Neutral Citation Number: [2026] EWHC 1388 (Ch)

Case No: CH-2025-000258

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

ON APPEAL FROM THE ORDER OF DEPUTY ICC JUDGE BAISTER (8 JULY 2025)

IN THE MATTER OF MR ANTHONY LYONS
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 9 June 2026

Before :

MR JUSTICE RAJAH

- -

Between :

ANTHONY LYONS

Appellant

- and –

BRIDGING FINANCE INC (acting by its receiver/manager PricewaterhouseCoopers Inc)

Respondent

- -
- -

Mr Christopher Boardman KC (instructed by **Kingsley Napley LLP**) for the **Appellant**
Mr William Willson KC (instructed by **Dentons**) for the **Respondent**

Hearing dates: 25 March 2026

- -

APPROVED JUDGMENT

Mr Justice Rajah :

Introduction

1. Bridging Finance Inc ("**BFI**") is a Canadian finance company, now in receivership. Anthony Lyons is a property investor domiciled in, and residing in, the Bahamas. This is an appeal from the decision of Deputy ICC Judge Baister on 8 July 2025 when he made a bankruptcy order against Mr Lyons on the petition of BFI in respect of a debt of CAD $39 million (about £26.6 million).

2. The background facts are summarised at paragraphs [3] to [11] of the judgment. In 2018, Mr Lyons was interested in a property investment involving an estate in Northumbria known as Dissington Garden Village. At that time the estate was owned by Lugano Dissington Estate Limited ("**LDEL**"). LDEL had two major lenders: (a) a senior lender, Topland Jupiter Limited (which had loaned about £20 million) ("**the Senior Loan**") and (b) a mezzanine/junior lender, Matterhorn Capital Dissington Loan Limited ("**Matterhorn Dissington**") (which had loaned about £9 million) ("**the Mezzanine Loan**"). Mr Lyons was the ultimate beneficial owner of Matterhorn Dissington.

3. LDEL ran into financial difficulties. In order to take control of the project Mr Lyons wanted to raise additional finance to purchase the Senior Loan from Topland. Following direct negotiations between Mr Lyons and BFI's senior managing director, Mr Graham Marr, BFI agreed to lend CAD $36 million to a newly incorporated English company, Dissington Lending Estate Limited **("DLEL**"), to allow DLEL to purchase the Senior Loan. Mr Lyons was the ultimate beneficial owner of DLEL.

4. On 26 October 2018, BFI loaned the sum of CAD$36 million to DLEL and Mr Lyons gave a guarantee to BFI in relation to DLEL's obligations under the Facilities Agreement. The loan and guarantee agreements were governed by English law with English court jurisdiction clauses.

5. It is the personal guarantee given by Mr Lyons which founds the petition debt.

6. On 17 October 2022, Mr Lyons was personally served in the Bahamas with a statutory demand. He filed an application to set aside the statutory demand on various grounds, including as to jurisdiction, which was eventually withdrawn before a final hearing on 7 December 2023. On 19 July 2024, BFI presented a bankruptcy petition and obtained permission to serve it out of the jurisdiction. Witness statements were served by Mr Lyons and his associate Mr Simon Conway. The petition was listed for a final hearing on 16 and 17 June 2025. Mr Lyons and Mr Conway were ordered to attend for cross-examination failing which their evidence would not be read save with the permission of the court. Neither attended.

7. At the trial, Mr Lyons disputed the court's jurisdiction to entertain the petition as he had emigrated from the United Kingdon in 2010 and was now domiciled and resident in the Bahamas. He also asserted that the debt was disputed on

substantial grounds. BFI's case was that the court had jurisdiction under section 265 Insolvency Act 1986 because Mr Lyons had carried on business in the jurisdiction in the three years preceding the presentation of the petition i.e. between 20 July 2021 and 19 July 2024. BFI also contended that there was no genuine triable issue as to whether the petition debt was due.

8. Section 265 Insolvency Act 1986, so far as relevant, provides:

> (1) A bankruptcy petition may be presented to the court under section 264(1)(a) only if
>
> *[…]*
> *(b) the test in subsection (2) is met*".
>
> (2) The test is that-
>
> *[…]*
> *(b) at any time in the period of three years ending on the day on which the petition is presented, the debtor*
> *[…]*
> *(ii) has carried on business in England and Wales".*
>
> (3) The reference in subsection (2) to the debtor carrying on business includes-
>
> *(a) the carrying on of business by a firm or partnership of which the debtor is a member, and*
> *(b) the carrying on of business by an agent or manager for the debtor or for such a firm or partnership"*

9. At the trial BFI advanced two bases on which it submitted that the judge should hold that Mr Lyons had "*carried on business in England and Wales*" in the 'relevant period'. The first was the 'general business basis' – i.e., Mr Lyons carried on business "*as a 'serial entrepreneur' – which business was carried out through the (at least) 33 different companies in which he had an ownership/control interest (and which business was/is independent from the business of the relevant companies)*" (Judgment, [22]). The second was the 'Hamilton Terrace business basis' – i.e., Mr Lyons carried on business by letting and ultimately selling a property called 'Hamilton Terrace' which was registered in his own name (Judgment, [22]).

