Neutral Citation Number: [2020] EWHC 1810 (Ch)

Case No: 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: 13/07/2020

Before :

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

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Between :

(1) NIHAL MOHAMMED KAMAL BRAKE **(2) ANDREW YOUNG BRAKE** **(as trustees of the Brake Family Settlement)** **(3) NIHAL MOHAMMED KAMAL BRAKE** **(4) ANDREW YOUNG BRAKE**	**Applicants**
- and -	
(1) DUNCAN KENRIC SWIFT **(as trustee of the estates of Nihal Brake and Andrew Brake)** **(2) THE CHEDINGTON COURT ESTATE LIMITED**	**Respondents**

- -
- -

Stephen Davies QC and Daisy Brown (instructed by **Seddons LLP**) for the **Applicants**
Andrew Sutcliffe QC and William Day (instructed by **Stewarts Law LLP**) for the **Second Respondent**
The First Respondent was not present or represented

Hearing dates: 14, 15, 18, 19 May 2020

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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.

....

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

HHJ Paul Matthews :

INTRODUCTION

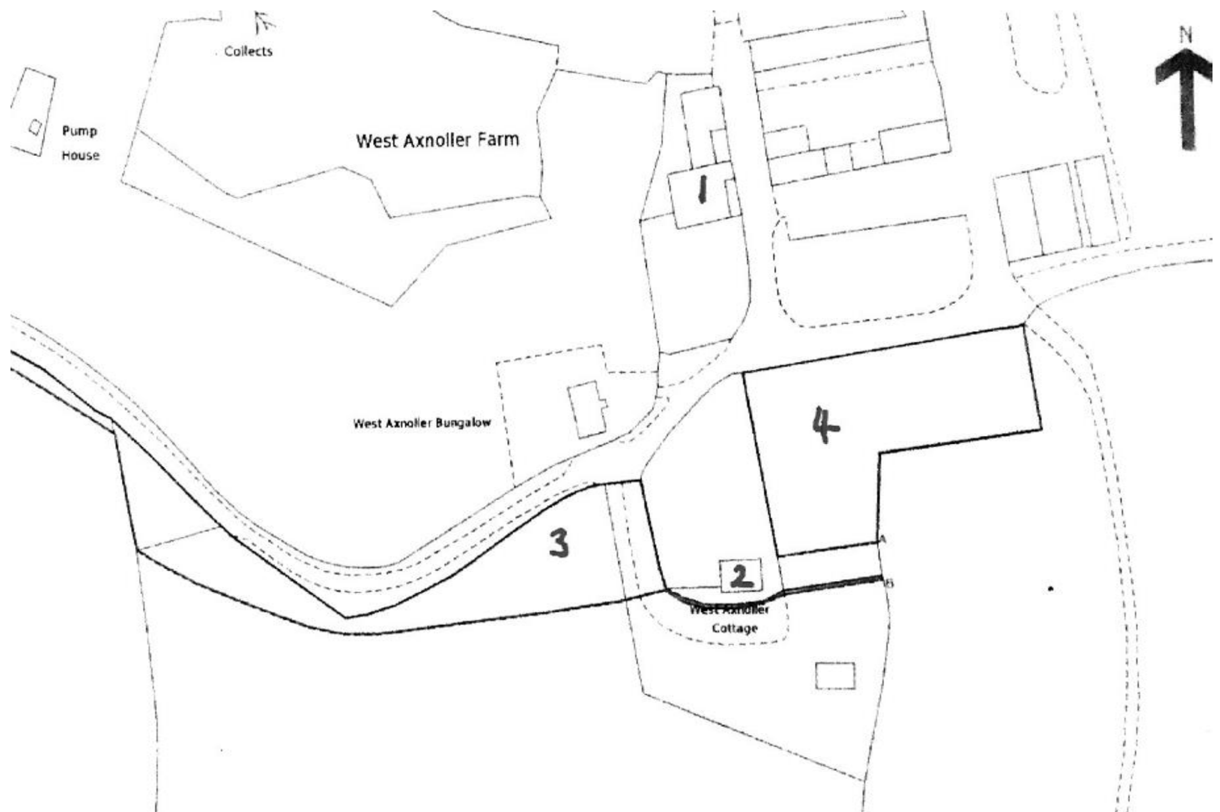
1. This is my judgment on the trial of the remaining part of what has been called the Bankruptcy Application, issued on 12 February 2019 against Duncan Swift, the first (and at that time the only) respondent, who was the applicants' former trustee in bankruptcy. The second respondent ("Chedington") was joined later. It concerns a claim to revest in the applicants (Mr and Mrs Brake) interests or claimed interests in land known as West Axnoller Cottage ("the cottage") and two small parcels of adjacent land, under section 283A of the Insolvency Act 1986. This claim was tried by me on 14, 15, 18, 19 May 2020, remotely by video conferencing during the Covid-19 Pandemic. I will come back to the technological issues later.

