Neutral Citation Number: [2022] EWHC 2973 (Ch)

Case Nos: 166 and 167 of 2015

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 25 November 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

(1) PATLEY WOOD FARM LLP **(2) LORRAINE BREHME** **(3) THE CHEDINGTON COURT ESTATE LIMITED**	**Applicants**
- and –	
(1) KRISTINA KICKS **(2) BLAIR CARNEGIE NIMMO** **(as trustees in bankruptcy of Nihal Mohamed Kamel Brake and Andrew Young Brake)**	**Respondents**

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William Day (instructed by **Moore Barlow LLP** and **Stewarts Law LLP**) for the **Applicants**
Rowena Page (instructed by **Gateley Legal**) for the **Respondents**
Alexander Learmonth KC (instructed by **Direct Access**) for **Mrs Nihal Brake and Mr Andrew Brake**

Hearing date: 16 November 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 25 November 2022.

HHJ Paul Matthews :

Introduction

1. On 16 November 2022 I heard an originating application within the bankruptcies of Mrs Nihal Brake and Mr Andrew Brake ("the Brakes") for an order under the Insolvency Act 1986, section 303(1), directing the respondents, the Brakes' current trustees in bankruptcy, to apply to be joined into, and to take certain other steps in relation to, proceedings currently pending in the Court of Appeal between the Brakes and the third applicant, The Chedington Court Estate Limited ("Chedington"). These proceedings are referred to as the "Eviction Proceedings", and are concerned with a property called West Axnoller Cottage ("the cottage"). On 17 November 2022, I announced my decision to allow the application. However, I said that I would put my reasons in writing as soon as possible, given that the pending proceedings required any application for joinder to be made by 21 November 2022. (The period has since been extended.) These are those reasons.

2. The first applicant ("PWF") is a corporate vehicle owned and directed by the second applicant ("Mrs Brehme"). They are both creditors of the Brakes, together accounting for about 60% of the total debts owed by the Brakes in their bankruptcies. In 2014 PWF obtained a charging order over any beneficial interest that the Brakes might have in the cottage. The Brakes were adjudicated bankrupt in 2015, and discharged automatically a year later. Over the last three years, I have given a number of judgments in litigation concerning the Brakes and Dr Geoffrey Guy and various entities controlled by him ("the Guy Parties"), including Chedington. In some of them I have set out the background to the litigation. The interested reader may care to look at *Brake v The Chedington Court Estate Ltd* [2022] EWHC 366 (Ch), [4]-[19], as a very general introduction.

3. I have so far tried four actions between the Brakes and the Guy Parties. In all four I found in favour of the Guy Parties. In two of them ("the section 283A Proceedings" and the "Possession Proceedings"), permission to appeal was refused by the Court of Appeal. In two, permission was given. In one of those two (the "Documents Proceedings"), the full appeal was heard and dismissed. In the fourth case (the Eviction Proceedings) the appeal was allowed on 10 October 2022 by the Court of Appeal on one ground, but dismissed on another: [2022] EWCA Civ 1302. The resolution of that appeal has however been held up pending the consideration of written submissions on what remedy, if any, is appropriate in the circumstances. The present application is concerned solely with that appeal.

4. I should mention that, in addition to these other pieces of litigation, there were also two originating insolvency applications brought by the Brakes, concerned with (i) the Brakes' bankruptcies, and (ii) the liquidation of the partnership between the Brakes and PWF. I struck out most of the former and all of the latter for lack of standing. My decision on the Bankruptcy Application was reversed in part by the Court of Appeal, though my decision on the Liquidation Application was upheld: *Brake v Lowes* [2020] EWCA Civ 1491, [2021] Bus LR 577, CA. That part of the Court of Appeal's decision reversing

my decision on the Bankruptcy Application was itself appealed to the Supreme Court. The hearing has now taken place, and the parties are awaiting judgment.

This application

5. The evidence filed on the present application includes an exhibit to the application notice itself, a witness statement with exhibit from the first respondent (opposing the application) and a witness statement (with exhibit) from the first and second applicants' solicitor. I may say that there was no permission for the latter statement. It gave background information which was already known to the parties and to me, and also exhibited some photographs of the condition of a quite different property previously occupied by the Brakes, known as Axnoller House. As I say later, these photographs have little probative value on this application.

6. In the application notice, the applicants' grounds include the following:

> "4. On 25 February 2022, the Judge handed down judgment following trial in the Cottage Eviction Proceedings, dismissing the claim ([2022] EWHC 366 (Ch)).
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> 5. By order dated 7 April 2022, Lord Justice Arnold gave the Brakes permission to appeal on three grounds … . Ground 3 of the appeal challenged the Judge's refusal to grant a possession order to the Brakes in respect of the Cottage. The hearing of the appeal was listed for 26 July 2022.
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> 6. On 25 July 2022, the Trustees' solicitors [Gateley LLP ("Gateley")] wrote to the Court of Appeal as follows … :
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> > "We understand that if the Brakes are successful in the upcoming Appeal that the possibility exists that they may seek an order for possession of the Cottage. Taking into consideration that our clients are not a party to these proceedings, if the Brakes seek an order in those terms we would be grateful if the proceedings would be adjourned so as to afford our clients an opportunity to consider their position and potentially be heard in relation to such claim. In this regard, you will no doubt appreciate that it would not be appropriate for an order to be made without our clients first being given that opportunity."
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> 7. … . It was common ground before the Court of Appeal that the Brakes had no beneficial interest in the Cottage and held their possessory interest subject to a bare trust for their trustee in bankruptcy (then Mr Swift, now the Trustees). The argument focused on whether Mr Swift had been entitled to authorise Chedington to dispossess the Brakes of the Cottage on 18 January 2019 without a Court order.
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> 8. On 10 October 2022, the Court of Appeal handed down judgment ([2022] EWCA Civ 1302) allowing the appeal on ground 1 of the appeal

and dismissing it on ground 2 of the appeal. As to ground 3, the Court said:

> "31. It was common ground on this appeal that we should deal only with the first two grounds of appeal. If the Brakes were entitled to damages that should be remitted to the High Court; and any question of an order for possession should be dealt with by way of consequential argument."

Having allowed ground 1:

> "83. It does not, however, follow from that that the Brakes are necessarily entitled to any further relief; but as I have said the parties may wish to make further submissions on that question."

In the result:

> "102. As requested by the parties, we will deal with the question whether any further relief is justified as a consequential matter. We will consider the parties' submissions on the points in writing; and if necessary we will reconvene for a further hearing. I would invite the parties to agree a timetable for the filing of written submissions. It may also be the case that the current trustees in bankruptcy apply for permission to intervene."

9. By order dated the same day … , the Court of Appeal directed (*inter alia*) that, by 4pm on Monday 21 November 2022, the Trustees shall (if so advised) make an application to join the proceedings (the Application). At the same time, the Trustees 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 Brakes).

10. By a letter dated 21 October 2022, Mrs Brehme wrote to the Trustees noting the prejudice to the bankruptcy estates that would arise if the Brakes obtained a possession order for the Cottage … . She said:

> "As the largest creditor in the bankruptcy therefore, I request that you oppose any efforts made by the Brakes to obtain an order for possession and that you make an application in the Court of Appeal to obtain an order for you to be in possession."

