Neutral Citation Number: [2023] EWCA Civ 901

Case No: CA-2022-002443

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS IN BRISTOL, INSOLVENCY AND COMPANIES LIST (ChD)
His Honour Paul Matthews sitting as a Judge of the High Court
[2022] EWHC 2973 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 2023

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
LORD JUSTICE ARNOLD

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Between :

(1) PATLEY WOOD FARM LLP **(2) LORRAINE BREHME** **(3) THE CHEDINGTON COURT ESTATE LIMITED**	**Applicants/ Respondents**
- and -	
(1) KRISTINA KICKS **(2) BLAIR CARNEGIE NIMMO** **(AS JOINT TRUSTEES IN BANKRUPTCY OF NIHAL MOHAMMED KAMAL BRAKE AND ANDREW YOUNG BRAKE)**	**Respondents/ Appellants**

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Andrew Westwood KC and Rowena Page (instructed by **Gateley Legal**) for the **Appellants**
William Day (instructed by **Stewarts Law LLP**) for the **Respondents**

Hearing date : 20 July 2023

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Approved Judgment

Lord Justice Arnold:

Introduction

1. Kristina Kicks and Blair Nimmo ("the Trustees") are licensed insolvency practitioners with extensive experience in insolvency, restructuring and asset recovery. They are the joint trustees in bankruptcy of Andrew Brake and Nihal Brake. On 25 November 2022 HHJ Matthews sitting as Judge of the High Court made an order under section 303(1) of the Insolvency Act 1986, for the reasons given in his judgment of the same date ([2022] EWHC 2973 (Ch), [2023] BPIR 507), directing the Trustees (i) to make an application to join claim F00YEO95 ("the Eviction Claim") which is currently on appeal before this Court, (ii) to file and serve written submissions and/or a witness statement (a) in opposition to ground 3 of the appeal and (b) in support of a possession order for West Axnoller Cottage ("the Cottage") in favour of the Trustees and (iii) to attend and make oral submissions at any hearing of those matters. The Trustees appealed against that order with permission granted by Newey LJ. After hearing the appeal the Court announced that the appeal would be allowed with reasons to follow in writing. These are my reasons for concurring with that disposition of the appeal.

Background

2. The background to the appeal is of considerable complexity. I will endeavour to explain it as briefly and simply as I can, but some detail is necessary.

3. In September 2004 Mrs Brake bought West Axnoller Farm in Dorset ("the Farm"), which included Axnoller House. By 2008 Mr and Mrs Brake were living in Axnoller House. In February 2010 the Brakes entered into a partnership ("the Partnership") with Patley Wood Farm LLP ("PWF"), whose principal was Lorraine Brehme. The Brakes contributed West Axnoller Farm as partnership property. The Partnership carried on a business of holiday lettings and events such as weddings. The Partnership was regulated by a partnership deed.

4. Adjoining the Farm is the Cottage. The Partnership acquired the Cottage after the execution of the partnership deed, in April 2010. Title to the Cottage was registered in the names of Mr Brake, Mrs Brake and Mrs Brehme; but it was partnership property, as contemplated by the partnership deed. Until 2012, the Cottage was used by employees of the Partnership. From 2012 onwards, it was used by the Brakes (and Mrs Brake's son Tom D'Arcy) when Axnoller House was let out for weddings.

5. A dispute arose between the Brakes and Mrs Brehme, which was referred to arbitration in accordance with the partnership deed. In December 2012, whilst the arbitration was on foot, the Brakes issued proceedings against PWF and Mrs Brehme seeking a transfer of the Cottage into the Brakes' sole names ("the Cottage Claim"). The Cottage Claim included a claim in proprietary estoppel. The Cottage Claim was stayed in February 2015 and has never been determined.

6. In June 2013 the arbitration was determined in Mrs Brehme's favour and an award of costs made against the Brakes. A charging order was obtained by Mrs Brehme in September 2014 securing the costs award over such interest (if any) as the Brakes held in the Cottage. Following a failure to pay the costs, the Brakes were made

bankrupt in May 2015. The original trustees in bankruptcy were Duncan Swift and Jeremy Willmont, but Mr Willmont retired and was not replaced. As a result of the bankruptcies, the benefit of the Cottage Claim vested in Mr Swift.

7. The Partnership went into administration in July 2016 and liquidation in May 2017. Because the Cottage was partnership property, the three registered proprietors held their legal title on trust for the Partnership and, after its liquidation, for the benefit of the liquidation estate. On 6 January 2016 Chief Master Marsh made an order which recorded that the three partners had agreed that the Cottage be sold as part of the winding up of the Partnership.

8. In the meantime, Adam & Co, the mortgagee of West Axnoller Farm, had appointed receivers under the Law of Property Act 1925 in October 2014. West Axnoller Farm (but not the Cottage, which was not mortgaged) was sold to Sarafina Properties Ltd ("Sarafina") in July 2015. In February 2017 Sarafina was acquired by The Chedington Court Estate Ltd ("Chedington"), a company owned and controlled by Dr Geoffrey Guy, and changed its name to Axnoller Events Ltd ("AEL"). Thereafter the Brakes operated the business at the Farm as employees of AEL. They continued to stay at Axnoller House, and at the Cottage when Axnoller House was let.