BACKGROUND

Purchase of West Axnoller Farm

2. The background to this claim is complex. I summarise it briefly here, based on summaries of the litigation which I have given in earlier judgments, supplemented by evidence in this case. I go into many of these matters in more detail later in this judgment. In September 2004, the first applicant (then Mrs D'Arcy, but whom I shall call by her current name, Mrs Brake) acquired West Axnoller Farm from local landowners, the Vickery family (who continued to have substantial landholdings locally). This property included a substantial dwelling-house known subsequently as Axnoller House (marked as "1" on the plan below). In 2006 Mrs Brake began to operate a holiday letting business at the Farm, subsequently joined in partnership in 2008 by her husband, the second claimant ("Mr Brake").

3. Just outside the southern boundary of the Farm, on the other side of the private lane leading to the Farm, lies another residential property known as West Axnoller Cottage (the "cottage", marked as "2" on the plan below). In July 2002 a Mr and Mrs White had purchased the cottage from the Vickery family and were living there when Mrs Brake bought the Farm. In 2006 Mrs Brake bought and was registered (again under her former name of D'Arcy) as proprietor of two further small parcels of land from the Vickery family, one on either side of the cottage (marked "3" and "4" on the plan below). The one on the west side is long and thin, and runs alongside the private lane for some distance (but not as far as the public highway). It also runs east on the south side of the cottage as a narrow strip of land only 4 feet wide. (On the plan below, it is shown simply as a thick black line.) The parcel on the east side of the cottage is more regular in shape, in effect two rectangles put together to form an L shape. Together these two parcels have in this litigation been variously referred to (by the applicants) as "the Cottage Access Land" and (by Chedington) as "the strip" or "the ransom strip". Despite the name given to that land in this litigation by the applicants, Mr and Mrs White never owned them. The cottage had direct access to the lane. I will call these two parcels the "Adjacent Land" or the "adjacent parcels". The land to the south of the cottage continued to belong to third parties, although Chedington finally bought it in 2019.



‘Stay-in-Style’

4. Mrs Brake borrowed money from bankers Adam and Co in 2006, secured by a first legal charge on the Farm. The financial crisis of 2008 made it impossible to obtain further bank finance to expand the business being carried on at the Farm. The applicants therefore looked for an outside investor. In 2009 Mrs Brake met Lorraine Brehme (“Mrs Brehme”), who was looking for a new venture. In February 2010 the applicants entered into a partnership with a limited partnership called Patley Wood Farm LLP (“PWF”), whose principal was Mrs Brehme. In essence PWF was Mrs Brehme’s investment vehicle. The new partnership (known as “Stay in Style”) was to carry on the business of providing luxurious weekend and other breaks, and hosting events such as weddings. The applicants contributed the Farm as partnership property, although it remained charged to Adam & Co to secure existing borrowings. With funds contributed by Mrs Brehme, on 8 March 2010 the partnership acquired the cottage, the legal title to which was transferred to the applicants and Mrs Brehme jointly, who were registered as proprietors. At first the cottage was used as accommodation for a housekeeper and then for a personal assistant (Simon Windus) and his family. After they left in 2012 it was used (inter alia) for the applicants to stay in when the main house was let.