11. On 28 October 2022, Ms Kicks responded on behalf of the Trustees that they considered that there was "no equity available to the Bankruptcy Estates in the Cottage and therefore no asset capable of realisation for the benefit of the Bankruptcy Estates' creditors" … . She continued:

> "In such circumstances, we have no positive duty to intervene in the [Cottage Eviction Proceedings]. It is very clearly not in the interests of the creditors of the Bankruptcy Estates for us to do so. Such an intervention will only increase costs in the Bankruptcy Estates

> without any possibility of a return to them and therefore cannot be justified."
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> 12. On 31 October 2022, the Brakes filed submissions in the Cottage Eviction Proceedings … confirming that they sought an order for possession and offering an undertaking to the Trustees by email (and the Court) to give vacant possession of the Cottage if the outcome of the Bankruptcy Application is that the Cottage vests in the bankruptcy estates … . It is inferred that there are further emails or other communications between the Brakes and the Trustees on this issue which have not been disclosed to date. However, there is no suggestion that the Brakes have offered or will pay the bankruptcy estate anything for the benefit of possession of the Cottage."

7. As I understand the matter, none of the factual statements contained in those paragraphs is challenged. The draft order supplied with counsel's skeleton argument on 15 November 2022 relevantly seeks orders that:

> "1. By 4pm on 21 November 2022, the Respondents shall make an application to join the Eviction Proceedings and 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 the West Axnoller Cottage (the **Cottage**) in favour of the Respondents.
>
> 2. If there is a hearing pursuant to paragraph 8 of the 10 October Order, the Respondents shall attend and make oral submissions (a) in opposition to ground 3 of the appeal and (b) in support of a possession order for the Cottage in favour of the Respondents.
>
> 3. Upon the Respondents obtaining a possession order for the Cottage in their favour, the Respondents shall grant the Third Applicant a licence in the terms offered in Appendix 1 to this Order. The parties shall seek to agree all other terms of the licence. Liberty to apply if any such terms are not agreed."

Further matters

8. In addition to the matters dealt with in paragraphs [4]-[12] of the application notice, I was also referred to an intervention by Lewison LJ in argument in the Court of Appeal, and a section in the argument of Alexander Learmonth QC, leading counsel for the Brakes, before that court. The former is as follows:

> "The other thing that puzzles me … is what right does the trustee, under a bare trust, have to occupy the trust property for his own personal benefit? It sounds to me suspiciously like a trustee making a profit from his office as trustee."

9. The latter reads:

> "LORD JUSTICE LEWISON: So how do the Brakes, in exercising their functions as trustee, claim to be entitled to occupy the trust property for themselves?
>
> MR LEARMONTH: That is not the point I make at all, my Lord. With respect, the point is not that the Brakes are entitled to occupy it; the point is that the beneficial owner is not entitled as of right to occupy it. Now, it may be that if Mr Swift had gone to court and said 'I want a possession order, not because I have better title', but brought a trust action saying these trustees – and join Mrs Brehme, the legal title owner, and said 'these people really need to hand it over to me', the court would agree with them. That is not what happened. Nothing had happened to turn a beneficial interest into a legal interest or into a right of possession. There could have been a section 14 application under the Trust of Land Act, but that did not happen, and that is the point. I refer to your Lordships to –
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> LADY JUSTICE ASPLIN: So you are saying he could have sought to bring down the trust or he could have sought the removal of the present trustees because they were not conducting matters properly?
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> MR LEARMONTH: Yes.
>
> LADY JUSTICE ASPLIN: And those were the steps that could he have taken.
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> MR LEARMONTH: He could have exercised his Saunders v Vautier rights. He could have removed the trustees under sections 19 and 20 of the 1996 Act, or under the court's equitable jurisdiction, or he could have gone to the court, under section 14 of the Act, and said: I want you to direct the trustees to exercise the discretion to allow me into possession. So those are his options, but I did not do any of those things. He chose a sort of – what I might pejoratively describe as a backdoor route. The dubious and dangerous route that is deprecated by Lord Temple. Maybe I do not need to go through the Trust of Land Act in as much detail as I was going to, but I was going to point out it does include a bare trust. It expressly extends to a bare trust."

(The error, "Temple" instead of "Templeman", appears in the transcript.)

10. I note also what Lewison LJ (with which Asplin and Arnold LJJ agreed) said early on in his judgment:

> "15. Why Mr Swift did not apply to the court to remove the Brakes from the title and to claim possession from them is both mysterious and unexplained. Nor is there any evidence that he complied with his obligations under clause 3.1 of the sale contract; which is again unexplained. Had he done it so, it is likely that the current litigation would have been avoided."

11. On 21 October 2022, the Brakes filed written submissions in compliance with the Court of Appeal's order. Paragraph [13] of those submissions reads:

> "The Current Trustees are not parties to this claim. The Court is therefore only concerned with the position between the Appellants and Chedington."

So, it is clear that the written submissions of the Brakes in the Eviction proceedings are premised on the trustees *not* being joined into the proceedings.

Evidence

12. The witness statement from the first respondent sets out the factual position from the point of view of the trustees in bankruptcy. Later in this judgment I set out that part dealing with the reasons for taking the position which the trustees have taken. But it is sensible to set out here some information concerning the liabilities and assets of the bankruptcy estates. At paragraph 22 of her statement, the first respondent says that the trustees have received proofs of debt totalling £3,221,556, of which Mrs Brehme has submitted a proof for £1,411,372, and PWF has submitted a proof for £495,545. These two proofs total £1,906,917, or just under 60% of the total proofs of debt.

13. As to assets, the first respondent says this:

> "30. As indicated above, there are very limited assets in the bankruptcy estates to fund our costs (including legal costs, other expenses and the Joint Trustees' fees). Paragraph 13 of the Application already notes that the bankruptcy estates are holding recoveries of £66,714.39 and £24,277.81 respectively, and the funding balance is £56,237.96 for both bankruptcy estates. However, these sums are exceeded by the Joint Trustees' (and Mr Swift's) unbilled costs and expenses that have been incurred in the bankruptcy so far. … ".

Inter partes correspondence

14. On 3 November 2022, Stewarts Law LLP ("Stewarts"), as solicitors to the third applicant, Chedington, wrote to Gateley, as solicitors to the respondent trustees in bankruptcy, in part as follows:

> "3. We have been provided with a copy of a letter from Lorraine Brehme to the Trustees dated 21 October 2022 setting out her concerns about the Brakes regaining possession of the Cottage. Our client shares Mrs Brehme's concerns. This letter has been sent on behalf of our client and its contents have been approved by Mrs Brehme in order to communicate their joint position.
>
> 4. In her letter Mrs Brehme requested that the Trustees oppose the Brakes' application and make an application for possession themselves. Mrs Brehme has provided us with a copy of the Trustees' response dated 28 October 2022 in which they refuse to oppose the Brakes' application or to make an application of their own for possession, despite the indications in the Court of Appeal judgment ([2022] EWCA Civ 1302, see especially para 15) that the Trustees would be successful if they took such a position.

5. For the reasons set out below we request that your clients urgently reconsider their position.

6. Your clients hold the entire beneficial interest in the Cottage. It is the main (if not only) asset in the bankruptcy estate. Your clients' predecessor in office entered into a contract for the sale of that beneficial interest to Chedington.

7. We understand from your letter dated 31 January 2020 that your clients do not intend to comply with any obligations under that contract pending determination of the Brakes' application in their bankruptcies of 12 February 2019 (the **Bankruptcy Application**), now before the Supreme Court. In effect, the process of realising the beneficial interest in the Cottage as an asset in the bankruptcy has been paused pending determination of the Bankruptcy Application.

8. While we can understand your clients' decision to pause transferring the beneficial interest in the Cottage to Chedington, at least until the Supreme Court delivers its judgment, in the meantime the Trustees remain under positive statutory duties to manage that asset in the interests of creditors: see e.g. section 305(2) of the Insolvency Act 1986.