9. Following their bankruptcies, the Brakes moved into the Cottage and stayed there, rather than Axnoller House, with limited interruptions until at least October 2016. Thereafter, the Brakes moved back into Axnoller House and continued to use the Cottage as they had done before May 2015, i.e. when Axnoller House was let.

10. Relations between the Brakes and Dr Guy broke down in November 2018. The Brakes' employment was terminated and they were ordered to leave Axnoller House. The Brakes did not leave, and continued to stay in Axnoller House. These events led to claims being brought by the Brakes against Chedington and others in the Employment Tribunal ("the Employment Claims") and by AEL against the Brakes for possession of Axnoller House ("the Possession Claim"). It is not clear from the materials before the Court what has happened to the Employment Claims, but for present purposes this does not matter.

11. On 2 January 2019 the liquidators of the Partnership accepted an offer from Chedington to buy the Partnership's interest in the Cottage. But the liquidators were unwilling to take legal action (even if financed by Chedington) to take steps to remove the Brakes from the legal title. Instead, the following plan was devised. Chedington would put Mr Swift in funds so as to enable him immediately to buy such right and title to the cottage as the liquidators could sell, thereby reuniting the beneficial interests in the Cottage. Mr Swift would then enter into a back-to-back sale to Chedington of such right and title to the Cottage as Mr Swift then had, and also of clean registered title as a result of an application to the court by him (financed by Chedington). In addition, and in order to demonstrate an appropriate benefit to creditors of the bankruptcies, a facilitation fee would be paid by Chedington to Mr Swift, of £30,000 (plus VAT) on the execution of the contract, together with £3,000 (plus VAT) per month until completion of the transfer enabling full registration, for a maximum of 12 months.

12. On 15 January 2019 two agreements were executed. The first was between the liquidators and Mr Swift by which the liquidators agreed to sell such right, title and

interest (if any) as the Partnership had and could transfer in the beneficial and/or equitable interest in the Cottage. The second was a contract between Mr Swift and Chedington for the sale of the Cottage at a price of £500,000. It was a conditional contract. The conditions included the obtaining by Mr Swift of a court order authorising (i) the transfer of the whole of the beneficial interest in the Cottage to Chedington, (ii) the transfer of the legal title in the Cottage to Chedington and (iii) Mr Swift to execute any documents necessary to achieve (i) and (ii). The conditions remain unfulfilled.

13. Also on 15 January 2019 Mr Swift executed a licence permitting Chedington to occupy the Cottage as a residential property in common with Mr Swift and all others authorised by him.

14. For reasons that remain both mysterious and unexplained, Mr Swift did not apply to the court for an order as contemplated by the contract of sale or for possession of the Cottage. Instead, he authorised Chedington to take possession of the Cottage without a court order. Accordingly, on 18 January 2019 a team assembled by Chedington took possession of the Cottage by gaining entry and changing the locks. As at that date the Brakes were not resident in the Cottage, but they remained in possession of it.

15. In February 2019 the Brakes commenced proceedings under the 1986 Act against both the liquidators of the Partnership ("the Liquidation Application") and Mr Swift ("the Bankruptcy Application"). The first purpose of these proceedings was to unwind the transactions between the liquidators and Mr Swift. The second purpose was (as against Mr Swift) to establish that the Brakes' pre-existing interests in the Cottage had revested in them in May 2018 under section 283A of the 1986 Act, on the basis that it was the Brakes' sole or principal residence at the date of bankruptcy, and Mr Swift had taken no steps to realise those interests three years later. In April 2019, by consent, Chedington was joined as second respondent to the proceedings against Mr Swift, because it claimed to be a successor in title to him. In June 2019 John Jarvis QC sitting as a Deputy High Court Judge made two orders by consent, one removing Mr Swift from office and the other appointing replacement trustees. The current office holders are the Trustees.

16. In January 2020 Chedington applied to strike out the Liquidation Application and most of the Bankruptcy Application on the basis that the Brakes lacked standing to bring them. Those applications were heard by HHJ Matthews in early March 2020. He struck out the whole of the Liquidation Application ([2020] EWHC 538 (Ch), [2020] BPIR 445), and most of the Bankruptcy Application ([2020] EWHC 537 (Ch), [2020] BPIR 466), for lack of standing on the part of the Brakes. An appeal against his decision in the Liquidation Application was dismissed, and an appeal against his decision in the Bankruptcy Application was allowed, by the Court of Appeal in November 2020 ([2020] EWCA Civ 1491, [2021] Bus LR 577). An appeal by Chedington to the Supreme Court was heard on 1 November 2022, but at the timing of writing this judgment the judgment of the Supreme Court is still awaited. If the Supreme Court dismisses the appeal, the relevant parts of the Bankruptcy Application will need to be tried. Mr Swift is not defending the Bankruptcy Application, and so the only party resisting it is Chedington.

17. In the meantime HHJ Matthews tried the section 283A claim in May 2020. In July 2020 he gave judgment in favour of Chedington ([2020] EWHC 1810 (Ch), [2020] 4

WLR 113). An application for permission to appeal was refused by the Court of Appeal in October 2020. This meant that, if the Brakes had any rights in relation to the Cottage (for example, by proprietary estoppel) when they became bankrupt, those rights never revested in them under section 283A.