10. The judge handed down his judgment on 8 July 2025. The judge decided against BFI on the 'general business basis' (Judgment, [23]-[52]) but against Mr Lyons on the 'Hamilton Terrace business basis' (Judgment, [53]-[60]). Accordingly, the judge found that he had jurisdiction to make a bankruptcy order. The judge found that there was no genuine triable issue as to whether the petition debt was

due, rejecting Mr Lyons' evidence as inherently implausible. The judge made the bankruptcy order.

11. Permission to appeal was granted by Trower J on Grounds 1 and 2 of Mr Lyons' Grounds of Appeal on 13 January 2026. Ground 1 challenged the judge's finding on the Hamilton Terrace business basis that Mr Lyons was "*carrying on business*" in the UK. Ground 2 raised an argument not raised before the judge below, that he had failed to properly consider whether it was right to exercise the Court's discretion to make a bankruptcy order when Mr Lyons was a foreign debtor. Permission to appeal was refused on Ground 3 which related to the judge's finding that there was no triable issue as to the petition debt being due. BFI has served a Respondent's Notice seeking to uphold the judgment on additional grounds, essentially challenging the judge's finding against BFI on the "general business basis".

12. On 13 February 2026, Thompsell J gave BFI liberty to apply to rely on new evidence based on assertions by Mr Lyons' trustees in bankruptcy (in a letter dated 9 February 2026) that Mr Lyons' evidence at trial "had not been truthful" on certain matters (which were not pursued before me) and the fact that Ground 2 was a new point that was not advanced at trial.

Principles

13. CPR 52.21(3) provides:

> *"The appeal court will allow an appeal where the decision of the lower court was—*
>
> *(a) wrong; or*
>
> *(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court*."

14. The approach of an appeal court to an appeal on a question of fact is well settled. The following principles were identified from the authorities by Lewison LJ in *Volpi v Volpi* [2022] EWCA Civ 464 at [2]:

> *"i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.*
>
> *ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.*

iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

15. In *Henderson v Foxworth Investments Ltd* (SC(Sc)) [2014] 1 WLR 2600 Lord Reed summarised the appellate court's approach at [67]:

"*It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot be reasonably explained or justified".*

16. The same caution applies to evaluative decisions where the judge has reached a conclusion based on an evaluation of primary facts or as to the inferences to be drawn from them; see *Prescott v Potamianos (also known as Re Sprintroom)* [2019] EWCA Civ 932. McCombe LJ, Leggatt LJ and Rose LJ said in a joint judgment at [76]:

"So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.'"

17. The reasons for appellate caution were summarised by Lewison LJ in his well-known judgment in *Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] E.T.M.R. 26 at [114],* as follows:

"114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also

to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva Plc [1977] R.P.C. 1 ; Piglowska v Piglowski [1999] 1 W.L.R. 1360 ; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23; [2007] 1 W.L.R. 1325 ; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33; [2013] 1 W.L.R. 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58; [2013] 1 W.L.R. 2477 . These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include

i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

18. The same approach applies whether the trial judge heard oral evidence or determined the case on written evidence. Deference to the trial judge is not just because the trial judge has an advantage in the assessment of credibility of witnesses who gave oral evidence but involves other considerations; see *McGraddie v McGraddie* [2013] 1 WLR 2477 at [3]. Those other considerations include those identified by Lewison LJ in *Fage* which remain operative in a case where there has not been oral evidence (although perhaps courtroom atmosphere may be less significant). It is the first-instance judge's role to determine and evaluate the facts relevant to the issues to be decided, whether that determination is based on oral evidence or written evidence or contemporaneous documents or photographs or expert evidence or any other admissible evidence. Even if the material can be placed before the appeal court in the same form in which it was before the first-instance judge, the judge at first instance will have immersed him or herself in the sea of evidence presented to him or her, whereas an appellate court will usually only be island hopping. Even if, exceptionally, the appeal court can be placed in as good a position as the trial judge to make a finding of fact, an appeal is not a rehearing but a review. It is not the role of the appeal court to substitute its judgment, but rather to review the decision below and to interfere only if compelled to do so.