9. Under no circumstances can it be in accordance with the Trustees' duties to allow the Brakes to take the benefit of possession of the Cottage. That is for three principal reasons.

a. First, we understand the Brakes are not proposing to pay any sum to the bankruptcy estate for the benefit of taking possession of the Cottage. In contrast, our client offers to enter into a new licence with the Trustees immediately for a term that terminates 30 days from the hand down of judgment in the Bankruptcy Application or from dismissal of the Bankruptcy Application in the event that the Supreme Court allows Chedington's appeal. Our client offers to pay a monthly fee of £3,000 for that licence. It is plainly in the interests of creditors for that offer to be accepted.

b. Second, the Brakes have form for refusing to vacate property. As you may be aware Chedington's subsidiary, Chedington Events Limited, was forced to issue possession proceedings to remove the Brakes from a neighbouring property called Axnoller House. These proceedings took over 3 years to resolve and incurred costs exceeding £1 million. We doubt the estate could afford to take such action, but even if it could, that cost would be to the prejudice of creditors. In this regard, while the Brakes have offered an undertaking to leave the Cottage within 28 days' notice following determination of the Bankruptcy Application, the Brakes have a track record of non-compliance with Court Orders.

c. Third, the Brakes' possession of the Cottage is likely to depreciate its value. In legal proceedings with our clients and in witness statements the Brakes have repeatedly claimed to be impecunious.

> As such they may not be able to afford to pay for utilities and the general upkeep of the Cottage. Further, if the Brakes refuse to leave, the Cottage cannot be sold with vacant possession (to Chedington or any other third party) which will in turn affect the realisation to be made on its eventual sale.
>
> 10. We therefore request that your clients urgently reconsider their position and inform the Court of Appeal by the applicable deadline of 4pm on 21 November 2022 that they:
>
> a. Apply to be joined to the Appeal;
>
> b. Oppose ground 3 of the Appeal, i.e. the Brakes' application for a possession order; and
>
> c. Request the Court instead to order that the Trustees be given possession.
>
> 11. The costs of such an intervention and preparing of a letter or short submissions are unlikely to be significant, not least because the issue is capable of determination by the Court of Appeal on the papers without a hearing. Those costs will certainly be less than the costs of trying to remove the Brakes from the Cottage if they refuse to leave (as above) or the costs of responding to an application under section 303(1) of the Insolvency Act 1986 (as below). In any event our client would be willing to (i) pay the Trustees' reasonable costs of the steps at paragraph 10 above; and (ii) to indemnify the Trustees in respect of any adverse costs risk.
>
> 12. In the event the Trustees do not agree to intervene as proposed it will be necessary for our client to urgently file a joint application with Mrs Brehme seeking a direction from the Court that the Trustees oppose the Brakes' application and obtain an order for possession of the Cottage in order to preserve the status quo pending resolution of the Bankruptcy Application.
>
> 13. This joint application will be made on the basis that the Trustees' decision not to intervene in the way set out above is not compliant with their function to manage and realise assets in the bankruptcy estate in order to obtain the most value to meet expenses and benefit creditors."

15. The letter went on to seek a reply, which in the context was intended to be a substantive reply, by 7 November 2022. Having received a holding reply but no substantive reply by that time, Stewarts issued the application notice on 8 November 2022. At the hearing, I was told by Mr Day that this was done in order to secure an early listing of the hearing, given the shortness of time before the deadline for any application for joinder. This is also stated in Stewarts' first letter to Gately of 15 November 2022. That is a perfectly understandable position to take, and I have no reason to disbelieve it as an explanation.

16. In fact, Gateley provided a substantive reply to Stewarts on 9 November 2022. In part this read as follows:

> "In your letter dated 3 November 2022, you request that the Trustees make an application for possession of West Axnoller Cottage ("**the Cottage"**) in the Eviction Proceedings and oppose the Brakes' application for possession of the Cottage. While we can appreciate that the Trustees obtaining an order for possession of the Cottage would be in the interests of Chedington, we would remind you that in circumstances in which Chedington are not even creditors of the bankruptcy estates, the Trustees are under a strict duty to act independently, and are required to act strictly in the interests of creditors, particularly in circumstances as is the case here where litigation has been ongoing between various parties since 2012.
>
> Chedington's position, as we understand it, is that the Trustees are the beneficial owners of the Cottage by virtue of the contract entered into on 15 January 2009 between Mr Swift (the former Trustee in bankruptcy of the Brakes) and Chedington. For the avoidance of doubt, the Trustees have maintained and continue to maintain a neutral position in respect of the validity or otherwise of this contract, pending the outcome of the Bankruptcy Application. The fact that Mr Swift may have purported to enter into the agreement in his capacity as Trustee does not of itself confer a beneficial interest to the bankruptcy estates if that interest did not exist at the time the contract was entered into.
>
> Chedington's position is that the Trustees have a duty to manage the assets of the Brakes' bankruptcy estates and should therefore join the Eviction Proceedings. The Cottage has no value to the bankruptcy estates as a result of the charging order obtained in favour of Patley Wood Farm LLP on 10 September 2014 over any beneficial interest the Brakes have in the Cottage. It is therefore not appropriate for the Trustees to be joined to the Eviction Proceedings nor to oppose or seek any order for possession as it is not in the estates' interests to incur costs (including potentially adverse costs) in becoming joined to the Eviction Proceedings, when there can be no benefit accruing to the bankruptcy estates.
>
> […]
>
> Dealing with the other points raised in your letter dated 3 November 2022:
>
> > 1. Chedington has offered to pay the Trustees' costs of being joined to the Eviction Proceedings and to indemnify the Trustees in respect of any adverse costs. It would be inappropriate to accept that offer in the circumstances of the extant proceedings and the need for the Trustees to maintain neutrality.
> >
> > 2. Chedington has also offered a monthly licence fee of £3,000. For the avoidance of doubt if such a licence was granted, then the Trustees would be under a duty to offer such a licence to other

> interested parties, including the Brakes, to ensure impartiality and obtain maximum realisations from a monthly licence fee."

17. Stewarts replied by letter dated 10 November 2022, pointing out a number of what they called "material errors" by Gateley, and calling the trustees' decision not to seek to intervene "surprising". I will refer to some of the points made later in this judgment.

18. In the respondent trustees' skeleton argument for this hearing, their position was expressed in this way:

> "16. The Trustees have summarised their reasons for deciding not to join the Eviction Proceedings at §§16.1-16.9 WS/Kicks, with further detail at §24ff. Those reasons (which should be read in their entirety) are reasonable and understandable. In summary:
>
> i) The Trustees have not been required by the Court of Appeal to join the Eviction Proceedings; rather they have been invited by the Court of Appeal to join only "if so advised". The question of whether they would seek joinder was intended to be discretionary and a matter for them to determine upon receipt of legal advice.
>
> ii) Joinder to the Eviction Proceedings would expose the Trustees and the estates to risk and expense arising from their continued involvement as named parties in proceedings of uncertain duration before the Court of Appeal and, possibly, before the Supreme Court (if an appeal is sought) or a lower Court (if further issues are remitted). Those risks and expenses include, but are not limited to:
>
> a) The need to finance their involvement in the Eviction Proceedings and in any subsequent appeals/remitted hearings, weighed against the fact that:
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> i) there are extremely limited funds in the bankruptcy estates;
>
> ii) if the sale of the Cottage to Chedington is completed, the estate will recover no further monies (only extremely limited benefits having derived to them in the first place from the sale);
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> iii) on a pure cost/benefit analysis, it is not in the interests of all creditors for the proposed course of action to be taken by the Trustees.
>
> b) The risk of an adverse costs order being made against them;

c) The risk of challenges and satellite litigation arising, including challenges to an application for joinder;

d) The risk of challenges being made by the Brakes to any decision by the Trustees to join, whether on the terms set out by Chedington or otherwise, and of allegations of preferential treatment/lacking impartiality.