18. In April 2019 the Brakes (and Mr D'Arcy) issued the Eviction Claim. The claim form asserted that the Brakes were the registered proprietors of the Cottage and entitled to exclusive possession of it. It pleaded their forcible exclusion from the cottage on 18 January 2019. The following relief was claimed:

    i) a declaration that the Brakes' exclusion from the Cottage was unlawful and/or that Chedington had no right or title to justify any interference with the Brakes' exclusive right to occupy the Cottage;

    ii) immediate delivery up of possession of the Cottage;

    iii) a declaration that Chedington was a trespasser on the Cottage;

    iv) an injunction restraining Chedington from interfering with the Brakes' right to occupy the Cottage;

    v) an enquiry into damages.

19. Chedington's Defence relied, among other things, on the licence granted to Chedington by Mr Swift as entitling Chedington to exclude the Brakes from the Cottage.

20. In September 2019 the Brakes issued a claim against Dr Guy, Chedington and AEL for breach of confidence, misuse of private information, procuring a breach of contract and compensation under Article 82 of the General Data Protection Regulation. This claim ("the Documents Claim") concerned the defendants' access to and use of what were said to be private and confidential documents and information in an email account which, prior to the Brakes' dismissal, had been used, not only for the business purposes of the weddings and events business carried on at the Farm, but also by Mrs Brake for her personal communications.

21. HHJ Matthews heard certain preliminary issues at two hearings in November 2020. He gave two judgments in favour of the defendants in March 2021 ([2021] EWHC 670 (Ch), [2021] 4 WLR 71, and [2021] EWHC 671 (Ch)). In March 2022 the Court of Appeal dismissed the Brakes' appeal against the second of those judgments ([2022] EWCA Civ 235).

22. HHJ Matthews tried the Possession Claim over two and a half weeks in September 2021 and the Eviction Claim over two and half weeks in October 2021. He gave judgment in both Claims in February 2022 ([2022] EWHC 365 (Ch) and [2022] EWHC 366 (Ch)). He held that AEL was entitled to possession of the Farm, including Axnoller House, and dismissed the Brakes' claim regarding their eviction from the Cottage.

23. The Brakes applied for permission to appeal against both decisions. These applications came before me on paper. I directed an oral hearing of both applications. After hearing argument in April 2022 I refused the Brakes permission to appeal in the

Possession Claim, but granted the Brakes permission to appeal in the Eviction Claim on three grounds. Ground 1 was the judge had erred in law in dismissing the Eviction Claim because the Brakes had better title than Chedington did. Ground 2 was that the judge had erred in law in dismissing the Eviction Claim because the Brakes had been protected by the Protection from Eviction Act 1977. Ground 3, which was consequential, was that the judge had erred in law in not granting the Brakes an order for possession of the Cottage.

24. Following the refusal of permission to appeal in the Possession Claim, the Brakes were evicted from Axnoller House.

25. The Brakes' appeal in the Eviction Claim was heard by this Court in July 2022. On the day before the hearing the Trustees wrote to the Court asking that, if the Brakes were successful and sought an order for possession of the Cottage, the Trustees be given the opportunity to consider their position and potentially to be heard. It was common ground at the hearing that we should only deal with the first two grounds of appeal, with consequential matters to be dealt with subsequently. We gave judgment on 10 October 2022 allowing the Brakes' appeal ([2022] EWCA Civ 1302, [2022] HLR 9). It is necessary to say a little about the reasoning which led to the appeal being allowed and about the order that was made.

26. Before I do so, it is worth explaining that the account given above of the various pieces of litigation involving the Brakes, Dr Guy and his companies and the various office holders is in no sense comprehensive. In addition, HHJ Matthews and other judges have had to deal with a large number of interim and procedural applications of various kinds. By one reckoning there have so far been 42 judgments since the Brakes' bankruptcies, to add to eight in the dispute between the Brakes and PWF and Mrs Brehme before then.

The judgment and order of this Court dated 10 October 2022

27. The Brakes' appeal was allowed on ground 1, although ground 2 was dismissed. Ground 1 was considered in the judgment given by Lewison LJ, with which Asplin LJ and I agreed. As Lewison LJ explained, the Brakes' claim for wrongful eviction from the Cottage on 18 January 2019 was a common law action for ejectment. Since the Brakes were in possession of the Cottage at that time, they were entitled to reclaim possession against any person other than one with a better title to possession than their own. Therefore the essential question was who had the better title to the Cottage on 18 January 2019. Although the Brakes had no beneficial interest in the Cottage, this did not matter. From the perspective of the common law, equitable interests were irrelevant. Not only were the Brakes two out of three of the legal owners of the Cottage, but also they were in actual possession of it. Chedington did not rely upon any title of its own, but that of Mr Swift, who had authorised Chedington to take possession. The lawfulness of the eviction therefore depended on Mr Swift having a better common law right to possession than the Brakes. Chedington relied upon the fact that (as matters then stood) Mr Swift was the sole beneficial owner of the Cottage, while the Brakes were bare trustees. Mr Swift had not sought the intervention of the court in its equitable jurisdiction, however. The Brakes accepted that, if Mr Swift had gone to court, the court could and probably would have ordered the Brakes to give up possession of the Cottage pursuant either to the rule in *Saunders v Vautier* (1841) 4 Beav 115, affirmed Cr & Ph 240 or section 14 of the Trusts of

Land and Appointment of Trustees Act 1996. They argued, however, that that did not entitle Mr Swift to exercise a self-help remedy without the intervention of the court. Lewison LJ accepted this argument.

