at a trial where that party has chosen to give evidence."

71. Mr Wardell then made submissions on *BB & Ors v Al Khayyat* [2021] EWHC 1499 (QB), which was a case that referred to *Stokoe* in the specific context of a jurisdiction challenge. The facts of *Al Khayyat* were that the claimants sought a direction to cross-examine the first and second defendants (the Al Khayyat brothers) on witness statements they had made. The claimant argued that cross-examination should be permitted because the Al Khayyat brothers were relied on by the third defendant (Doha Bank) to challenge the claimants' evidence that the Al Khayyat brothers had acted as terrorist financers on behalf of the government of Qatar which was of central relevance to the defendants' *forum non conveniens* argument. Chamberlain J held that it would be inappropriate to allow cross-examination because:

> "It would amount to a deposition of the Al Khayyat brothers before it has even been determined whether the claim should be heard in this jurisdiction. This would be contrary to the general policy of English law that depositions are not permitted subject to exceptions not material here…"

and he then gives the reference to the passage from *Stokoe* to which I have just referred.

72. Turning now to Mr Moverley Smith's submissions in answer, Mr Moverley Smith emphasised that the court's unfettered case management powers in CPR Rule 32.7 expressly provide for cross-examination other than at trial, as does Insolvency Rule 12.28(3) from the Insolvency (England and Wales) Rules 2016. I would add that the Insolvency Rules contain another apparently open-ended power to direct oral evidence at rule 12.11(d)(iii).

73. Mr Moverley Smith submitted that cross-examination is required to deal with the second limb of *Brownlie*, namely the requirement for the court to take a view on the material before it if it can readily do so. He further submitted that there is no other way, other than a direction for cross-examination, of addressing the unfairness in the plausibility of evidence test referred to in *Brownlie*.

74. Mr Moverley Smith sought to distinguish each of the cases relied upon by Mr Wardell. In support of this, Mr Moverley Smith referred me to the Privy Council authority *Bols Distillery BV (t/a Bols Royal Distilleries) v Superior Yacht Services Ltd* [2006] UKPC 45, [2007] 1 WLR 12. Lord Rodger, delivering the advice of the Privy Council, referred to the *Canada Trust* case mentioned earlier at [27] and [28] as follows:

> "The decision of the Court of Appeal in the *Canada Trust* case was appealed by the defendants to the House of Lords. Counsel for the defendants dealt with the appropriate standard of proof in their written case, but not in oral argument. So counsel for the plaintiffs was not called upon to address it. In these circumstances, only Lord Steyn referred to the matter. He gave his view briefly at page 13.
>
> > 'In a purely internal English case, the test of a good arguable case had been laid down by the House of Lords as applicable also in respect of domicile as a ground of jurisdiction: *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438. The question is whether in the context of article 6 the more stringent test of a balance of probabilities should apply. The adoption of such a test would sometimes require the trial of an issue or at least cross-examination of deponents to affidavits. It would involve great expense and delay. While it is true that the jurisdictional issues under the Conventions are very important, they ought generally to be decided with due despatch without hearing oral evidence. In my view, Waller LJ's judgment at 553 to 559 correctly explained on sound principled and pragmatic grounds why the defendants' argument is misconceived.'"

75. At [28], Lord Rodger made the following observation on good arguable case commencing at [28] between letters F and G:

> "In practice, what amounts to a 'good arguable case' depends on what requires to be shown in any particular situation in order to establish jurisdiction. In the present case, as the case law of the Court of Justice emphasises, in order to establish that the usual rule in Article 2(1) is ousted by Article 23(1), the claimants must demonstrate 'clearly and precisely' that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties. So, applying the 'good arguable case' standard, the claimants must show that they have a much better argument than the defendants that, on the material available at present, the requirements of form in Article 23(1) are met and that it can be established, clearly and precisely, that the clause conferring jurisdiction on the court was the subject of consensus between the parties."

76. Based on these paragraphs from *Bols*, Mr Moverley Smith submitted that what amounts to a good arguable case is sensitive to what is required to be shown in order to establish jurisdiction. Both *Kaefer* and *Bols* were cases specifically about jurisdiction under the Brussels Convention and that was the context, he submitted, in which the comments on oral evidence in *Kaefer* were made. The case before me is not about the Brussels Convention, submits Mr Moverley Smith, and accordingly *Kaefer* was not directly on point and should not be taken as having closed the door on oral evidence at the jurisdiction stage for the Second Petition.