Arbitration and bankruptcy

5. Differences arose between the applicants on the one hand and PWF on the other, as partners in Stay in Style. In accordance with the partnership agreement, these were referred to arbitration. That arbitration ended on 21 June 2013 with an award in favour of PWF, and the dissolution of the partnership. The applicants in the meantime (in December 2012) asserted a claim in the High Court against Mrs Brehme and PWF, initially for damages for failure to make promised investments (“the Damages

Claim"), and also for specific performance of an alleged agreement to transfer the cottage to the applicants. By amendment in July 2013 a further claim was added for a proprietary estoppel equity relating to the cottage. This claim has been stayed since the applicants became bankrupt in 2015, and so the proprietary estoppel claim still remains unvindicated. Following a failure to pay orders made against them for costs in the arbitration, the applicants were adjudicated bankrupt on 12 May 2015. The partnership itself subsequently went into administration (in 2016), and then into liquidation (in 2017).

Sale to Sarafina Properties Ltd

6. There were disputes between the applicants and the relevant insolvency officials about many aspects of the bankruptcies and the liquidation. One was and is whether the cottage is partnership property, or the beneficial property of the Brakes. In addition, in October 2014 Adam & Co, the bank which had lent money to Mrs Brake against the security of the Farm, appointed receivers under the Law of Property Act 1925. After marketing the property, they sold it in July 2015 to a newly incorporated company, Sarafina Properties Limited, a corporate vehicle for the Hon Saffron Foster ("Mrs Foster"). I am told that Mrs Foster is a daughter of Lord Vestey, as well as a friend of the applicants. The cottage and the adjacent two parcels of land were not included in this sale, never having been subject to the bank's charge.

Purchase of Sarafina Properties Ltd by the second respondent

7. In February 2017 Mrs Foster sold the company to Chedington, and its name was changed to Axnoller Events Limited ("AEL"). Chedington is an investment vehicle for Dr Geoffrey Guy ("Dr Guy"). Mrs Brake was employed by AEL to continue to run the wedding and rental accommodation business as before. There is a dispute about the position of Mr Brake. Relations between the parties broke down however, and on 8 November 2018 notice was given of termination of their employment. This has led to proceedings in the employment tribunal against Chedington and others by each of the applicants ("the Employment Claims"), and proceedings in the High Court by AEL against the applicants to recover possession of the Farm ("the Possession Claim"). There is a further dispute between the parties concerning an email account that was formerly used for the purposes of the business at the Farm ("the Documents Claim"). I am not concerned with any of this in these proceedings.

Transactions relating to the cottage

8. Following this, in December 2018 Chedington bought the two parcels adjacent to the cottage from the applicants' trustee in bankruptcy, Duncan Swift ("Mr Swift"), and was registered as proprietor. In January 2019, Mr Swift entered into a transaction with the liquidators of the partnership in relation to the cottage, to acquire the liquidators' rights in it. Chedington entered into back to back transactions with Mr Swift in order to acquire those rights. The Brakes allege that Chedington and Mr Swift acted collusively, implementing "unlawful arrangements to create the false appearance that Chedington had acquired title to the cottage". Chedington subsequently took possession of the cottage, the Brakes say unlawfully. They therefore commenced eviction proceedings against Chedington ("the Eviction Claim"). So the position on the ground currently is that the applicants are in occupation of the house, but seek

possession of the cottage, whereas Chedington is in occupation of the cottage, but seeks possession of the house.

Insolvency proceedings

9. In addition, on 12 February 2019 the Brakes commenced insolvency proceedings (the "Liquidation Application" and the "Bankruptcy Application") against both the liquidators of the partnership and their trustee in bankruptcy. The first purpose of these insolvency proceedings was to unwind the disputed transactions. The second purpose was (as against the trustee) to establish that the Brakes' pre-existing interests in the cottage and the adjacent parcels had revested in them and Mrs Brake respectively on 12 May 2018 under the Insolvency Act 1986, section 283A, on the basis that they were the Brakes' sole or principal residence at the date of bankruptcy, and Mr Swift had taken no steps to realise them 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 Mr Jarvis QC made an order by consent removing Mr Swift from office, and another appointing his successors. In December 2019 Mr Jarvis QC gave directions for the trial of these insolvency proceedings before me in May this year.