28. Accordingly, the Court made a declaration that Chedington had no right or title at common law to justify any interference with the Brakes' exclusive possession of the Cottage. It follows that the Brakes' eviction from the Cottage was unlawful at common law. The Court also gave directions for the determination of what, if any, consequential relief the Brakes should be granted. All other consequential matters, including costs and permission to appeal, were reserved until after that determination.

29. It was common ground between the parties that there should be an enquiry as to the damages claimed by the Brakes. As for possession, Chedington had conceded at trial that, if the Brakes could establish that they had a better title than Chedington on 18 January 2019, then the Brakes were entitled to possession of the Cottage. It followed from the Brakes' argument on the appeal and the Court's acceptance of that argument, however, that the Brakes' entitlement to possession was subject to any application to the court that might be made by the beneficial owner(s) of the Cottage, now said to be (as matters stand) the Trustees. Accordingly, the Court made the following order:

> "By 4pm on 21 November 2022, the Trustees in Bankruptcy shall (if so advised) make an application to join the proceedings … At the same time, the Trustees in Bankruptcy shall file and serve written submissions and/or a witness statement setting out their position on the question of any further relief in these proceedings sought by the Appellants."

The purpose of this order was to give the Trustees the opportunity to apply to join the proceedings provided that they did so by the time specified.

Events leading up to the application before the judge

30. On 21 October 2022 Mrs Brehme wrote as the largest creditor in the Brakes' bankruptcies to the Trustees requesting them to apply to join the Eviction Claim in order to oppose an order for possession of the Cottage being made in favour of the Brakes. By letter dated 28 October 2022 the Trustees declined to do so, noting that they had remained neutral in the proceedings to that date in accordance with legal advice, and saying that such an intervention would only increase costs in the bankruptcy estates without any possibility of a return to them and therefore could not be justified.

31. On 31 October 2022 the Brakes filed written submissions as to consequential matters in the Eviction Claim appeal in which they sought possession of the Cottage. The Brakes confirmed an offer made by them of an undertaking to the Trustees and the Court to deliver up possession of the Cottage to the Trustees on 28 days' notice if the outcome of the Bankruptcy Application was that the beneficial interest in the Cottage fell within their bankruptcy estates.

32. On 3 November 2022 Chedington's solicitors ("Stewarts") sent the Trustees a three-page letter requesting them to join the Eviction Claim, to oppose an order for possession in favour of the Brakes and to seek an order for possession in favour of the

Trustees. The letter pointed out that the Cottage was the main, if not only, asset in the bankruptcy estates. It acknowledged that the Trustees were awaiting the decision of the Supreme Court before complying with the contract entered into by Mr Swift, but pointed out that in the meantime the Trustees were under a duty to manage the asset in the interests of the creditors. It argued that it could not be in accordance with the Trustees' duties to allow the Brakes to take possession of the Cottage for three reasons: (i) the Brakes were not proposing pay anything, whereas Chedington offered to pay a licence fee of £3,000 a month; (ii) the Brakes had form for refusing to vacate property (viz. Axnoller House) and for non-compliance with court orders as to costs; and (iii) the Brakes' possession of the Cottage was likely to depreciate its value. It suggested that the costs of intervention were unlikely to be significant, not least because the issues of both joinder and possession were capable of determination on the papers without a hearing. It said that Chedington offered to pay the Trustees' reasonable costs of the steps requested and to indemnify the Trustees against any adverse costs risk. It threatened a joint application with Mrs Brehme to the court for an order if the Trustees did not comply with Chedington's requests by 7 November 2022.

The application

33. On 8 November 2022 PWF, Mrs Brehme and Chedington (collectively, "the Applicants") issued an application pursuant to section 303(1) of the 1986 Act seeking to compel the Trustees to join the Eviction Claim and take the other steps requested.

34. On 9 November 2022 the Trustees' solicitors ("Gateley") responded relatively briefly to Stewarts' letter of 3 November 2022 and to the section 303 application. Among other points, the letter noted that the Trustees were under a strict duty to act independently and in the interests of the creditors, particularly in circumstances where litigation had been ongoing between various parties since 2012. The letter referred to PWF's charging order over the Cottage and reiterated that it was not appropriate for the Trustees to be joined to the Eviction Claim when there could be no benefit accruing to the bankruptcy estates.

35. On 10 November 2022 Stewarts sent Gateley a further three-page letter alleging that Gateley's letter of 9 November 2022 contained a number of material errors with respect to the legal and factual position concerning the Cottage and saying that this reinforced the Applicants' view that the Trustees' position was misconceived. Among other points, the letter informed the Trustees that PWF had agreed to remove its charge upon the sale of the Cottage to Chedington. It stated that the Cottage was in poor condition and unlikely to have a rental value exceeding £1,000 a month. Realistically, the only parties apart from Chedington who would be likely to be willing to pay over the odds were the Brakes, but they were subject to a freezing injunction and on their own case were impecunious. It said that the odd position taken by the Trustees suggested that they were not as neutral as they claimed to be, and invited them to reconsider.

36. On 14 November 2022 Ms Kicks made a witness statement in opposition to the application. On 15 November 2020 the Applicants served a witness statement in support of the application. On the same day the parties exchanged skeleton arguments, and Stewarts wrote to Gateley commenting on concerns raised in the Trustees' skeleton argument. The application was heard by the judge on 16 November 2022. He

announced his decision on 17 November 2022 and gave his reasons on 25 November 2022.