e) The inevitability that further non-legal expenses and time would be incurred (including officeholder time and costs). No provision has been made for those costs: the Trustees are being expected to work effectively for free.

iii) The Applicants' initial offer of an indemnity (whilst available) addressed only some of the above concerns. In any event, it appears that that offer is now off the table.

iv) The offer of an indemnity was also not one the Trustees felt able to accept, bearing in mind:

a) Their need to act impartially and independently, and to be seen to be doing so. In this regard it must be remembered that the Eviction Proceedings are only one of a number of proceedings and challenges concerning the Brakes, the Applicants and the Brakes' bankruptcy estates, and it is obvious that suspicions are rife as between the Applicants and the Brakes. The desirability of the Trustees maintaining neutrality has only been underscored by the responses already taken to the Application and their stance in respect of it, namely:

i) by the Applicants' unfounded claim that in declining to join the Eviction Proceedings the Trustees were '*not as neutral as they claim to be'*: see Stewarts' letter of 10 November 2022; and

ii) by the Brakes' response to the Application and their indication that they wish to be represented at the hearing: 'Your clients and others are attempting to force the new TIBs to join proceedings to which we are a party and which of course substantially affect us…': see email of 13 November 2022 at 10:52.

b) The degree of control such an arrangement could give Chedington over the Trustees' involvement in the Eviction Proceedings, and the Trustees' risk of costs exposure should the scope of the indemnity be challenged or denied at a later date; and

c) The limited nature of the offer (not extending to the costs of satellite litigation, further appeals, regulatory complaints, or any remitted hearings).

17. Bearing in mind all of these risks, the Trustees determined that they were not willing to accept the terms on which the Applicants requested the Trustees to join the Eviction Proceedings. Their grounds for doing so were entirely reasonable."

The trustees' reasoning

19. As I have said, on 14 November 2022, the first respondent made a witness statement. As is made plain in their counsel's skeleton argument (referred to above), this set out the trustees' reasoning for not making an application to be joined to the Cottage Eviction proceedings as follows:

"16. For the reasons explained in further detail below, the Joint Trustees have concluded in line with the neutral position that we have adopted to date, and upon receipt of legal advice (in respect of which the Joint Trustees' rights to privilege are strictly reserved), that, taking account of all relevant matters, including those put forward by the Applicants in this application, they will not apply to join the Cottage Eviction Proceedings. The Joint Trustees' grounds for adopting this position can be summarised as follows:

16.1 The Court of Appeal's order does not oblige the Joint Trustees to apply to join the Cottage Eviction Proceedings. As indicated above, the Court of Appeal directs that the Joint Trustees shall only apply '*if so advised*' and this is accepted by Stewarts at paragraph 2 of its letter dated 3 November 2022 …

16.2 Involvement in the Court of Appeal hearings exposes the Joint Trustees and the bankruptcy estates to unknown costs for an unknown duration. It is not correct to suggest that matters will be determined on paper: to the contrary, at paragraph 102 of the Court of Appeal's Judgment the Court expressly envisages that a further hearing may be required. A consequence of that hearing could be the further remission of matters to a Judge in a lower court, or yet further hearings before the Court of Appeal. There is also the possibility of appeal(s) from any decision is made. Therefore, the Joint Trustees should only have to take steps as a consequence of court decisions and not be party to the present proceedings or any other related proceedings unless they need to be actively involved. The Joint Trustees are officers of the court and will observe any court order is made. I address this further below.

16.3 The Joint Trustees must act in the interests of <u>all</u> creditors. While the Joint Trustees recognise the Applicants' frustrations and that the First and Second Applicants (PWF and Mrs Brehme) are long-standing creditors of the Brakes, this does not mean that the Joint Trustees should prefer the interests of one or two creditors while exposing the bankruptcy estates

(and, therefore, all of the Brakes' creditors as set out in detail below) to uncertain and potentially very lengthy and expensive litigation.

16.4 The value and future realisation of the Cottage is uncertain and depends upon the outcome of the Bankruptcy Proceedings, pursuant to which the Brakes are seeking to set aside the onward sale of the Cottage to Chedington. This uncertainty appears to be accepted by Stewarts in paragraph 8 of its letter dated 3 November 2022 … If the onward sale of the Cottage to Chedington is upheld then it may be (whilst preserving all of the estates' rights in this regard) that the Cottage is simply passed across to Chedington under the terms of the conditional sale agreement that no further consideration of benefit to the bankruptcy estates.

16.5 there are presently insufficient assets in the bankruptcy estates to fund the Joint Trustees' fees and expenses (including legal costs) of the proposed application to join an application for possession. Given the very protracted and litigious nature of the court proceedings in this matter to date there is also real potential for these costs to escalate quickly, over which the Joint Trustees would then have no control.

16.6 The Joint Trustees do not wish to expose ourselves to the risk of an adverse costs order in the event that, for example, the requested application to join or application for possession are unsuccessful.

16.7 While Chedington had offered to indemnify the Joint Trustees for our '*reasonable costs*' and any adverse costs, the Joint Trustees are concerned both at how such an arrangement would be perceived by third parties (including the Brakes) bearing in mind our duty to act impartially and independently. It also appears to us that any indemnity would give Chedington a degree of control over the Cottage Eviction Proceedings, in that they would be able to direct what level of legal support we could obtain and, potentially from whom; any failure to promptly discharge costs or dispute incurred costs would place the estates in a vulnerable position, involved in litigation without funds on account; if a disagreement should arise under the indemnity (or otherwise while the bankruptcy estates are being administered), the Joint Trustees would be left exposed in litigation that we do not wish to be a party to; and there has been no offer or undertaking to meet the costs of any onward appeal or (if so ordered) hearing in a lower Court. In any event, I understand that the offer of an indemnity has now been withdrawn by Chedington. I address these points further below.

16.8 The Brakes have offered to give the Court an undertaking to vacate the Cottage on 28 days' notice if they are given possession of it. Whilst the necessity for such an undertaking will be a matter for the Court of Appeal in due course, the offer is one which we intend to write to the Court of Appeal to indicate our support for. Whilst the Applicants to this application treat the proffered undertaking with suspicion, we are aware of the seriousness of such an undertaking and (given the Brakes are represented by experienced counsel) assume that the Brakes are also so aware. We do therefore derive reassurance from the proffered undertaking

as to our ability to seek possession of the Cottage in due course. We will request this honourable Court to direct, in so far as it needs to do, that any such application may come back before it on an expedited basis if required. Such a direction may go some way to alleviate the concerns of the Applicants and should assist us to secure possession expeditiously and cost effectively in due course with the assistance of High Court enforcement officers (if needed).

17. Accordingly, while the Joint Trustees will of course abide by whatever decision the court makes in relation to the Application, the Joint Trustees do not consider that they are acting unreasonably or, indeed, perversely by concluding that it is not in the interests of the bankruptcy estates to apply to join the Cottage Eviction Proceedings. … .

[…]

33. Both the Application and Stewarts letter dated 10 November 2022 … seek to criticise the Joint Trustees for not accepting the offer of indemnity that was contained in Stewarts' letter dated 3 November 2022 …

34. Notwithstanding that the offer of indemnity has now been withdrawn, the Joint Trustees' two principal concerns with the indemnity offered were as follows:

34.1 How this would be perceived by third parties (including the Brakes, and whether this will be used as a basis to criticise the Joint Trustees' conduct; and

34.2 The risk that an indemnity would give Chedington potential leveraged and/or possible control over the Joint Trustees in the Cottage Eviction Proceedings.