Strike-out applications

10. In January this year Chedington applied to strike out the proceedings against the liquidators and most of those against Mr Swift and itself, on the basis that the Brakes lacked standing to bring them. I heard those applications in early March 2020, and acceded to them. I struck out the whole of the Liquidation Application ([2020] EWHC 538 (Ch)), and most of the Bankruptcy Application ([2020] EWHC 537 (Ch)), for lack of standing (on application, I gave permission to appeal; those appeals are still outstanding, with 'hear-by' dates in November 2020). The main matter left still to be tried in May, against the trustee and Chedington, was the revesting issue under section 283A.

11. It was agreed by the parties before me on 3 March that that issue was divided into three sub-issues: (1) whether the Brakes' as yet unvindicated claim in proprietary estoppel to the cottage as against the liquidators was an interest in a dwelling-house within section 283A ("the interest issue"); (2) whether the adjacent parcels of land fell within the definition of a dwelling-house within that section ("the dwelling-house issue); and (3) whether the cottage and the adjacent parcels were the Brakes' sole or principal residence at the date of bankruptcy ("the residence issue"). By this stage the trustee accepted that, having ceased to hold office, he no longer had any interest in the proceedings, and did not propose to play any active part. His successors as trustees have not applied to be substituted for him. He did however give evidence at the trial, called by Chedington.

Further applications

12. Following the hearings on 2 and 3 March 2020, further applications were made by the current applicants, on 13 March 2020. In summary these sought to bring forward the Eviction Proceedings to May, and to list a preliminary issue in those proceedings at the time of the trial of the remaining part of the Bankruptcy Application (that is, the section 283A issue), and at the same time to adjourn the trial of the section 283A

issue. In substance, therefore, the applicants were seeking to replace the trial of the remaining issue with an issue from different proceedings. By a written judgment given on 23 March 2020 ([2020] EWHC 694 (Ch)), I refused these applications. On 30 March 2020 the applicants sought permission on paper to appeal against my order. By a written judgment handed down on 6 April 2020, I refused this application. On 9 April 2020, Chedington issued an application for a negative declaration that it was not required to prove its title at the trial.

13. On 24 April 2020, I held the pre-trial review in this matter. At this hearing, I gave directions for the remote hearing of the trial, by virtue of the Zoom videoconferencing platform, to be curated by a third party technology company, and to be web broadcast, as it would not be possible for the public to attend in person. I also directed that Chedington's application dated 9 April 2020 be heard and determined separately before the trial. Given the shortness of time before the trial was to begin, I heard the application on 1 May 2020 and I handed down a written judgment on 4 May 2020 ([2020] EWHC 1071 (Ch)). I held that in substance the application succeeded, although it was neither necessary nor desirable to make a declaration to this effect in the circumstances.

14. This judgment was almost immediately followed by two further applications by the applicants. One was an application by notice dated 4 May 2020, asking me to recuse myself from trying the matter. The other was an application asking for a stay, or alternatively an adjournment, of the trial either generally or pending final determination of appeals against the earlier decisions of mine on 2 and 3 March 2020. Because of the imminence of the trial, I heard both these applications on Thursday 7 May 2020, and announced my decision at the end of the hearing, but only putting my reasons in writing and handing them down formally on Monday, 11 May 2020 ([2020] EWHC 1156 (Ch)). I refused both applications, for reasons then given. The applicants sought permission to appeal against both decisions, which was refused by Patten LJ in the Court of Appeal on the next day, 12 May 2020. The way was therefore clear for the trial to begin, as it did, on 14 May 2020.