Applicable legal principles

37. There was no dispute either before the judge or this Court as to the legal principles applicable to the Applicants' application. A trustee in bankruptcy's primary function is to "get in, realise and distribute the bankrupt's estate". In carrying out this function, and in the management of the bankrupt's estate more generally, the trustee is entitled, subject to the provisions of Chapter IV of the 1986 Act, to "use his own discretion": section 305(2) of the 1986 Act.

38. Section 303(1) provides:

> "If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt's estate, he may apply to the court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit."

39. In *Re Edennote Ltd* [1996] 2 BCLC 389 at 394 Nourse LJ said that, fraud and bad faith apart, the court will only interfere with the act of a liquidator "if he has done something so utterly unreasonable and absurd that no reasonable man would have done it". It is common ground that the same test applies to a trustee in bankruptcy.

40. In *Bramston v Haut* [2012] EWCA Civ 1637, [2013] 1 WLR 1720 Kitchin LJ (as he then was) cited Nourse LJ's statement at [68] and went on in [69] to approve the test set out by Registrar Baister in *Osborne v Cole* [1999] BPIR 251 at 255:

> "It follows that it can only be right for the court to interfere with the decision the official receiver has taken if it can be shown he has acted in bad faith or so perversely that no trustee properly advised or properly instructing himself could so have acted, alternatively if he has acted fraudulently or in a manner so unreasonable and absurd that no reasonable person would have acted that way."

41. In *Re Edengate Homes (Butley Hall) Ltd* [2022] EWCA Civ 626, [2022] 2 BCLC 1 Males LJ cited Nourse LJ's statement at [43], describing it at [44] as "a formidable test" and noting that it left "a potentially large category of cases where the liquidator's conduct may be open to valid criticism but where that conduct cannot be so characterised".

The Trustees' evidence

42. In her witness statement Ms Kicks said:

> "11. … the Joint Trustees … have always adopted an entirely neutral position in relation to the various proceedings between the Brakes and the Applicants. This is because we are of the view that it is not in the bankruptcy estates' interests for us to

be involved as no substantive benefit is likely to accrue to the estates by us doing so.

12. There are several reasons for us having reached this conclusion, including that:

12.1 We are in our capacity as trustees in bankruptcy under a strict duty to act independently;

12.2 The underlying dispute between the Brakes and the Applicants has so far proved to be highly contentious, time consuming, very protracted and expensive; and

12.3 There has always been very limited assets in the bankruptcy estates to fund costs (including legal costs, other expenses and the Joint Trustees' fees).

13. I return to these issues in some further detail but in my experience this is a consistent and reasonable position for insolvency office-holders to adopt."

43. Ms Kicks' evidence as to the financial position of the bankruptcy estates may be summarised as follows. The Trustees have received proofs of debt totalling £3,221,556. Mrs Brehme has submitted a proof for £1,411,372 and PWF for £495,545, together making £1,906,917 (59.2% of the total). No proof has been submitted by Chedington. The bankruptcy estates have received recoveries of £66,714.39 (Mrs Brake) and £24,277.81 (Mr Brake). In addition, the Brakes provided funding in the sum of £200,000 to enable the Trustees to investigate Mr Swift's conduct and the merits of pursuing pre-bankruptcy proceedings between the Brakes, Mrs Brehme and PWF. Against that, Mr Swift's unbilled time costs exceed £500,000 plus VAT, while the Trustees' unbilled time costs down to 29 July 2022 are £83,200.85 (Mrs Brake) and £106,392.20 (Mr Brake). In addition, expenses of £80,487.75 (Mrs Brake) and £80,609.97 (Mr Brake) have been incurred, although there is a large overlap between these figures. Accordingly, the Trustees do not expect to pay a dividend to any class of creditor.

44. With regard to the indemnity offered by Chedington by Stewarts' letter dated 3 November 2022, Ms Kicks expressed three particular concerns. First, that the Brakes would use it to criticise the Trustees' conduct either in the Eviction Claim or by way of a section 303(1) application. Secondly, that Chedington would seek to control or influence what steps the Trustees took in the Eviction Claim. Thirdly, that in the event of disagreement as to what amounted to "reasonable costs", the Trustees would be left exposed.

The judge's judgment

45. In his judgment the judge set out the background to the application at [1]-[22]. The judge considered the Applicants' standing to bring the application at [24]-[35]. He held that PWF and Mrs Brehme had standing, and therefore it did not matter whether Chedington had standing. There is no challenge to that conclusion, but nevertheless it is necessary to note what the judge said in that context at [28]:

> "… the trustees say that there are large unbilled costs and remuneration of the trustees, which mean that the bankruptcy estate is substantially 'underwater'. As to that, of course, the factual position is that these fees and costs are simply an estimate, and not yet liquidated. But the more significant point is that the remuneration and the accounts of the trustees can always be challenged by the creditors (unless it turns out there is a surplus, the creditors having been paid in full). There is therefore no certainty that any outstanding fees and costs will be allowed in the sum estimated or anything like it."

46. The judge considered the merits of the application at [36]-[57]. He set out the law at [36]-[40]. At [41] the judge noted that the Applicants did not allege bad faith or fraud on the part of the Trustees, but rather alleged perversity. He expressed the view that he had to consider the position as at the date of the hearing, a view that neither side dissented from on the appeal. Having summarised the parties' submissions at [43]-[48], the judge set out his assessment at [49]-[56].