Ground 1

The Judge erred in law and/or fact in concluding that the Appellant had "carried on business" within the meaning of section 265(2)(b)(ii) of the Insolvency Act 1986 in the period from 20 July 2021 to 19 July 2024, and therefore that he had jurisdiction to make the Order.

19. At paragraphs 53 to 60; of the judgment the judge addressed BFI's contention that Mr Lyons had carried on a business in the relevant period in connection with a property known as Hamilton Terrace.

20. He summarised the relevant facts at paragraph [54] as follows:

> *"Mr Lyons acquired Hamilton Terrace (or at least part of it – the titles of two properties were merged at some stage) in July 2003. Works were done to transform what was originally five flats into a single residence. Mr Lyons had complete ownership of the property in its current state from at least 2010. It was registered in his sole name. He sold it on 23 March 2022 for £26 million odd. He signed the transfer, and his signature was witnessed. The property was let at various stages, although not continuously, between 10 April 2016 and 31 August 2021. The rent was around £25,000 a week. A number of tenancy agreements are in evidence, including one for a period of two years dated 7 January 2020. In 2019 Hamilton Terrace was used by Bentley to celebrate the centenary of its foundation, although no information is in evidence as to the terms on which it was made available. Mr Lyons and Mr Conway both give evidence about their dealings with Hamilton Terrace, but I do not need to go into it as the essential facts set out above are not challenged; indeed they come from Mr Lyons and/or Mr Conway. Mr Willson submits that the activities I have described amounted to carrying on business."*

21. He cited his own decision of *Durkan v Jones* [2023] EWHC 1359 which had extensively reviewed the authorities on what constituted carrying on a business, noting that the caselaw had not attempted to define a business and the conclusion in *Durkan* that, in the absence of guidance in the legislation or case law, the expression should be given its natural meaning.

22. Adopting that approach he concluded that Mr Lyons had been carrying on business at Hamilton Terrace. He summarised his reasons as follows:

> *"(a) Mr Lyons is, and appears always to have been, a property investor, He says he continued to invest in businesses in England and elsewhere even after emigrating (paragraph 17 of his witness statement of 17 January 2025). Although his/Mr Conway's evidence is that he did not usually invest in a personal capacity, he clearly did in this case.*
> *(b) The property was developed and refurbished. In his witness statement of 17 January 2025 Mr Lyons describes the creation of the property out of two properties and the amalgamation of the titles and goes on to say that it was later converted from five flats into a single dwelling before being put on the market.*
> *(c) He accepts that the property was rented pending its sale. He also accepts that he signed "several of the tenancy agreements" (I understand Mr Conway*

signed others but with Mr Lyons's authority) and received rental income (paragraph 2 of his witness statement of 1 May 2025).
(d) He accepts that the property was sold, and although I have no direct evidence of the fact, I presume that he, as the owner of the property, received the net proceeds of that sale, just as he received the rental income. In fact whether he made a profit is neither here nor there: business can result in a loss too.
(e) I accept Mr Lyons's and Mr Conway's evidence that these activities were primarily managed by Mr Conway "with the staff of Matterhorn Property," but plainly they were acting as Mr Lyons's agents. The project was his, not that of Mr Conway or Matterhorn."

23. He noted Mr Lyons' argument that the project had initially been a joint venture with a Mr Todd, but Mr Todd had withdrawn leaving Mr Lyons "*holding the baby*", and that at one stage Mr Lyons had contemplated occupying Hamilton Terrace as his home, although that had not happened. He observed that the term "*joint venture*" itself connotes a business transaction and concluded that these arguments did not detract from the fact that Mr Lyons had developed, rented and sold Hamilton Terrace. He noted that Mr Lyons' counsel had been unable to give a satisfactory response to the question posed in *Durkan*: if Mr Lyons was not carrying on business, how could his activities in relation to the property otherwise be described?

24. He also concluded that the business was carried on in the relevant period because it was still being rented out when the relevant period commenced and it was sold during the relevant period. He noted that the sale was an important transaction, representing the culmination of years of investment and effort. He reminded himself that a single transaction can constitute the carrying on of a business, citing *Conway v Kenny* [1999] EWCA Civ 639, [1999] 1 WLR 1340 as authority.