35. In relation to paragraph 34.1 above, it is not inconceivable that the Brakes would seek to criticise the indemnity and attempt to use this as a basis to appeal any steps taken by the Joint Trustees in the cottage eviction proceedings. Further, it is not inconceivable that the Brakes would seek to use the indemnity as a basis on which to criticise the Joint Trustees' conduct (pursuant to section 303 of the Insolvency Act 1986 or otherwise). I have already referred to the consequences of these possible outcomes above in terms of the Joint Trustees' costs being likely to escalate significantly and it was not clear whether the offer of indemnity by Chedington (which has in any event been withdrawn) was intended to apply to these situations.

36. In relation to paragraph 34.2 above, if Chedington becomes liable for the Joint Trustees' '*reasonable costs*' then there would be a risk in the Joint Trustees' view that Chedington may seek to control or influence not steps the Joint Trustees take in relation to the Cottage Eviction Proceedings and, for example, what level of legal input the Joint Trustees can obtain. Further, if there is a disagreement between the Joint Trustees and Chedington under the indemnity (for example, in relation to the Joint

> Trustees' costs and expenses or in relation to the course of action that the Joint Trustees propose to take) the Joint Trustees would be left exposed in litigation that we do not wish to be a party to.
>
> 37. In addition, Stewarts has indicated in its letter 10 November 2022 … That in the event of the underlying transaction being unwound, Chedington may have a claim against the bankruptcy estates for £6500 and £500,000. In such circumstances, there would appear to be potential for disagreement and a conflict arising outside of any indemnity that may impact on Chedington's willingness to indemnify the Joint Trustees, potentially leaving the Joint Trustees as parties to litigation with no costs protection.
>
> 38. In any event, and as indicated above, I understand that the offer of indemnity has now been withdrawn."

Further correspondence

20. The correspondence between the solicitors continued. Each side wrote to the other on 15 November 2022 responding to points made in the other side's skeleton argument. Gateley wrote to Stewarts:

> "1. For the reasons explained in detail in Kicks 1, and as you and your Counsel are well aware, the Trustees have chosen to adopt an entirely neutral position in relation to the various court proceedings that are ongoing between the Brakes and the Applicants, including the Brakes' case for an order for possession.
>
> 2. Notwithstanding this, your Counsel incorrectly asserts in his skeleton that the Trustees '*support*' the Brakes in the Court of Appeal for an order for possession for the Cottage. Your Counsel seeks to rely on paragraph 16.8 of Kicks 1 in this regard. This is a misreading of the clear words of Kicks 1 and misstates the Trustees' position.
>
> 3. What Ms Kicks states at paragraph 16.8 of Kicks 1 is as follows:
>
> > "The Brakes have offered to give the Court an undertaking to vacate the Cottage on 28 days' notice if they are given possession of it. Whilst the necessity for such an undertaking will be a matter for the Court of Appeal in due course, the offer is one that we intend to write to the Court of Appeal to indicate our support for."
>
> 4. Accordingly, the Trustees' position is that if and to the extent that the Court of Appeal decides that the Brakes are entitled to an order for possession (a question on which the Trustees are, we repeat, neutral), the Trustees would support the suggestion that an undertaking should be provided by the Brakes to deliver up possession on 28 days' notice. The Trustees neither support nor oppose the Brakes' case for an order for possession; that is ultimately a matter for the Court of Appeal to decide."

21. On the same day, Stewarts wrote to Gateley (in part):

"There appears to be some misunderstanding by the Respondents as to the nature of the relief being sought. As should now be clear from the draft order enclosed with our skeleton argument (and, in particular, the undertakings in the appendix):

> 1. Chedington continues to offer to fund the Trustees' reasonable costs and expenses of and occasioned by joining the Eviction Proceedings and taking steps to secure possession.
>
> 2. Chedington continues to offer an indemnity in respect of any costs orders made against the Trustees in the Eviction Proceedings.

By reference to paragraph 16(b) of your skeleton argument, this means:

- Para 16(b)(i) – the Trustees would not need to finance their involvement in the Eviction Proceedings and any subsequent appeals/remitted hearings. Chedington will meet all reasonable costs and expenses in this regard.

- Para 16(b)(ii) – Chedington offers a full indemnity in respect of an adverse costs order being made against the Trustees in the Eviction Proceedings.

- Para 16(b)(iii) – Chedington will fund and indemnify in respect of any challenge to joinder. We do not understand what other "*challenges and satellite litigation*" the Trustees are concerned about. Please would you clarify what you have in mind by return so that we can take instructions.

- Para 16(b)(iv) – We do not consider there is any risk of challenge from the Brakes if the Trustees are acting pursuant to the directions of the Court.

- Para 16(b)(v) – Chedington's offer of funding (as set out in the draft undertaking) is not limited to legal expenses and time.

[…]

We understand from paragraph 11(b) of your skeleton that the misunderstanding that the offer of funding and an indemnity was caused by paragraph 6 of our letter of 10 November 2022. It seems to us that this misunderstanding did not feature in the Trustees' decision making, because that decision had already been made and was communicated to us by your letter of 9 November 2022.

Nonetheless, given the misunderstanding, and in a final effort to reach a pragmatic compromise, if the Trustees will now adopt a neutral position on the Application, the Applicants are content for paragraph 4 of the draft order to provide for no order as to costs."

(I may say that the references given in this letter next to the bullet points do not quite correspond to those in the skeleton argument which is being referred to. However, in the context, it is clear that the five bullet points refer to paragraph 16(ii)(a)-(e).)

22. Then on 16 November 2022 Gateley wrote to Stewarts replying to Stewarts' letter of 15 November 2022, saying (in part).

> "2. In circumstances where the Application is brought pursuant to section 303 of the Insolvency Act 1986 (IA 86) and seeks to criticise the Trustees' conduct as perverse (a point repeatedly made in your Counsel's skeleton argument), it is clearly not possible for the Trustees to adopt a neutral position in relation to the Application. In this regard, it is noted that your draft order does not provide for any express finding by the court that the Trustees have not acted unreasonably or perversely.
>
> 3. While the Trustees are grateful for your clarification of your clients' position regarding the offer of indemnity and this goes some way to addressing the concerns identified at paragraphs 16 (b) and (c) of the Trustees' skeleton argument, you have not addressed the concerns set out at paragraphs 16 (a), (d) and (e).
>
> 4. In addition, it is clear from your correspondence with Mrs Brake dated 13 November 2022 (page 299 of the hearing bundle) that the Brakes oppose your Application and the directions sought by the Applicants.
>
> 5. In light of the matters set out above, it is not possible for the Trustees to adopt a neutral position in relation to your Application. However, in the event that the court determines that the Trustees have acted perversely and, therefore, makes the directions sought by your clients, as the Trustees have previously confirmed they will abide by whatever court order is made in this regard.
>
> 6. As the Trustees have made clear in Kicks 1, they recognise the Applicants' frustrations but the position ultimately remains that the Trustees are caught in the middle of a hostile dispute between the Brakes and the Applicants."

The hearing

23. At the hearing before me on 16 November 2022, William Day appeared as counsel for all three applicants, albeit instructed separately by solicitors for PWF and Mrs Brehme on the one hand and solicitors for Chedington on the other. Rowena Page appeared as counsel for the respondent trustees in bankruptcy. Alexander Learmonth KC appeared on behalf of the Brakes, instructed through direct access. The Brakes were also present in court. All three counsel produced very high quality submissions, for which I am very grateful. I add only that Mr Learmonth properly recognised that his clients were not in fact parties to the application, that there was no application for joinder, and that I was hearing him on the basis that Mr Day did not object to my doing so *de bene esse*.