Trial

15. As I have said, at the PTR it was ordered (by consent) that the trial would take place remotely on the Zoom video conferencing platform, curated by a third party technology company. The choice of Zoom was largely party driven, although it is also my own experience that this platform is superior in terms of functionality and efficiency to Skype for Business, which was the only platform which HMCTS was prepared at that stage to support on a judicial laptop computer. Third-party involvement was therefore necessary, because HMCTS does not permit the use of Zoom on judicial laptop computers. The trial was live-streamed over the web, so ensuring public participation. There were some technology problems with the remote hearing. The most significant was a problem of connectivity for the applicants, and in particular during the evidence of Mrs Brake. I will return to this later.

EVIDENCE

Witnesses

16. The following witnesses were tendered for cross-examination: Mrs Nihal Brake (the first applicant), Mr Thomas Hyde, Ms Susan Maslin, Mr Andrew Brake (the second applicant), Mr Russell Bowyer (director of the second respondent), Ms Lorraine Brehme, and Mr Duncan Swift (the first respondent). Although a number of witness statements of other persons were in the trial bundle, I was not asked to admit them as hearsay evidence.

17. I give here my impressions of all the witnesses tendered for cross-examination.

18. Mrs Brake was an intelligent and quick-witted witness. Her background in asset management was evident. She had a very good recall of facts and control of details. However, she wished very much to control the process too, challenging counsel and asking him many questions instead of answering them. Indeed, she frequently interrupted counsel, and sometimes me, presumably because she felt that she could deal with the point under consideration more quickly that way. Invariably, however, this made the process longer. She also insisted on giving a great deal of history and unnecessary information in answering questions, which made her responses extremely discursive. This tended to happen when she had difficult questions to answer. From time to time I intervened and asked Mrs Brake not to ask questions and to answer simply the question she was asked rather than giving speeches. She always apologised.

19. Overall, it seemed to me that she considered that she was completely in the right and that others (especially Mrs Brehme and Dr Guy) were responsible for everything bad that had happened to her. She was taken to statements of case and witness statements she had made in other related legal proceedings (of which there are a great many), which contained elements which were inconsistent with the case that she was now making and the evidence she was now giving. Her efforts to explain the inconsistencies were unconvincing. In addition, she also shifted her position during cross-examination and re-examination, for example in relation to the date on which she said that the change from one principal residence to another had occurred, and in relation to moving furniture from the house to the cottage.

20. However, I also bear in mind that more recently (since 2017) she has suffered serious ill-health, and still has a number of ongoing medical conditions. I also bear in mind that her evidence was given over a poor internet connection and there were a number of problems of connectivity during the time she gave evidence. Indeed, the latter part of her evidence had to be given over the telephone, because the video picture was inadequate. Chedington sought to make something of this, insisting that in some way Mrs Brake had sabotaged her own connection. I am entirely unpersuaded of this, and proceed on the basis that, whatever the cause, it was not her doing. Nevertheless, I am sure that it unsettled her, and I have made allowance for that. I do not think that Mrs Brake deliberately told me anything which she *knew* to be untrue. However, I think she exploited uncertainty and ambiguity so as to put the best 'spin' on the evidence. I also think that in certain respects she has convinced herself that, because she is right, reality must match her case. In all the circumstances I felt that I could rely with confidence on her evidence only where it was confirmed or corroborated by an independent source.

21. Mr Hyde was very precise, professional witness. He did not attempt to go beyond what he knew, and was unshaken in cross-examination. I accept his evidence entirely.

22. Ms Maslin was an elderly lady who spoke in clear and straightforward terms, with firm opinions. It was clear to me that she sympathised entirely with the applicants. I also had some doubts about the accuracy of her memory. A more serious problem arose from the fact that she was assisted in giving her evidence by a lady called Kate Ellison, whom Ms Maslin described as one of her riders. Ms Ellison's task was to hand the volumes of the trial bundle to Ms Maslin as they were needed. However, on at least one occasion (when I intervened) I clearly heard Ms Ellison prompt Ms Maslin as to the answer to give (which Ms Maslin then gave). In itself that particular answer was not very significant, but I intervened to remind Ms Maslin that her assistant should not be prompting her. She immediately accepted this. Ms Maslin was recalled on the following Monday, and Kate Ellison called for the first time, to give further evidence about this aspect of the matter. Both firmly denied that any prompting took place. I cannot accept this. It is clear that it did. I gave permission for the transcribers to listen to the recording again to check this Maslin's evidence, and they revised the transcript accordingly. That shows prompting taking place. I have also listened to and watched the recording of Ms Maslin's evidence myself in order to check my recollection and also the transcript, and I am entirely satisfied that Ms Ellison did prompt Ms Maslin on at least one occasion. I am afraid that the result of the prompting episode, and then the flagrant denial that it took place, means that I have very little confidence in the truthfulness of Ms Maslin's evidence. In any event, even without this, I considered that some of her evidence was too good to be true.