The Law

25. In *Jones v Aston Risk Management* [2024] EWHC 2553, [2025] BPIR 280, HHJ Cawson (as he then was) gathered the following propositions from the authorities cited to him (including *Durkan*):

"(i) The question is one of mixed fact and law, and the court must consider: (a) what the debtor did; (b) when he did it; and (c) whether what he did amounted to carrying on business – see Masters v Barclays Bank plc (supra) at [16(a)], and Durkan v Jones at [24]. This may invite the question as to what the debtor is or was doing if not carrying on business – see Durkan v Jones at [36]: 'There is another way of looking at the matter, which is to ask what the debtor was doing if he was not carrying on business. He was not engaged in charitable work, nor was he engaged in a pastime or hobby.'

(ii) Carrying on business through a company or being a director or shareholder (even sole director or shareholder) of a company does not, in itself, amount to the carrying on of business as an individual and on one's own

account – see In re Brauch (A Debtor) (supra) at 328F-G, per Goff LJ. Likewise, simply providing a guarantee for the indebtedness of a company – see Masters v Barclays Bank plc (supra).

(iii) However, it is open to the court to find that a director or shareholder, in addition to his involvement in the company, is also conducting a separate business of his own – see In re Brauch (A Debtor) (supra) at 328G-329F, per Goff LJ. In the latter case, the debtor was held to have conducted a separate business of his own involving the incorporation and use of some ninety companies to acquire land. The companies were held to form part of the machinery by which the debtor implemented his own business project. It was held that it was necessary to look at the totality of the evidence and see whether or not the right conclusion was that there was a business being carried on by the debtor independently of the business of the companies – see 330F, per Goff LJ.

(iv) The number of occasions upon which a person has been involved in the promotion or establishment of businesses assists towards the conclusion that the person has an independent business of promoting companies – see Masters v Barclays Bank plc (supra) at [20].

(v) A one-off transaction might be sufficient to show that the debtor was carrying on a business. An example is provided by Gate Gourmet Luxembourg IV Sarl v Morby (supra), where the entry by the debtor into a share purchase agreement concerning the sale of his shareholding in a significant number of companies was held to be sufficient to amount to the carrying on of a business distinct from that of the companies themselves – see at [26], per Mr Registrar Briggs. Cf. Charlton v Funding Circle Trustee Ltd (supra) where a discussion between the debtor and potential investors with regard to the sale of his shares in company did not amount the carrying on of a separate business. The director in that case was held to have simply been exploring options for the rescue of the company.

(vi) There is authority for the proposition that where a debtor has been shown to be carrying on business, then the relevant business will be considered to have continued until such time as all debts of the business had been discharged albeit that the actual conduct of the business itself might have ceased – see re A Debtor (No.784 of 1991). In this case, the debtor had sold a nursing home business carried on in her own name, and had moved to Tenerife, but leaving an unpaid tax debt. The existence of the latter debt meant that the debtor was to be regarded as continuing to carry on business and, for the purposes of s 265(2)(b) (ii), until such time as the debt was discharged. This principle was applied in Gate Gourmet Luxembourg IV Sarl v Morby (supra) with the result that the business (i.e. the sale of shares by the debtor in a number of companies pursuant to the share purchase agreement) was held to have continued throughout subsequent litigation involving a claim of breach of warranty, and given the existence of an outstanding tax debt – see at [27], per Mr Registrar Briggs.

(vii) It does not matter that the business is only carried out on small scale. What matters is the nature and quality of what is being done, rather than its extent – see Durkan v Jones (supa) at [39], per Deputy ICC Judge Baister."

An intention to make a profit

26. Mr Boardman on behalf of Mr Lyons contends that the words "*carry on business*" in section 265(2)(b)(ii) connote a subjective intention to derive profit from commercial activity so as to generate income. He says that the judge did not correctly address his mind to this issue and made no findings on it.

27. I accept that carrying on business, as that phrase is naturally understood, involves some form of activity of a commercial nature, usually undertaken with a view to profit. Actual profit is not required. A shopkeeper who runs a loss-making shop is still carrying on the business of a shop. The profit need not be by way of the generation of income. A property developer who buys properties, develops them, and sells them for a capital profit may have no income in the interim, but is still carrying on a property development business. There may be exceptional cases where, for example, there is no profit motive – such as where the business (say, the provision of micro loans on commercial terms) is intended to break even or its losses are subsidised because it advances the purposes of a charity. The charity may still be carrying on business for the purposes of section 265. I do not, however, accept that the judge did not have all this in mind. He said that carrying on business should be given its natural meaning, and that includes, ordinarily, a profit motive.