47. In his assessment the judge reasoned as follows. He began at [50] by stating:

> "… in looking at the evidence and following the sequence of events, I have to say that what I see is these trustees striving at all costs not to have to take part in litigation against the Brakes. This is to my mind an entirely illegitimate consideration. …"

48. The judge then proceeded to consider the concerns that had been expressed by and on behalf of the Trustees at [51]-[52] and expressed the view that these had all been satisfactory addressed by the offers made by Chedington. He agreed with the Applicants that there was no risk of challenge by the Brakes if the Trustees were acting pursuant to the directions of the court. He noted that Chedington's offer to pay the Trustees' reasonable costs was not limited to legal costs. He concluded at [52]:

> "In the circumstances, it is difficult to see the downside to the trustees in making an application to intervene."

49. The judge turned next to consider the benefits if the Trustees were successfully to intervene in the Eviction Claim. He identified three benefits at [53]. First, the ability to obtain an income stream from the Cottage. Secondly, further deterioration of the Cottage could be avoided. Thirdly, the Trustees would not be exposed to the risk of the Brakes refusing to leave the Cottage. He dismissed the undertaking offered by Brakes, saying "a bird in the hand is worth two in the bush".

50. The judge then considered and dismissed the Trustees' concern over their independence, saying at [54]:

> "Equally unimpressive is the trustees' failure to appreciate that it is their job *not* to be neutral as between the creditors and the bankrupts. It is their job to advance the interests of the creditors against the bankrupts. The trustees may say they want to be neutral and impartial as between *Chedington* and the Brakes, but that is irrelevant to the question what is in the best interests

> of the creditors. They say that their independence would be at risk if they accepted funding from Chedington. But that is simply absurd. Trustees in bankruptcy and other insolvency officeholders accept funding from third parties every day, without compromising their independence."

51. The judge concluded at [55]:

> "In this case the trustees have funding, indemnities, encouraging comments from the Court of Appeal, and a clear opportunity to monetise the cottage for the benefit of the estates. However, they have chosen to fold their arms and do nothing. All in all, I am entirely satisfied that the decision not to intervene in the Eviction Proceedings, even if it were originally justified (which I doubt), was certainly not justified by the time of the hearing before me. In my assessment, by that stage it had become an absurd decision, to which no reasonable trustee could have come. In that sense, it is perverse, and the test for section 303 is satisfied."

52. The judge went on at [57] to say that it was appropriate to grant the relief sought with one amendment. That was that the conditional obligation on the Trustees to grant a licence on certain terms to Chedington should be replaced by an option on the part of the Trustees to enter into such a licence, so that the Trustees would have the opportunity, if so advised, to seek a better return on the asset.

53. Having made the order under appeal on 25 November 2022, the judge considered consequential issues in a further judgment dated 6 December 2022 ([2022] EWHC 3118 (Ch), [2023] Costs LR 171). He ordered the Trustees to pay the Applicants' costs of the application, refused to allow the Trustees to recoup costs from the bankruptcy estates and refused permission to appeal.

Subsequent events

54. Although the correctness of the judge's decision must be considered as at the date on which it was taken and on the basis of the materials which were before him, it is nevertheless germane for reasons that will appear to note certain subsequent developments.

55. On 9 December 2022 the Trustees made an application seeking (i) directions pursuant to section 303(2) of the 1986 Act confirming that draft submissions to the Court of Appeal prepared by counsel for the Trustees did not constitute a breach of the order dated 25 November 2022, alternatively (ii) a variation of the order pursuant to section 375 of the 1986 Act to permit the Trustees to submit the submissions to the Court, and (iii) directions as to how the Trustees might properly comply with the order. The Trustees explained that they had made the application on advice because they were concerned as to the impact of their duty of candour to the court when making their application to join the Eviction Claim given the Trustees had been advised that it was highly arguable that, in purchasing the Cottage in the manner described above, Mr Swift had acted outside his powers as trustee in bankruptcy and/or for an improper

purpose. If correct, that would mean that the Trustees did not have beneficial title to the Cottage.

56. HHJ Matthews heard this application on 16 December 2022. By his order of the same date, he directed the Trustees not to submit the draft submissions to the Court of Appeal. He also made positive directions as to what the Trustees should submit. The judge gave his reasons for making that order in an extempore judgment ([2022] EWHC 3257 (Ch), [2023] BPIR 726). In that judgment the judge stated at [16]:

> "… I regret to say that [this application] reminds me of the comments that I made in my earlier judgment that the Trustees in Bankruptcy just seem to be looking for an excuse not to be involved. I do accept what Mr Calland [counsel for the Trustees] says, that he has come into this case, taken a professional view and given certain advice and so on. That is as may be, but, in this context, I think that it is merely the instrument implementing the attitude which the Trustees appear already to have taken."

57. On the same day the Trustees applied to this Court for permission to appeal.

58. On 3 January 2023 (time having been extended by this Court) the Trustees applied to join the Eviction Claim appeal and filed written submissions and a witness statement of Ms Kicks in support of that application in accordance with the judge's orders.

59. On 13 January 2023 Chedington filed written submissions on consequential matters in the Eviction Claim appeal supporting the Trustees' application.