23. I should also say that there were also electronic sounds which came from Ms Maslin's location during the giving of her evidence. It was suggested by Mr Sutcliffe QC that these may have been the sounds of instant messaging devices, possibly telling Ms Maslin what answers to give to questions. In revisiting the recording of the evidence, I have paid attention to the sounds. In my judgment they are far too frequent for them to be the product of a person sending instant messages to Ms Maslin, and even if they were, I am confident that Ms Maslin would not have been able to absorb the information sent in any such messages and give the answers she did without apparently having any regard to such messages. Whatever the source of these noises, I am satisfied that they did not affect the evidence of Ms Maslin. However, for the reasons given I have largely discounted it anyway.

24. Mr Brake was a straightforward witness who spoke plainly and with great deliberation. He is not a man of any great business experience, and it is clear that he is not comfortable, or at home, in the worlds of business or of law. Indeed, he could properly be described in those worlds as naïf. He is of west country farming stock. His passion is the world of horses. Quite understandably, he was protective of his wife, whose word he accepted unconditionally, and he bridled at some of the questions put to him. I also think he failed to understand much of the complexity of the situation, and the detail of the documents. It simply went over his head, and he just accepted what his wife told him. As a result, I am satisfied that he was telling me the truth so far as he understood it. In other words, he told me what he thought. In this sense, I accept his evidence as truthful, without meaning that I accept what he said as objectively correct.

25. Mr Bowyer was a clear and straightforward witness, and I had no doubts about accepting his evidence as truthful.

26. Mrs Brehme was a straightforward, focused and honest witness. She did not try to play games. She knew her limits, stood her ground, and cross-examination made little or no impression on her. She is not a party to the present litigation, but I bear in mind the fact that she regards Mrs Brake as responsible for the loss of her investment in the partnership. Nevertheless I regard her evidence as truthful, and where there is a conflict between her evidence and that of Mrs Brake, I prefer that of Mrs Brehme.

27. Mr Swift was a very fair and honest witness, who accepted correction and took no false points. He was quick, with a good grasp of detail, and had answers to nearly all the important points put to him. Cross-examination made no real impression upon him. He came across as a highly professional insolvency practitioner. I accept his evidence as truthful.

Factfinding

28. The lawyers involved will know this, but for the benefit of the parties I will say a few words about how English judges decide civil cases like this one. I borrow the following words largely from other judgments of mine in which I have made similar comments. First of all, judges are not superhuman, and do not possess supernatural powers that enable them to divine when someone is not telling the truth. Instead they look carefully at all the oral and written material presented, with the benefit of forensic analysis (including cross-examination of oral witnesses), and the arguments made to them, and then make up their minds. But there are a number of important procedural rules which govern their decision-making, some of which I shall briefly mention here, because lay readers of this judgment may not be aware of them.

The burden of proof

29. The first is the question of the burden of proof. Where there is an issue in dispute between the parties in a civil case, one party or the other will bear the burden of proving it. This is however subject to some important nuances which I shall mention later. In general, the person who asserts something bears the burden of proving it. The importance of this is that, if the person who bears the burden of proof of a particular matter satisfies the court, after considering the material that has been placed before the court, that something happened, then, for the purposes of deciding the case, it *did* happen. But if that person does *not* so satisfy the court, then for those purposes it did *not* happen.