28. No authority was advanced for the implicit proposition that the subjective intention of the debtor is conclusive. The debtor's subjective intention is relevant. A debtor's intention to engage in activities with a view to regular profit rather than some other non-commercial motive may well be determinative as to whether the debtor is carrying on a business. In principle, however, it seems to me that whether a debtor has been carrying on a business should be determined from all of the circumstances of the case, and the debtor's subjective intention is simply part of the circumstances; see e.g. the charity example above.

29. Mr Boardman submits that the judge failed to give sufficient weight to the evidence of Mr Lyons' subjective intentions. He submits that on the evidence before the judge there was no intention to engage in any business activity.

30. I was taken to some of the contemporaneous documentation which was before the judge. That shows that Mr Lyons acquired 100 Hamilton Terrace for £1 on 2 July 2003. At some point he acquired a property backing onto 100 Hamilton Terrace known as 5 Abercorn Close and on 16 August 2010 he applied for its title to be merged with that of 100 Hamilton Terrace. On 10 December 2010, expressly because he was emigrating to the Bahamas, Mr Lyons entered into a management agreement with Matterhorn Capital Limited, of which Mr Conway was a director, "*to continue to manage the conversion of the property from a house in multiple occupation to a single residential dwelling, finance raising,*

accounting for expenses, residential lettings (if any), disposal and management of the Property". As the judge observed, it was let for various periods between 2016 and 31 August 2021 and eventually sold on 23 March 2022 for £26 million odd.

31. I was taken to the witness statements of Mr Lyons and Mr Conway. Neither of them having attended for cross-examination, the weight to be placed upon their evidence was a matter entirely for the judge. The fact that he relied on parts of them does not mean that he accepted all of them – a point which is self-evident from his rejection of Mr Lyons' evidence disputing the debt as inherently implausible. With that caveat, and taking Mr Lyons' case at its highest, I note from those witness statements the following points.

(1) The acquisition of 100 Hamilton Terrace was intended to be "*a business deal as a joint venture transaction*" with Mr Todd, but Mr Todd withdrew at about the time of the acquisition.

(2) Mr Lyons had no option but to carry on with the proposed development which was complex and difficult and took many years. The day to day management was carried out by Mr Conway and Matterhorn as Mr Lyons' agents.

(3) Although Mr Conway says Mr Lyons considered living there, Mr Lyons said it was never a home and his ownership of the property "*was only for the purpose of redevelopment".*

(4) When the development was complete the market was such that it was difficult to sell the property. The decision to rent it out was to enhance its marketability and to prevent it deteriorating pending sale.

32. This was, of course, a selective review of the material before the judge. I was taken to particular parts of the evidence but the judge below will have read and considered much more.

33. Nevertheless, against that background Mr Boardman submits that the evidence shows that Mr Lyons did not at the outset intend to carry on a business. His intention was to be a passive investor in a joint venture from which he hoped to make a profit. It is not necessary to determine whether someone who enters a joint venture to develop a property, but merely intends to provide the finance while the other joint venturer will contribute his time and energy to take the steps required to implement the development, is "*carrying on a business*". Whatever his original intention, Mr Lyons took over the proposed development when Mr Todd exited the joint venture. Thereafter, and for nearly 19 years, Mr Lyons was not just the provider of the finance, but also the person carrying out the development, renting and eventually selling the property either himself or through his agents Mr Conway and Matterhorn. The inference that Mr Lyons was carrying out the redevelopment with a view to profit is an obvious one. Mr Lyons' intention from the outset was to make a profit from the development and the fact that he had reluctantly had to take over the legwork to generate that profit did not change that. In this case whether Mr Lyons' subjective intentions are conclusive or not makes no difference.

34. Mr Boardman's submission was that any original intention to carry on a business with the joint venture fell away over the years when the property was developed as Mr Lyons was unable to sell it immediately and the only reason for renting it out was to increase its marketability. There are at least two reasons for rejecting this submission. Firstly, the primary commercial enterprise was to acquire Hamilton Terrace, redevelop it and sell it for a profit. The fact that it took many years to sell did not remove that commercial objective. Secondly the fact that the property was rented out at a market rent for financial gain displays the necessary commercial intention to utilise the property for profit. That there were other advantages to doing this, such as enhancing the primary objective of selling the property for a profit, does not detract from that.