Standing

24. The first issue that arises is the question of standing. Both the trustees and the Brakes challenged the standing of all three applicants to make this application. The applicants in turn challenged the standing of the Brakes. The only persons present whose standing was not challenged were the respondent trustees. The question of standing to make an application under section 303 of the Insolvency Act 1986 has received considerable attention in recent times. For present purposes, it is only necessary for me to make two citations of authority.

25. In *Brake v Lowes* [2021] Bus LR 577, an appeal from a decision of mine from an earlier part of this same, sprawling litigation, Asplin LJ (with whom Floyd and Henderson LJJ agreed) said this:

> "78. It seems to me that as Mr Davies accepted, there is an additional requirement before a bankrupt can seek relief against the trustee in bankruptcy under section 303(1). This is consistent with the approach in all of the cases to which I have referred and has been the case for a considerable time and was articulated in the *Dodwell* case in 1949. The very nature of the bankruptcy regime is such that the bankrupt having taken the benefit of being relieved of his debts, absent fraud, cannot have the standing to interfere with the day-to-day administration of the estate by the trustee on behalf of the creditors. He must be able to show that he has a substantial interest which has been affected by the conduct complained of and a direct interest in the relief sought. The potential existence of a surplus is one way of being able to demonstrate such a substantial interest but it seems to me that it is not the only one.
>
> […]
>
> 85. It seems to me that in the light of the pleaded conduct, which for this purpose is assumed to be true, the Brakes in their capacity as bankrupts have a legitimate and substantial interest in the relief sought sufficient to give them standing to make an application under section 303(1). At the very least, their interests were substantially affected by the grant of the Licence, the consequences which flowed from it and Mr Swift's alleged unlawful acts. This is not a case such as *Dodwell*, in which the bankrupts seek merely to interfere in every day conduct of the bankrupt estate or in transactions effected by the trustee merely as a matter of commercial judgment. It seems to me that assuming the allegations to be true, it is not only perfectly arguable that at least some of the acts satisfy the substantive perversity test expounded in the *Edennote* and *Mahomed* cases but also that the Brakes have a direct interest in the relief sought. It also follows that when determining the preliminary question of standing, the judge was wrong to decide definitively that the acts complained of were not acts by Mr Swift in the bankruptcy."

(It is this decision which has recently been the subject of an appeal to the Supreme Court, with judgment still to come. But, sitting here, it remains binding on me today.)

26. In *Re Edengate Homes* [2022] 2 BCLC 1, a case under section 168(5) of the 1986 Act, dealing with the equivalent situation in a liquidation, Males LJ (with whom Asplin and Stuart-Smith LJJ agreed), said this:

> "[36] In my judgment these authorities demonstrate that the judge's approach to the issue of standing was correct. It is not sufficient that an applicant for relief under s 168(5) is a creditor of the insolvent company. It must in addition have a legitimate interest in the relief sought. Where the application is to set aside a disposal of property by the liquidator, including the assignment of a claim, an applicant will have a legitimate interest if it is acting in the interests of creditors generally. Typically that will be the case when the effect of the relief sought will be to maximise the assets of the estate. But an applicant will not have standing if the relief sought is contrary to the interests of the creditors as a class, as it will be where that will result in a lesser recovery. This concept can be expressed in a variety of ways: 'where an application may be made as "a creditor" then it must be made by that creditor in his capacity as such (and not in any other capacity)': *Re Zegna III Holdings Inc, BLV Realty Organisation Ltd v Batten* [2009] EWHC 2994 (Ch), [2010] BPIR 277 at [24] per Norris J; 'whether an application in a liquidation or other insolvency process is really for the benefit of the creditors as a whole': *Nero Holdings Ltd v Young* [2021] EWHC 1453 (Ch), [2021] BPIR 1324 at [59] per Michael Green J; or as the judge put it (at [34]), the applicant's 'interest in the outcome of the application must also be aligned with the interest of the class as a whole and it must not have a collateral interest which transcends the class interest'. However it is put, the essential point is clear."

The applicants

27. So far as concerns the first and second applicants, they are creditors, representing approximately 60% of the debts in the bankruptcy. They have a legitimate and substantial interest in the relief sought, since more money will come into the estate if the cottage is monetised by being licensed to Chedington (or some other third party) in return for a fee. This money can be used for the purposes of the bankruptcy, for example on investigations which may advance claims to other assets, or even towards a dividend to creditors. The majority of the legal expenses have been paid using money provided in 2019 by the Brakes themselves.

28. However, 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.

29. The respondent trustees did not cite any authority for the proposition that a claim to trustee remuneration on its own could prevent creditors from having

an interest in relief sought on an application under section 303. In my judgment, as a matter of law it does not do so. In the result, therefore, I hold that the first and second applicants in principle do have standing to bring this application.

30. The Brakes submitted that the first and second applicants were acting simply as puppets of the third applicant and in the interests of the third applicant rather than their own. They cited my own decision at first instance in *Brake v Lowes* [2020] EWHC 538 (Ch). The Brakes' case there against the liquidators was that they should have accepted the Brakes' own *lower* offer for the cottage compared to the *higher* offer of Mr Swift, thus depriving the creditors of the best price. I concluded (at [24] of that decision) that the Brakes were not only funding the challenge by minor creditors in the partnership liquidation, but also giving all the instructions to the lawyers, and the creditors were not involved at all. In effect, the Brakes were putting forward their own case as if it were the creditors'. That was why I ruled that the minor creditors did not have standing.

31. The Court of Appeal affirmed my decision: [2021] Bus LR 577. Asplin LJ (with whom Floyd and Henderson LJJ agreed) said:

> "100. Do the Unsecured Creditors, nevertheless, have a legitimate interest in the relief sought in the Liquidation Application? It seems to me that that is very doubtful. The relief sought is that, amongst other things, the joint liquidators accept the Brakes' bid for the Cottage in the sum of £476,000, made in their capacity as trustees of the Settlement. That must be adverse to the interests of the liquidation estate and the unsecured creditors as a whole in just the same way as the position of the creditors in the *Walker Morris* and *Re Fairfield* cases. Furthermore, Mr Sutcliffe says that even if the Brakes were given an opportunity to bid £570,000 for the Cottage (which is pleaded), it is common ground that the £70,000 in excess of the Chedington bid would be soaked up by expenses.
>
> […]
>
> 103. In this case, it seems to me that even if the Unsecured Creditors' application is not adverse to the liquidation and might increase the sums available to unsecured creditors, the judge was entitled to adopt the same approach as Nicholas Strauss QC [in *Walker Morris v Khalastchi* [2001] 1 BCLC 1]. Although they are creditors, it seems to me that the judge was right to take account of the unchallenged evidence to the effect that the Unsecured Creditors were seeking to advance the interests of the bankrupts rather than their own. Theirs was not a dual capacity because they only sought to advance the Brakes' case."

32. However, in my judgment this case is quite different. This is first of all because, unlike *Brake v Lowes*, there is a clear financial interest for the first and second applicants in the success of the third applicant's proposal (since this would potentially put money into the bankrupt estates). A further difference is that, unlike in *Brake v Lowes*, on this point being made by Mr Learmonth KC, Mr Day immediately confirmed to me, on instructions, that

the third applicant was not funding the costs of the first and second applicants. There are also cost statements from the two separate firms of solicitors, and I do not see how I can go behind those on the material before me. In my judgment, on this basis, even assuming that the Brakes themselves had standing to make it, this challenge to the standing of the first and second applicants would fail.

33. In those circumstances, I do not think it necessary to go in detail into the more complex question of whether Chedington also has standing. I record its position that it does have that standing, on the basis that it is the counterparty to a contract made with the trustees' predecessor on behalf of the bankruptcy estate, and so has a legitimate and substantial interest in the relief sought. For my part, I am inclined to think that it does have both a legitimate and a substantial interest. But I do not need to decide that now, and do not do so.