77. Turning to *Stokoe*, Mr Moverley Smith submitted that this decision can be distinguished because the witness in *Stokoe* had given evidence under compulsion and had not "chosen to give evidence". In the instant case, the debtor has not been compelled to give evidence, but has chosen to do so and accordingly what Bean LJ said at [17] of *Stokoe* (see §70. above) is not on point.

78. Next, Mr Moverley Smith submitted that the *Al Khayyat* case did not assist the debtor because none of the reasons given by Chamberlain J for refusing cross-examination applied. In *Al Khayyat*, Chamberlain J considered at [59] that to direct cross-examination of the Al Khayyat brothers would have led to their cross-examination on matters going to the substance of the claim before it had even been determined that the court had jurisdiction. Mr Moverley Smith submitted that this hazard did not apply in the instant case because there was no underlying "claim" to be heard as this was a bankruptcy petition.

79. Mr Moverley Smith further pointed to [62] of *Al Khayyat* where Chamberlain J had considered whether he should permit cross-examination on what the judge described as a "much more limited basis", and eventually concluded that he should not do so:

> "…Given that I have decided that cross-examination on the underlying allegations would be inappropriate in an application of this kind, cross-examination would not be likely materially to assist the judge in determining the matters that fall to be considered on the stay application, even if it could be done without turning the hearing into a mini-trial."

80. Mr Moverley Smith submitted that that passage at [62] as a whole indicates that Chamberlain J had recognised that cross-examination on such an interlocutory hearing may be ordered, notwithstanding that his Lordship had decided not to do so in the particular circumstances. Accordingly, Mr Moverley Smith submitted that Mr Wardell

was not correct in his position that cross-examination was never permissible at an interlocutory challenge to jurisdiction.

81. Finally, Mr Moverley Smith proposed that the court might take the view that the question of a place of residence might be determined once and for all at a single hearing for the purposes both of the Second Set Aside Application and the Second Petition, and that was referred to at the hearing as a "rolled-up hearing".

82. I turn now to my conclusions on the Cross-examination Direction. I take first MTC's submission, relying on *Bols*, that the guidance in *Kaefer* is inapt for the instant case, having been concerned with jurisdiction under the Brussels Convention.

83. I am unable to accept that *Bols* supports MTC's submission or that *Kaefer* is in any way limited in its application to cases about jurisdiction under the Brussels Convention. In the first place, *Bols* (from 2007) predates both *Brownlie* and *Kaefer*. It is clear from Kaefer at [77] that the need to show "much" the better case has been laid to rest, apparently without qualification. So the reference to that requirement in [28] of *Bols* must be approached in that light.

84. In any case, it seems to me that, if anything, the argument for cross-examination would appear to have been stronger in *Bols* than in the general run of cases by reason of its particular jurisdictional context. *Bols* indicates that the court contemplated that a more exacting approach to showing a good arguable case might apply to the kind of jurisdictional gateway that was in issue in that case, where the claimants were required to demonstrate "clearly and precisely" that the clause conferring jurisdiction was in fact subject to consensus between the parties. Accordingly, it does not in my judgment provide any support for the contention that cross-examination might be necessary in the instant case, where it was not considered necessary in *Bols*. The point of distinction identified by Mr Moverley Smith based on the Brussels Convention does not, in my judgment, assist MTC.

85. As for the extract from Lord Steyn's speech in *Canada Trust* set out at [27] of *Bols*, not only does this not assist MTC, in my judgment it provides strong support for the debtor's analysis. In this passage, Lord Steyn compares the test of good arguable case on the one hand with the test of balance of probabilities on the other, and concludes that adoption of the balance of probabilities "would sometimes require the trial of an issue or at least cross-examination of deponents to affidavits", carrying the implication, read in context, that a test of good arguable case would not require it.

86. On my reading of the extract at [27] of *Bols*, it was Lord Steyn's clearly held view in *Canada Trust* that oral evidence is to be avoided at the jurisdiction stage, and it is this view that drives his conclusion that the appropriate choice of test is that of good arguable case in preference to balance of probabilities. Again, on my reading of this passage, it is implicit in Lord Steyn's reasoning here that a test of good arguable case is inconsistent with there being cross-examination in applying that test.