35. Mr Boardman also submitted that this was a solitary venture and not a business. He emphasised that all Mr Lyons' other property developments were of commercial property and implemented through corporate vehicles and not in his own name. This was the only development which was in his own name. However, as the judge observed, a single venture can constitute carrying on a business for the purposes of section 265. In addition to *Kenny v Conroy* which the judge cited, authority for that proposition can be found in *Charlton v Funding Circle Trustees [2020] BPIR 125, Gate Gourmet Luxembourg IV SARL v Morby [2015] BPIR 787*, and *Masters v Barclays Bank plc [2013] BPIR 1058*. Although a tax case, and not a case on section 265 Insolvency Act 1986, I find the decision in *IRC v Livingstone* (1927) SC 251 helpful. In that case a ship repairer, a blacksmith, and a fish salesman's employee who had not previously been connected with each other in business bought a cargo steamer, converted it (partly by their own labour) into a steam drifter and sold it four months later for a profit. The Scottish Court of Session held that the transaction, though isolated, was the carrying on of a trade for tax purposes. The Lord President said this:

> "*I think the profits of an isolated venture, such as that in which the respondents engaged, may be taxable under Schedule D, provided the venture is " in the nature of trade." I say " maybe," because, in my view, regard must be had to the character and circumstances of the particular venture. If the venture were one consisting simply in an isolated purchase of some article against an expected rise in price, and a subsequent sale, it might be impossible to say that the venture was " in the nature of trade " ; because the only trade in the nature of which it could participate would be the trade of a dealer in such articles, and a single transaction falls as far short of constituting a dealer's trade as the appearance of a single swallow does of making a summer. The trade of a dealer necessarily consists of a course of dealing, either actually engaged in, or at any rate contemplated and intended to continue. But this principle is difficult to apply to ventures of a more complex character such as that with which the present case is concerned. I think the test which must be used to determine whether a venture such as we are now considering is, or is not, " in the nature of trade " is whether the operation s involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as " in the nature of*

trade," merely because it was a single venture which took only three months to complete. The respondents began by getting together a capital stock sufficient (1) to buy a secondhand vessel, and (2) to convert her into a marketable drifter. They bought the vessel and caused it to be converted at their expense with that object in view, and they successfully put her on the market. From beginning to end these operations seem to me to be the same as those which characterise the trade of converting and reconditioning secondhand articles for sale."

36. Where, therefore, as here, an isolated but significant venture is of the same kind, and carried on in the same way, as a recognised commercial business such as property development, it is likely to constitute the carrying on of a business.

37. Mr Boardman submits that all that happened in the Relevant Period was the rental of the property and its sale and that this is not capable of constituting the carrying on of a business. I do not think that is the right way to judge whether a business was being carried on in the relevant period. Mr Lyons was carrying on a business of property development of Hamilton Terrace which commenced when he purchased it, as part of which he rented it out to enhance its marketability, and he sold it, which is the earliest point at which the business can be described as having concluded. If some part of that period of operation of the business took place in the Relevant Period, then he was carrying on business in the relevant period. Here, the property was being rented to enhance its marketability and then sold during the relevant period. So he was clearly carrying on business in the relevant period.

38. The real point on this ground of appeal is that, absent any identifiable flaw in the judge's approach, this court cannot interfere with the judge's evaluative decision as to whether Mr Lyons was carrying on a business unless it is a decision which no reasonable judge could have reached. No flaw has been identified. As I have outlined above there was ample evidence on which a judge could reasonably form the view that Mr Lyons had carried on a business in purchasing, developing, renting and selling Hamilton Terrace with a view to profit and that the business was still being carried on in the relevant period until the property was sold. It is not for me to substitute my judgment for that of the judge, but I respectfully agree with his conclusion.

Ground 2

If the judge did have jurisdiction to make the Order, the Judge erred in law and/or fact in failing to give any or adequate consideration to the exercise of discretion given that the Appellant was a foreign debtor.

39. In *JSC Bank of Moscow v Kekhman & others* [2015] EWHC 396 (Ch) Morgan J held that the same approach to the winding up of foreign companies should be adopted to the bankruptcy of foreign individuals. Where jurisdiction has been established the court has a discretion as to whether to make a bankruptcy order and will be concerned as a matter of international comity not to exercise its jurisdiction in an exorbitant way. In determining whether to exercise its jurisdiction the Court will consider (a) whether the debtor has a sufficiently

close connection with England and Wales (b) whether there is a reasonable possibility of benefit resulting from the making of a bankruptcy order; and (c) whether one or more persons interested in the distribution of assets were persons over whom the English court could exercise jurisdiction. These factors are taken from the Court of Appeal decision in *Stocznia Gdanska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116 in the context of winding up foreign companies under Part V of IA86.

40. I observe that in circumstances where jurisdiction is established under section 265(2) on the basis that the debtor has been carrying on a business in the jurisdiction in the relevant period before the presentation of a petition, the first factor is almost certainly satisfied; see the similar observation by the editors of *Dicey, Morris and Collins on The Conflict of Laws* 16th ed. at 31-26.