60. On 30 January 2023 the Brakes filed written submissions in reply on consequential matters in the Eviction Claim appeal. In these submissions the Brakes: (i) noted what happened as result of the judge's orders; (ii) noted that the Trustees were applying to this Court for permission to appeal; (iii) vigorously opposed the Trustees' application to be joined to the appeal; (iv) argued that the Trustees did not have beneficial title to the Cottage because Mr Swift had acted outside his powers and/or for an improper purpose; (v) submitted that these matters required a hearing estimated at two days to determine; and (vi) suggested the Court hold a directions hearing to give directions for that hearing.

61. On 2 February 2023 Newey LJ granted the Trustees permission to appeal and ordered that the hearing of the appeal be expedited.

62. Thereafter this Court decided to hold a directions hearing in both the Eviction Claim and the Trustees' appeal. This was initially fixed for 23 March 2023, but owing to a miscommunication and a consequential availability issue, this had to be re-fixed for 12 May 2023. All parties (that is to say, the Brakes, the Trustees and the Applicants) filed written submissions in preparation for that hearing addressing certain questions identified by the Court. As result of those submissions, it became apparent that the most efficient course would be to direct that the Trustees' appeal be determined before the Court attempted to determine the remaining consequential issues in the Eviction Claim appeal, because if the Trustees' appeal was successful the joinder

application would fall away. At the hearing all parties agreed with this. Subsequently the hearing of the Trustees' appeal was fixed for 20 July 2023.

63. In the meantime, Gateley have been in negotiations with Stewarts over the costs of the Trustees' joinder application and of associated matters such as the directions hearing on 12 May 2023. Despite protracted correspondence, no agreement had reached by the time of the hearing on 20 July 2023. Moreover, it was only on 18 July 2023 that an offer of a payment on account was made.

64. In addition to the difficulties the Trustees have experienced in getting their costs agreed by the Applicants, the Applicants have sought to control every aspect of the Trustees' conduct of the joinder application. For example, in a letter dated 5 May 2023 Stewarts insisted that the Trustees seek a final determination of the joinder application at the hearing on 12 May 2023, failing which the Trustees' costs would not be paid pursuant to the Applicants' undertaking. After the hearing on 12 May 2023 the Applicants indicated that they would dispute the Trustees' claim for their costs of attendance at the hearing.

The Applicants' preliminary objection to the appeal

65. In his skeleton argument in opposition to the appeal, counsel for the Applicants said that "[t]his is an odd appeal" and went on:

> "It is unclear how this appeal could be in the interest of the bankruptcies. The inference can (and should) be drawn that it is being pursued for reputational or costs reasons."

66. In his oral submissions counsel for the Applicants went further, and submitted that the appeal was "irregular", and should be dismissed irrespective of its merits, even though it had been brought in accordance with the applicable rules and with permission and even though the Applicants had not taken this point either when opposing the Trustees' application for permission to appeal or by way of an application to set aside the grant of permission or to strike out the appeal.

67. In support of this submission counsel for the Applicants relied on *Re Londonderry's Settlement* [1965] Ch 918. In that case the trustees had sought the court's directions as to whether they were bound to disclose certain trust documents at the request of a beneficiary, but had done so in abstract terms rather than in relation to specific identified documents. Plowman J decided that the trustees were bound to disclose the documents, and the trustees appealed. The appeal was successful in part. Harman LJ, with whom Danckwerts LJ agreed, observed *en passant* at 930-31 that the appeal was "an irregularity", because "[t]rustees seeking the protection of the court are protected by the court's order and it is not for them to appeal. That should be done by a beneficiary…". Salmon LJ expressed the view at 936 that "the trustees were fully justified in bringing this appeal. Indeed it was their duty to bring it since they believed rightly that an appeal was essential for the protection of the general body of beneficiaries". When it came to costs, the Court of Appeal ordered the costs of the trustees and the defendant to be taxed on the common fund basis (equivalent to the standard basis now) and paid out of the trust funds. The Court did not give any reasons for making this order.

68. *Londonderry* was considered in *Re R & RA Trusts* (unreported, Guernsey Court of Appeal, 20 May 2014). In that case the trustees of certain family trusts applied for disclosure of information by some of the beneficiaries of those trusts. The third respondent supported the trustees' application and made her own application for more far-reaching disclosure orders against the other respondents. The Deputy Bailiff dismissed both applications. The third respondent appealed. The Guernsey Court of Appeal allowed the appeal in part.

69. The leading judgment was given by Birt JA, with whom Sir John Nutting agreed, who observed:

> "16. The Trustees brought the application before the Royal Court because they considered that they needed the information sought in order to reach a fair decision as to how to separate the interests of the daughter and her family. They could not do that without being able to assess accurately the value of the trust fund. It follows that they were disappointed with the Deputy Bailiff's decision to refuse them the required information.
>
> 17. However, the trustees have not sought leave to appeal. The reason for this is that they have been advised not to appeal and to leave any appeal to the daughter. This is on the basis of an observation of Harman LJ in *Re Londonderry Settlement* [1965] Ch 918. …
>
> 18. In my judgment, the view of Salmon LJ to be to preferred. Whilst I fully accept that in the majority of cases a trustee who has sought directions from the court should not appeal even if he is not convinced that the court reached the right decision, a trustee is perfectly entitled to appeal if convinced that the decision of the court is not in the best interests of the beneficiaries. Strictly speaking, a trustee who appeals may be at risk of an adverse costs order should the appeal fail; but such an adverse costs order will only be made in administrative proceedings where the appeal court concludes that the trustee has acted unreasonably in appealing, because it is only where a trustee has acted unreasonably that he is to be deprived of his indemnity as to costs …"

70. He went on to say that the trustees should have appealed and that it was always very unlikely that they would be denied their indemnity out of the trust fund. Beloff JA agreed, and added that on the question of the trustees' entitlement to appeal he was "in the Salmon rather than the Harman camp".