The standard of proof

30. Secondly, the standard of proof in a civil case is very different from that in a criminal case. In a civil case it is merely *the balance of probabilities*. This means that, if the judge considers that a thing is more likely to have happened than not, then for the purposes of the decision it *did* happen. If on the other hand the judge considers that the likelihood of a thing's having happened does not exceed 50%, then for the purposes of the decision it did not happen. It is not necessary for the court to go further than this. There is certainly no need for any *scientific* certainty, such as (say) medical experts might be used to.

Oral evidence

31. Thirdly, in commercial cases where there are many documents available, and witnesses give evidence as to what happened based on their memories, which may be faulty, civil judges nowadays often prefer to rely on the documents in the case, as being more objective: see *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22]. Oral evidence and cross-examination are however still important. They enable proper scrutiny of the documents, and they also permit the judge to gauge the personality and motivations of witnesses.

32. The relevant facts in this case go back about fifteen years. The present case is at least partly a commercial case, and there are sufficient written records, letters, emails and so on as to make the *Gestmin* approach relevant to this case. I will therefore give appropriate weight to both the documentary evidence and the oral evidence, bearing in mind both the fallibility of memory and the relative objectivity of the written evidence available.

Failure to call evidence

33. Fourthly, where a party could give or call relevant evidence on an important point without apparent difficulty, a failure to do so may in some circumstances entitle (though not compel) the Court to draw an inference adverse to that party, sufficient to strengthen evidence adduced by the other party or weaken evidence given by the party so failing. But before this point can be reached a number of conditions have to be satisfied. In the present case, Chedington ask me to draw adverse inferences against the applicants because of what they call a "failure to call obviously relevant witnesses". I will return to this later.

Reasons for judgment

34. Fifthly, a court must give reasons for its decisions. That is what I am doing now. But judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered. Moreover, it must be borne in mind that specific findings of fact by a judge are inherently an incomplete statement of the impression which was made upon that judge by the primary evidence. Expressed findings are always surrounded by a penumbra of imprecision which may still play an important part in the judge's overall evaluation.

Overall

35. So decisions made by civil judges are not necessarily the objective truth of the matter. Instead, they are *the judge's own assessment* of the *most likely facts* based on the *materials which the parties have chosen* to place before the court, taking into account both the fallibility of memory and to some extent also what the court considers that the parties should have been able to put before the court *but chose not to*. And, whilst judges give their reasons for their decisions, they cannot and do not explain every little detail or respond to every point made.

FACTS FOUND

Purchase of the Farm

36. As I have said, Mr and Mrs White bought the cottage from the Vickerys on 29 July 2002. The transfer form TP1 shows that the Vickerys granted to Mr and Mrs White for the benefit of the cottage a right of way from the public highway over the Farm's private lane to the land at the front of the cottage and which came with the property. By that date the Whites had already applied for planning permission for a two-storey extension to the cottage, together with a conservatory, garden implement store and also to extend the residential curtilage. Planning permission was granted by the local authority on 27 August 2002. The extension was subsequently built, though it was not in evidence at exactly what date. It was certainly built by the time the cottage was sold in 2010. As I have already said, Mrs Brake bought the Farm in September 2004, with the help of mortgage finance from Adam & Co, and in 2006 (which was also the year that she married Mr Brake) she bought the two parcels of land adjacent to the cottage.

The holiday-letting business

37. The Farm was a disused dairy farm, in a state of some dereliction, with a total area of about 95 acres, mostly pastureland. The main house at the Farm was a farmhouse, rather than a country or manor house. Mrs Brake obtained planning permission to change the use of the farmland to equestrian use. She converted two barns into holiday houses from which to run a holiday letting business, which started in 2006. In 2008 Mr Brake joined her in partnership. That was also the year of the 'credit crunch', and a worldwide financial crisis. Although the business needed more funds to renovate and convert the main house, banking finance was no longer available. Indeed, banks were seeking repayment of outstanding loans rather than making new ones. Mrs Brake had significant liabilities to Adam & Co, which were either falling due or would become due in the next year or two. But she also wanted further funds in order to extend and renovate the main house and make other improvements to the existing facilities. Accordingly, the applicants looked for outside finance. In July 2009 Mrs Brake met Mrs Brehme, who had sold out of her previous business, and was looking for an investment opportunity.