41. At the trial below, Mr Lyons' counsel did not seek to argue that if jurisdiction was established the court should not exercise it. The judge was not referred to *Kekhman* (although as he was the first instance judge in that case too, it is likely he was well aware of it). It is hardly surprising, therefore, that the judgment does not deal expressly with the issue. That no point was taken that if jurisdiction was established the court should still not exercise its jurisdiction seems to me to have been a deliberate decision. The Grounds of Appeal were prepared by different counsel to that which represented Mr Lyons at the first hearing.

42. Whether a new point may be taken on appeal is a matter of discretion for this court. For the relevant principles guiding the exercise of the discretion see *Notting Hill Finance Limited v Sheikh* [2019] EWCA Civ 1337. Ordinarily the fact that (a) a party has made a deliberate choice not to take a particular point at first instance and (b) if taken the point would have required fresh evidence, would point to the appeal court's discretion to allow the point to be taken on appeal being refused in the interests of finality and preventing prejudice to the Respondent. However, the Respondent does not oppose the Appellant taking this point which was not taken below.

43. I exercise the discretion afresh, as the Respondent has invited me to do. I conclude that the *Latreefers* test is satisfied in this case. Mr Lyons does have a sufficiently close connection to England because he was carrying on the Hamilton Terrace business until March 2022, which was within the relevant period and 8 months before the statutory demand was served on him. There is a reasonable possibility of benefit from the bankruptcy order because Mr Lyons owns numerous UK companies and Luxembourg companies holding substantial UK based assets. In addition, the trustee in bankruptcy believes there is a claim to claw back monies which were moved from Mr Lyons' many UK bank accounts after the petition was presented. Finally there are persons interested in the distribution of Mr Lyons' assets who are subject to the jurisdiction of the Court. The Petitioner is one, having submitted to the jurisdiction by issuing the petition; see *OJSC Ank Yugraneft* [2009] 1 BCLC 298 at [15], footnote 1.

Respondent's Notice

44. In light of my conclusions on Grounds 1 and 2 the Respondent's Notice is academic. I shall deal with it as briefly as I can. Two issues arise: (i) the "personal capacity" issue; and (ii) the "timing" issue.

45. At paragraphs [23] to [52] of the judgment the judge dealt with BFI's contention on "the general business basis" – i.e. that Mr Lyons carried on business in a personal capacity in the relevant period through his network of companies. There is no doubt that the companies carry on business in the jurisdiction.

46. The judge began by considering in some detail the Court of Appeal decision in *Re Brauch (A Debtor) Ex part Britannic Securities & Investments Ltd* [1978] Ch 316 and the subsequent authorities which had considered *Re Brauch*, including Australian case law. The principle of separate legal identity for a corporation means that the business of a corporation is not the business of its shareholders or directors. *Re Brauch* made clear that it is possible for a shareholder to be carrying on business in a personal capacity in close association with a corporate structure, which is separate from the business of the companies. Mr Brauch was a property speculator or developer. Each property he acquired was purchased by a single company. There were 90 such companies. The Court of Appeal concluded (Buckley LJ, at page 335-336) that on the totality of the evidence there was a business being carried on by the debtor personally, and independently of the business of the companies, and that (Goff LJ, at page 329) the business was that of promoting or acquiring companies to speculate in land or, alternatively, of finding suitable properties, negotiating a price, obtaining necessary valuations and financing their purchase.

47. The judge then went on to review the relevant facts in this case and the submissions of both parties.

48. Mr Lyons was associated with at least 33 companies incorporated in England and Wales which were carrying on business in the UK. They were ultimately controlled and owned by a holding company called Anthony Lyons Investments Limited which itself was ultimately beneficially owned by Mr Lyons and in respect of which he had significant control.

49. The judge said at [47] that there were "*compelling analogies*" between the facts in this case and those in *Re Brauch*.

> "*Both Mr Brauch and Mr Lyons were property investors. Both used companies as the vehicles through which they conducted their investments. The number of companies each used was significant, 90 in the case of Mr Brauch, 33 in the case of Mr Lyons. (I do not think the numbers matter much: both numbers are significant: all things being equal I would say that 33 is as good as 90. In Re Oswal there were 12.) Both Mr Brauch and Mr Lyons were involved in the incorporation and promotion of the companies through which they conducted their business. The Court of Appeal found that as a fact in Re Brauch. Although it is not explicitly averred in this case, I can reasonably infer that Mr Lyons did incorporate and promote the companies he ultimately controlled, or procured others to, and I do so. Finally, both Mr Brauch and Mr Lyons intended to profit personally from what they did."*