87. *Bols* provides strong support, in my judgment, for Mr Wardell's contention that a direction for cross-examination is not appropriate for a hearing where the court will apply the test of good arguable case. This is also consistent, in my judgment, with what was said in *Brownlie* and *Kaefer*. As to that, Lord Sumption suggested in

Brownlie at [4] that what his Lordship described as a "problem" with the jurisdiction stage is that:

> "…Some jurisdictional facts, for example the existence of the contract said to have been made or breached in England, may be in issue at trial if the case is allowed to proceed, when they will in all probability be determined on fuller material than is likely to be available at the interlocutory stage."

88. Further, Green LJ in *Kaefer* held that the court must take care to avoid going beyond the good arguable case threshold where the factual basis of jurisdiction will remain live at trial, in the passage at [76] in *Kaefer* to which I have referred more than once in this judgment.

89. In light of these high authorities, it would be anomalous and perhaps difficult for a court to hear oral evidence on the question of jurisdiction where it need only – and indeed, *Kaefer* makes clear that it must be careful that it *does only* – decide jurisdiction on a good arguable case basis and without going further into the facts than that, in order to preserve the position for trial. This is because, having heard cross-examination, a court would ordinarily proceed to decide the matter once and for all on the ordinary civil standard (i.e., the balance of probabilities), yet at the jurisdiction stage the matter is *positively not* to be decided finally. This all points away from a direction for cross-examination.

90. Turning to *Stokoe*, as I have said, Mr Moverley Smith submitted that this case can be distinguished. To recap, Bean LJ had held at [17] that:

> "English law does not generally permit, save by consent, depositions, in other words oral interrogation of an opposing party, except at a trial where that party has chosen to give evidence."

91. Mr Moverley Smith submitted that Bean LJ's reasoning did not apply to the instant case because, unlike the witness in *Stokoe*, the debtor has not been compelled to give evidence but has chosen to do so.

92. I accept that the point of distinction may bring the circumstances of the instant case within the second part of Bean LJ's exception to the principle identified (i.e., that the debtor has chosen to give evidence, rather than having been compelled to do so), but it does not address the first part, which is the at the heart of Mr Wardell's submissions on the law. This is that the debtor is not giving evidence *at trial*; rather he has made a witness statement for an interlocutory hearing on jurisdiction.

93. Accordingly, although Mr Moverley Smith has accurately identified a factual distinction between *Stokoe* and the case before me (namely the compulsion point), I do not consider that distinction to be relevant to the issue I have to decide. The point of distinction being drawn by Bean LJ was between interlocutory hearings (which is what the Second Set Aside Application will be) and final hearings; I do not consider that Bean LJ's use of the word "trial" should distract from this point. In all respects relevant to the question of whether or not cross-examination should be ordered, the substantive hearing of the Second Petition occupies the position of final hearing, analogous to "trial" on the distinction drawn by Bean LJ.

94. This leads me also to reject Mr Moverley Smith's submission that the hazard identified by Chamberlain J at [59] of *Al Khayyat* does not arise in this case. Mr Moverley Smith suggested that any cross-examination directed on the Second Set Aside Application would not amount to cross-examination on any underlying claim by reason of this being a bankruptcy petition and consequently there being no underlying "claim". While I agree with Mr Moverley Smith that a bankruptcy petition cannot be regarded as a "claim" in the sense that existed in *Al Khayyat*, i.e., a substantive action that remained to be tried, this does not in my judgment address the relevant point. In fact, Chamberlain J's reasoning at [59] applies squarely to the matter before me.

95. In my judgment, the principle underlying Chamberlain J's concern was not confined to circumstances where a "claim" remained to be tried but, rather, was based on the same broader distinction between interlocutory and final hearings that was drawn by Bean LJ in *Stokoe*. I accept Mr Wardell's submission that the hazard of ordering cross-examination on an interlocutory hearing in advance of the court deciding whether or not it has jurisdiction, where the exact same point will remain at large for determination on the balance of probabilities at the final hearing, applies to the case before me just as it applied in *Al Khayyat*.

96. I am also unable to accept Mr Moverley Smith's submission that [62] of *Al Khayyat* provides support for the view that cross-examination may as a matter of principle be ordered at the interlocutory stage, perhaps on the "more limited basis" contemplated by Chamberlain J on matters not going to the underlying allegations. Unlike the position in *Al Khayyat*, there is no matter on which cross-examination has been suggested other than in relation to the underlying issue concerning residence for the purposes of s.265(2)(b)(i) that will remain outstanding at the final hearing. Accordingly, there is no "more limited basis" on which cross-examination might be directed.