71. Although *Re R & RA Trusts* is not an English decision, it is persuasive authority. Even if *Re R & RA Trusts* is disregarded, however, it does not seem to me that *Londonderry* establishes that an appeal by trustees in circumstances such as these is incompetent. Even taken at its highest, all it shows is that, if the trustees take the risk of appealing, then the court may (or may not) refuse to permit the trustees an indemnity out of the trust funds.

The appeal

72. It is common ground that the judge's decision was an evaluative one. It follows that, given that it is not suggested that the judge made any error of law, this Court can only intervene if there is some identifiable flaw in the judge's reasoning, such as a gap in the logic, a lack of consistency or a failure to take account of some material factor, that undermines the cogency of the conclusion: see *Re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] BCC 1031 at [72]-[78] (McCombe, Leggatt and Rose LJJ, as they then were).

73. In my judgment there are four identifiable flaws in the judge's reasoning. First, while the judge was correct to say that it is the Trustees' duty to act in the interests of the creditors, what the judge failed to recognise is that the Trustees are experienced professionals who have a statutory discretion as to what steps they should take. It is not the Trustees' duty to act in the interests of the creditors *at all costs*.

74. Secondly, the judge disregarded the key reason given by the Trustees, both in their initial letter dated 28 October 2022 and in Ms Kicks' witness statement, for their decision not to apply to join the Eviction Claim appeal, namely that it was unlikely that this would result in any benefit to the bankruptcy estates, and hence to the creditors. On current figures, the bankruptcy estates are in deficit to the tune of well over £3.5 million. The only potential financial benefit to the bankruptcy estates of joinder is the £3,000 monthly licence fee offered by Chedington if the Trustees were to obtain possession of the Cottage. Even if this were to continue for a year until the Bankruptcy Application is resolved, the total sum payable would be £36,000. That would be a drop in the ocean.

75. The judge appears to have disregarded this factor when assessing the merits of the application because of what he said at [28] when considering the issue of standing. The judge was correct to observe that the fees charged by Mr Swift and the Trustees can be challenged by the creditors, and therefore there is no certainty that the full sums claimed will be allowed. Equally, however, there is no certainty that the sums claimed will be substantially disallowed. In the case of Mr Swift, his conduct is being challenged by the Brakes, which could lead to such a result; but it is supported by Chedington and, inferentially, by PWF and Mrs Brehme. Even if Mr Swift's fees are substantially disallowed, it seems improbable that the Trustees' fees will be. Furthermore, even if all the fees are disallowed, the estates will still be substantially in deficit and the licence fee offered by Chedington will not result in any dividend for creditors.

76. In some cases it might, I suppose, be argued that it would be of some benefit to the bankruptcy estate to reduce the size of the deficit even if that did not result in any payment to creditors. In the present case, however, it seems clear that the only possible benefit would be to increase the sums available for payment of the Trustees' own fees. The Trustees are at least entitled to take the view that this is not a course of action that they wish to pursue.

77. Thirdly, the judge considered that it was difficult to see the downside to the Trustees in making an application for joinder. With all due respect to the judge, the downsides were obvious and have been confirmed by subsequent events. The Trustees have been forced to become embroiled in protracted, complex, time-consuming and hostile

litigation. It was entirely predictable that the Trustees' application would be opposed tooth-and-nail by the Brakes. We have not heard any argument on the grounds of opposition raised by the Brakes, and it would be inappropriate to express any view as to their merits, but the time estimate of two days given by counsel for the Brakes gives some measure of the potential scope and complexity of the issues. Furthermore, the Trustees' concern about their exposure to costs has been amply vindicated by what has happened subsequently. It is not a satisfactory answer to this to say that it is commonplace for costs to be the subject of dispute in litigation or that the court can decide what is reasonable.

78. Fourthly, the judge dismissed the Trustees' concerns as to their independence as "absurd". I acknowledge that the present case cannot be equated with cases such as *Re Ng* [1997] BCC 507 and *Trustee in Bankruptcy of Bukhari v Bukhari* [1999] BPIR 157 which were relied on by counsel for the Trustees. Even so, it seems to me that the Trustees were entitled to be concerned about their independence being compromised. This is not a straightforward case of third party funding. The reality of the situation, as events since the judge's decision have confirmed, is that Chedington, which is not a creditor, has not merely been funding the Trustees' application, but also dictating to the Trustees what submissions they can and cannot make to the court regardless of the legal advice the Trustees have received.

79. In my view the Trustees' decision not to apply to join the Eviction Claim appeal cannot possibly be stigmatised as perverse. I would add that the judge's comments in the decision under appeal at [50] and in his judgment dated 16 December 2022 at [16] quoted in paragraphs 47 and 56 above came perilously close to an imputation of bad faith on the part of the Trustees when bad faith was not even alleged.

Lady Justice Asplin:

80. I agree.

Lord Justice Lewison:

81. I also agree.