50. However, despite the strong similarities to *Re Brauch*, the Judge (at [52]) "*with considerable misgivings*" did not accept BFI's submission for two principal reasons:

> (1) First, he found (at [51]) that that he was unable to distinguish between things done by Mr Lyons in his personal capacity (as an investor/shareholder and guarantor) as opposed to things done by his companies ("**the "personal capacity" issue**").
>
> (2) Second, he concluded (at [49]-[50]) that, to be effective for the founding of jurisdiction, the incorporation or promotion of the relevant companies – which were the acts of an individual– needed to have occurred during the Relevant Period; and, on the facts, he found that none of the relevant companies had been incorporated during the Relevant Period ("**the "timing" issue**").

The personal capacity issue

51. Mr Willson submits that the Judge erred in concluding that there was insufficient evidence before him which allowed him to isolate actions that showed with sufficient clarity that Mr Lyons was acting in a personal capacity during the Relevant Period.

52. This is an evaluative decision of the judge. Mr Willson says that BFI had filed "*voluminous evidence*" in relation to the general business basis which the judge will have considered. For the reasons set out above an appeal court will not interfere with his decision unless there has been some error in the decision making process. None has been identified.

53. Mr Willson relied in particular on the judge's findings that Mr Lyons was a property developer, that he used limited companies for his business, that he controlled his companies and that he had a beneficial interest in the profits - these are said to be "*Brauch factors*". Those facts do not, without more, demonstrate that Mr Lyons was conducting a business separate from that of the companies.

54. Mr Willson took me on some island hopping through the evidence in support of a contention that Mr Lyons' attempt to rescue his investment in the Dissington Project in 2021-2022 and/or to restructure the financing of the Dissington Project in 2021 was evidence of Mr Lyons acting in a personal, and not a corporate, capacity. However, like the judge, I find it very difficult to tell from the correspondence in what capacity Mr Lyons was acting. Even if he was acting in his personal capacity, he was a guarantor of DLEL's debt, and had a personal interest as guarantor in the project not failing. That is not the same thing as having a separate business from that of the company.

55. Mr Willson says that the judge wrongly thought that Mr Lyons' use of the title CEO and Mr Conway's description of Mr Lyons as a shadow director pointed to his involvement "*being corporate as opposed to personal*". He says that a shadow director is an individual upon whose instructions the directors are

accustomed to act, and therefore is acting personally. The judge was merely quoting Mr Conway's description of Mr Lyons as a shadow director. He did not accept Mr Conway's evidence and he made no finding that Mr Lyons was a shadow director. The reference to Mr Lyons' use of the title CEO points to Mr Lyons being a *de facto* director. The point remains that the judge was immersed in the evidence and was best placed to judge whether Mr Lyons' use of the title CEO or his relationship with Mr Conway pointed to his involvement being corporate as opposed to personal.

Respondent's second ground – the timing issue

56. Mr Willson says that the Judge also erred in finding that the promotion/incorporation of the relevant companies needed to take place during the Relevant Period (Judgment, at [48]-[50]). The Court of Appeal in *Re Brauch* made no finding that the promotion and other activities relied on occurred during the then-relevant one-year period. The judge thought it was implicit in the court's judgment that it did. The judge's own reasoning was that the incorporation and promotion of a company (or the acquisition of a shell company) are essentially one-off events and to be effective for the purpose of founding jurisdiction, they must have occurred in the relevant period.

57. If the business the debtor is said to be carrying on is the business of promoting or acquiring companies to speculate in or develop land (as in *Re Brauch*), which is separate from the business of the companies in speculating or developing land, then it may be difficult to show that the debtor's business is continuing in the relevant period unless there is some relevant activity during the relevant period (although it may be that evidence of a continuing intention to promote or acquire companies in the future as part of the same enterprise may suffice). Relevant activity would most obviously be promoting or acquiring companies. The mere fact that the companies previously promoted or acquired before the relevant period continued to carry on business during the relevant period does not shed much light on the relevant issue.

58. In the end whether there was a business being carried on in the relevant period is an evaluative decision of the judge. It was open to the judge on the evidence before him to find that if there was a *Re Brauch* type of business of promoting or acquiring companies, that business was not being carried on in the relevant period because the companies and the corporate structure relied on by BFI were promoted, acquired and set up long before the relevant period began.

59. Finally, Mr Willson says that unbeknownst to the judge one company was incorporated during the Relevant Period and another dissolved. Whether this would have made a difference to the judge's thinking we will never know as the point was not raised with the judge at the trial (or after judgment). The trial was the first and last night of the show.