The Brakes

34. So far as concerns the Brakes, Mr Learmonth KC argued that, if Chedington had standing, then so did the Brakes. But I consider that the two sides are not *in pari materia*. I do accept that the Brakes have an interest in opposing the relief sought because, if it is granted, that would impede their getting back into possession of the cottage. However, it seems to me that their interest is neither substantial nor legitimate, because as things stand they (together with Mrs Brehme) hold the legal title to the cottage only as bare trustees for the trustees in bankruptcy, and the trustees in bankruptcy can bring a claim for possession at any time, to which (it appears from observations in the Court of Appeal) the Brakes would have no defence. Indeed, the Brakes have offered a (conditional) undertaking to the trustees and to the court to vacate the cottage on being given notice to do so, which acknowledges this state of affairs. Accordingly, I infer that the Brakes seek to oppose the relief, not because they want to vindicate long-term rights, but simply as a device for frustrating the transaction between Chedington on the one hand and the trustees' predecessor on the other. That is not a legitimate interest.

35. In any event, it was notable that, although Mr Learmonth KC on their behalf addressed me with both elegance and intelligence, the Brakes made no attempt to be joined to the application. This is even though at one point Mr Learmonth went so far as to suggest an adjournment of the application to allow his clients to put in evidence. Instead, and generally, however, they were content simply to make observations from the sidelines in their own interest: willing to wound, yet afraid to strike. It was clear from Mr Learmonth's submissions to me that they had been advised of, and had clearly in mind, the costs risks attaching to persons who join themselves to proceedings but find themselves on the losing side. Mr Day, for his part, urged the court to join the Brakes of its own motion. However, I decline to take that course at the instance of the applicants. They deliberately decided not to join the Brakes as respondents (as their solicitors' letter of 11 November 2022 makes clear, and as indeed is their right), and I cannot see that anything has changed just because the Brakes chose to attend the hearing. Each side has made its bed, and should lie on it.

The merits

36. I turn now to the question of the merits of the application. Section 303(1) of the 1986 Act provides as follows:

> "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."

The test to apply

37. The test which the court has to apply under this provision is clearly set out in a number of recent authorities. Although the section refers baldly to a bankrupt, any creditor or any other person being dissatisfied by the conduct of the trustee in bankruptcy, it is clear that this is not enough. Something more is required. For present purposes, I need only refer to two short statements. The first of these is in the judgment of Kitchen LJ (with whom Rix and Arden LJ J agreed) in *Bramston v Haut* [2013] 1 WLR 1720 (the case of a trustee in bankruptcy):

> "69. I believe the test which must in general be satisfied was correctly described by Registrar Baister in these terms 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 in that way.' "

38. The second is the statement of Males LJ in Re *Edengate Homes*, dealing with a liquidator (but there is of course no suggestion that the test is different for a trustee in bankruptcy):

> "[43] It is common ground that the test on the merits is one of perversity or, as it was put more fully in *Re Edennote*, affirming previous authority, the correct test (fraud and bad faith apart) is that—
>
> > '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.'
>
> [44] As the judge said, this is a formidable test. Mr Curl pointed out that it leaves 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."

39. So the court intervenes only where there is fraud or bad faith on the part of the trustee, or the conduct or decision-making of the trustee is not merely wrong, but can properly be characterised as perverse, that is, so utterly

unreasonable and absurd that no reasonable trustee would have done it. I emphasise that in this context 'perversity' is not related to fraud or bad faith. It does not imply any dishonesty. But perversity much resembles the test in relation to private law trusts: *Scott v National Trust* [1998] 2 All ER 708, 717-18; *Saffil Pension Scheme Trustees v Curzon* [2005] EWHC 293 (Ch), [24]. Nevertheless, this kind of unreasonableness is not to be equated with public law *Wednesbury* unreasonableness: see *Bramston v Haut*, at [68], [71].

40. Thus, for example, in ordinary circumstances an officeholder who lacks funds or risks paying costs will not be required to enter into litigation. In *Seear v Lawson* (1880) 15 Ch D 426, a decision that it was lawful for a trustee in bankruptcy to sell a right of action for the benefit of the estate, despite the common law doctrine of champerty, Sir George Jessel MR (with whom James LJ "entirely" agreed) said, at page 433:

> "The proper office of the trustee is to realise the property for the sake of distributing the proceeds amongst the creditors. Why should we hold as a matter of policy that it is necessary for him to sue in his own name ? He may have no funds, or he may be disinclined to run the risk of having to pay costs, or he may consider it undesirable to delay the winding-up of the bankruptcy till the end of the litigation."

The decision

41. Here the trustees have refused to apply to join the Court of Appeal proceedings. Their original decision letter is dated 8 November 2022, in response to Stewarts' letter of 3 November 2022. But in my judgment the interests of justice demand that subsequent events should be taken into account when the court makes a decision on an application of this kind. No authority to the contrary was cited to me. After all, in the meantime, the position could have moved either way. Indeed, the trustees now accept that some of their concerns as originally expressed have been met, but they still refuse to apply to take part. I have to decide this application on the basis of where we are now. It being accepted that this is not a case of fraud or bad faith, the question is whether the position adopted by the trustees can properly be described as perverse, in the sense of one which no reasonable trustee could have taken.

42. The reasons for the position taken by the trustees have been set out by the first respondent in her witness statement of 14 November 2022, relevant extracts from which have been set out above. They are also summarised by their counsel's skeleton argument, also set out above.

Submissions

43. The applicants' position is that the trustees have misunderstood or are mistaken about the situation in a number of important respects. First of all they say that the funding and indemnity which Chedington offered and continues to offer covers all the concerns which they had. Secondly, they say that the trustees have failed to take into account the downside to the estate of allowing the Brakes back into possession of the cottage, as against the upside of money

flowing into the estate. Thirdly, they say that the trustees have taken no account of the first and second applicants' position, and made mistakes of fact, in relation to Mrs Brehme's charging order over such beneficial interest as the Brakes might have in the cottage, and the identity of the counterparty from whom Mr Swift obtained the beneficial interest in the cottage.

44. As to the charging order, Chedington points out, first of all, that the only beneficial interest of the Brakes in the cottage would be that arising by virtue of a proprietary estoppel claim which they made against PWF and Mrs Brehme, but which has been stayed for many years, and may never be revived. Any such interest would have vested in the trustees in bankruptcy in 2015, but was not revested in the Brakes under section 283A of the Insolvency Act 1986: see [2020] 4 WLR 113. Secondly, Chedington points out that Mrs Brehme has consented to remove the charging order before the conveyance of the beneficial interest in the cottage to Chedington.

45. Fourthly, they say that the trustees are starting from the wrong point by insisting on their "neutrality" and "impartiality", when they are required to act in the interests of the *creditors*, and not to be neutral or impartial as between them and the bankrupts. In this connection I note Gateley's comments in paragraph 6 of their letter of 16 November, quoted above (at [22]). One aspect of this is the trustees' reluctance to be seen to be funded by a third party, Chedington. But, as I said during the hearing, it is a commonplace for insolvency officeholders to be funded in the action they take by third parties. Indeed, the applicants pointed to the fact that the Brakes in 2019 themselves funded the (then) new trustees in bankruptcy to the tune of £200,000, because they wanted the trustees to investigate their predecessor as trustee, Mr Swift. They also say that the present trustees have been shifting their ground over time, as if they made the decision first, and then looked for reasons afterwards.