97. I also reject MTC's suggestion of a "rolled-up hearing". Ultimately, I accept Mr Wardell's submission that the stages cannot be concertina'd in that way. The good arguable case threshold must be cleared before the Second Petition can be served, and the Second Petition must be served before it can be argued on a final basis. This is consistent in my view with what was said in *Al Khayyat* at [59] and *Kaefer* at [80].

98. In my judgment, for the reasons I have given, there is significant support in the authorities for Mr Wardell's submission that cross-examination should not be ordered as a matter of principle at the jurisdiction stage, and I tend towards the view that that submission is correct.

99. Even if that is wrong, I would in any event decline to exercise my case management discretion to order cross-examination on the Second Set Aside Application. I take that view because I do not consider that I have been shown any sufficient reason to depart from the usual practice of not ordering cross-examination on an interlocutory hearing on jurisdiction for the purposes of service out of the jurisdiction.

100. It is notable that the parties' researches have not identified any decided case where cross-examination was ordered at the jurisdiction stage. That does not mean, of itself, that cross-examination cannot be ordered, and Mr Moverley Smith rightly emphasised the apparently unfettered nature of the court's power to order cross-examination under the CPR and the Insolvency Rules. But given that it has not apparently been done before, I would have expected MTC to be able to point to some feature of the case to

take it outside the usual run of jurisdiction challenges to justify a different approach. In other words, to show not simply that cross-examination is not necessarily precluded, but rather to show why it should be done in this case in particular in circumstances where it does not appear to have been done before and is, at the very least, not usual practice.

101. On that point, Mr Moverley Smith pointed to what he suggested are the unusual facts, namely that the debtor is seeking to reopen a point (i.e., whether the debtor had a place of residence in England and Wales) on the basis of evidence that was inconsistent with previous evidence. There are two elements to that submission: firstly, reopening a point and, secondly, the inconsistency with previous evidence point.

102. I do not accept that either of those features are particularly unusual or, if they are, I do not agree that they are unusual in a way that is relevant to the question of whether or not cross-examination should be directed at the service stage.

103. As to the suggestion that the residence point is being reopened, as has already been discussed when dealing with the Witness Statement Direction, the witnesses who have given the New Evidence are now addressing the question on the Second Set Aside Application, which is not the same as the question on the First Set Aside Application, notwithstanding that they have the Overlap Period in common.

104. It is not particularly unusual for a bankruptcy petition against a debtor to fail and for a subsequent petition to be presented by the same petitioner against the same debtor, which will necessarily mean that the three-year period for section 265(2)(b) purposes is different. It may not be a daily occurrence; but there is nothing inherently unusual about the same petitioner and debtor having to address a different three-year period for the purposes of section 265 on a subsequent petition.

105. Further, although the New Evidence is on any view different in a material way from his previous position on York House, it is far from unusual to find that litigants who have given evidence in one context later seek to row back on it in another context. The court is accustomed to encountering situations like that in circumstances where partisan assertions cannot be tested in cross-examination. The court may sometimes approach the later inconsistent evidence with a jaundiced eye and, when deciding whether a party wishing to challenge such evidence has shown a good arguable case, may well decide to attach considerable weight to what was said in the earlier evidence. That may particularly be the case where that earlier evidence was given without evident guile and at a time when the witness did not have any obvious motive to adopt any particular self-serving position on the point now in issue.

106. Mr Moverley Smith submitted that there is no way, other than a direction for cross-examination, to address unfairness in the application of the plausibility of evidence test referred to in *Browlie*. But to my mind, that is exactly what limb (iii) of the *Brownlie* test, as interpreted by *Kaefer* at [80], is there to do. In a case where there are objective factual features supporting a party seeking to establish jurisdiction and a party resisting jurisdiction relies on untested bare assertions in witness statements, it is not difficult to see that limb (iii) of the good arguable case test, applied in accordance with *Brownlie* and *Kaefer*, will be well able to accommodate that kind of conflict of evidence. The court will take care to ensure that the test of plausibility does not work injustice on a party challenging assertions that it is unable to test by cross-examination

until the final hearing. Accordingly, I accept Mr Wardell's submission that [80] of *Kaefer* is, as Mr Wardell put it, exactly this case.

Overall Conclusion

107. I decline to make either the Witness Statement Direction or the Cross-examination Direction. Subject to any submissions that I will now hear, I propose to list the Second Set Aside Application and the Renewed Service Application to be heard in the existing listing of the Second Petition on 20 February 2023. The Second Petition will remain listed at that time, and directions for its further disposal can be given depending on the outcome of the two applications. That concludes my judgment.