46. As for the trustees in bankruptcy's concern about a private deal being done with the third applicant, the applicants say three things. First, they say that there is no suggestion that the trustees had any dialogue with the Brakes to see what was their view. Second, the trustees in bankruptcy could have sought the directions of the court, but have not. Third, they say that the correspondence passing between the trustees in bankruptcy and the Brakes is not available to the court, because the Brakes assert "without prejudice save as to costs" privilege in respect of it, which the trustees in bankruptcy appear to have accepted without any attempt to satisfy themselves that it was so. Accordingly, the court has simply no knowledge of any private deal in the other direction.

47. In addition, the applicants say that, by not intervening, the trustees in bankruptcy both give up the opportunity to monetise the cottage in the near future and also expose it to the risk of further damage. As to the first of these, there is no suggestion that, if the Brakes go into possession of the cottage, they will pay anything for their occupation. So the estates will not benefit. Indeed, as Lewison LJ noted, the *Brakes*, although bare trustees, would benefit, thus making an apparently unauthorised profit from their trust. As to the second, they point to the damage suffered at Axnoller House during the time that it was occupied by the Brakes. For present purposes, I do not think that the second point has any weight. The Brakes do not accept any responsibility for

the damage, and I am in no position at this stage to decide the question as a matter of fact. The photographs do not assist me.

48. The trustees focus on the reference to "reasonable" costs in Chedington's offer of funding and indemnity. They suggest that this implies a funding gap (between what the market charges and what Chedington will pay) which the trustees should not be expected to bear. Further, they make the points (at paragraph [17] of Ms Kicks' witness statement) that the Court of Appeal indicated in its judgment (at [83]) that the result of the case might not necessarily be a possession order in favour of the Brakes, and that the Brakes have offered an undertaking to vacate the cottage at the request of the trustees *if* the cottage in fact vests in the trustees as a result of the Bankruptcy Application. They suggest that these things may avoid the need for litigation altogether.

Assessment

49. I say at once that in my judgment it is not "perverse" for a trustee in bankruptcy to make a mistake, or accidentally to make a decision without taking into account all and only relevant considerations. It is not perverse simply to get things wrong. Trustees are like anyone else, and everyone makes mistakes from time to time. But I do think it is possible for a trustee to be perverse in *maintaining* a decision even when the relevant mistakes have been corrected. And, in considering whether a decision is one which no reasonable trustee could have made, I think the court is entitled to assume that the trustee does not consider that it has to be neutral or impartial as between the creditors and the bankrupt(s).

50. Moreover, 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. These trustees (like their predecessor) are professional officeholders, experienced in what they do, as the first respondent is indeed at pains to point out in her witness statement (at [18]-[21]). They are remunerated at professional levels to take on difficult jobs, and they chose to take on this one. As Sir George Jessel MR said in *Seear*,

> "The proper office of the trustee is to realise the property for the sake of distributing the proceeds amongst the creditors."

51. My assessment of the situation is this. The respondent trustees initially refused to apply to intervene in the Eviction Proceedings currently before the Court of Appeal, despite the comments of that court (referred to earlier in this judgment) set out in its judgment handed down on 10 October 2022. They did so on the basis of a large number of factors summarised in both the first respondent's witness statement and in the respondent's counsel's skeleton argument. The applicants say that these are all factors were in effect mistaken, because they had been dealt with by the letter sent on their behalf to the trustees' solicitors on 3 November 2022. Whether that is so or not, the trustees themselves accepted in their solicitors' letter of 16 November 2022 that by 15 November 2022 some at least of trustees' concerns had been met. However, it

was said that "the concerns set out at paragraph 16(a), (d) and (e)" of their counsel's skeleton argument had still not been addressed. (I think the reference should more properly be to paragraph 16**(ii)**(a), (d) and (e), but it is clear enough.)

52. In my judgment, all of these remaining concerns had also been addressed. Paragraph 16(ii)(a) (financing involvement in the proceedings and subsequent appeals or hearings) was clearly dealt with in the letters of 3 November 2022 and 15 November 2022 (though in the latter incorrectly labelled, as para 16(b)(i)). Paragraph 16(ii)(d) (possible challenges being made by the Brakes and allegations of preferential treatment) was addressed in the letter of 15 November 2022 (though again incorrectly labelled, as para 16(b)(iv)). Stewarts said that they did not consider there to be any risk of challenge from the Brakes if the trustees were acting pursuant to the directions of the court. I respectfully agree. Any trustee, but especially professional trustees in bankruptcy, ought to possess a certain degree of robustness. You are looking after someone else's interests, not your own. As I have said, it goes with the territory. Paragraph 16(ii)(e) (non-legal expenses and time occurred) was also expressly addressed in the letter (though again incorrectly labelled, as para 16(b)(v)). Stewarts said that Chedington's offer of funding was not limited to legal expenses and time. In the circumstances, it is difficult to see the downside to the trustees in making an application to intervene.

53. On the other side, the trustees' intervention, if successful, would have several benefits. One obviously is the ability to obtain an income stream from the cottage in the near future, until the question of any challenge by the Brakes to the original trustee in bankruptcy's transaction with Chedington is finally concluded. This contrasts with the position if the Brakes retake possession, but (so far as the evidence goes) without any intention to make any payment for the benefit of the estates. A second benefit is to avoid the possibility of further deterioration of the cottage to take place, bearing in mind the impecuniosity of the Brakes, which would not allow them to spend money on maintenance and repairs. A further benefit is that it does not expose the trustees to any risk that, if the appeal to the Supreme Court succeeds, or if it fails but the Brakes do not succeed in upsetting the sale transaction between Mr Swift and Chedington, the Brakes will refuse to leave the cottage, just as they refused to leave Axnoller House. On this point the trustees rely on the undertaking offered by the Brakes to leave in certain circumstances. But a bird in the hand is worth two in the bush.

54. The trustees submit that there is a chance that the Court of Appeal will resolve the problem in Chedington's or the trustees' favour without the necessity of their intervention. Of course there is always a chance. But to put this essentially speculative idea into the balance in deciding what is in the interests of the creditors to do is pure Micawberism. The trustees simply hope that something will turn up to get them out of what they perceive to be an awkward situation. This is unimpressive. 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. Indeed, one of the current trustees and a predecessor (not Mr Swift) accepted £200,000 in funding from the Brakes themselves.

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.

56. The next question is that of the relief that should be granted, if any. In that connection, Mr Learmonth KC drew an analogy between the granting of an interim injunction and leaving a successful claimant to a remedy in damages. He said that in the present case there was no need to go so far as to direct the trustees to apply to intervene. It would be sufficient to leave the applicants to their remedy in damages. I am not impressed by this analogy. Section 303 is not an example of equity's auxiliary jurisdiction or the court's inherent jurisdiction. It is a statutory remedy, specifically created as part of the bankruptcy system, and should not be restricted by reference to completely different rules which were brought into existence by judges (not legislators), at a different time and for a different purpose.

Conclusion

57. In my judgment it is appropriate in this case to grant the relief sought, with one amendment. That is 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 have the opportunity, if so advised, to seek a better return on the asset.

58. I will deal with consequential matters in the first instance on paper. The parties should send me primary submissions on costs, permission to appeal, and any other consequential matters by 4 pm on 28 November 2022, copied to the other parties, and any reply submissions (similarly copied) by 4 pm on 30 November 2022. The period specified in CPR rule 52.12(2)(a) shall be the period of 21 days from the hand-down of this judgment in final form.

59. Lastly, I apologise for the length of this judgment. But because of the circumstances, and the need to conclude the Eviction Proceedings, I prepared these reasons in some haste. As the French mathematician and philosopher Blaise Pascal once wrote, "I have made this longer only because I did not have the time to make it shorter".