Outside investment: Mrs Brehme

38. Mrs Brake sent an email to Mrs Brehme dated 6 August 2009, saying that the business needed an investment of £2 million, to be used as follows:

> "£150,000 to Adam and Co now
>
> £200,00[0] to finish and furnish main house.
>
> £550,000 to Adam and Co in April 2010.
>
> £350,000 to convert existing stables to spa for main house and wellness centre.
>
> £200,000 to build riders club ménage (must be finished before the wellness centre as horses will need to move for the stables to be taken over). Planning permission pending but very likely.
>
> £550,000 to buy Andy and Tom and I out of the main house so that it could go into the business and for a contingency sum for the building works."

(The reference to "Tom" is to her son by her first husband, Tom D'Arcy, who would then have been about nine years old.)

39. It will be noted that, of the £2 million investment, only £750,000 was actually to be put directly into the business. The rest was to go to paying off Mrs Brake's debts to Adam & Co, and to buying the applicants out of the main house, where they were then living as their principal residence. Mrs Brehme baulked at this. Instead, it was agreed that the partnership would buy the nearby cottage, which was then on the market. This would enable the applicants to have somewhere to live for the time being, and thereby free up the main house for letting. There would be provision for the applicants to take some money out of the business equal to 25% of the value of the cottage at any time after two years from the commencement of the new partnership. This was intended to enable the applicants to purchase their own property to live in. Heads of agreement between the parties were agreed in September 2009, and a formal partnership agreement was subsequently drawn up.

The new partnership

40. The partnership agreement of 19 February 2010 was made between Mr Brake, Mrs Brake, and Patley Wood Farm LLP, which was defined as "LLP". It provided in part as follows:

> "1.1. The definitions and rules of interpretation in this clause apply in this agreement.
>
> Admission Date: [ ] February 2010, being the date of LLP's admission to the Partnership.
>
> Founding Partners: Mr Brake and Mrs Brake.
>
> Managing Partner: Mrs Brake, who was appointed as managing partner in accordance with clause 14.
>
> Partnership Property: the Premises and all other assets (all rights in them) which are used by the Partnership for the purposes of the Business and listed in Part I of Schedule 5 except for those assets listed in Part II.
>
> Premises: the freehold or leasehold premises to be occupied by the Partnership, 0 [sic], and such other premises as the Partners may decide in accordance with clause 15.6(i).
>
> […]
>
> 2. The Partnership is a continuation of the partnership established by the Founding Partners before the Admission Date and shall be carried on under the terms of this agreement from the Admission Date until it is terminated in accordance with its terms.
>
> […]

4.1. The net capital of the Partnership after loans and overdraft immediately before the Admission Date, as contributed by the Founding Partners, is £4 million.

4.2. LLP hereby agrees that its aggregate loans of £380,000 made to the Partnership before the Admission Date are to be converted into a capital contribution from the Admission Date and added to LLP's Capital Account. LLP further undertakes to contribute (A) a further £1,120,000 in cash on the Admission Date to the Partnership by way of additional capital contribution and (B) a further £500,000 in cash on or before sixth of April 2010 by way of additional capital contribution.

[…]

4.5. The capital of the Partnership at any time will belong to the Partners in the amounts contributed by them from time to time.

[…]

5.1. Partnership Property at any time shall belong to the Partners in the proportions in which they have contributed to the capital of the Partnership at that time.

5.2. Any Partnership Property which is vested in one or more of the individual Partners' names shall be held by them on trust for sale for all of the Partners. …

6.1. The Net Profits and Losses of the Partnership (including capital profits and losses realised in that Accounting Period) shall belong to and be borne by the Partners in the ratio set out in Schedule 1 …

[…]

8.4. The Partners hereby agree that the Founding Partners are entitled to reside in the Premises as Licensees rent-free.

8.5. West Axnoller Cottage forms part of the Premises. The Partners agree that as and when the Founding Partners so decide at any time after the second anniversary of the Admission Date, West Axnoller Cottage will be valued by an independent valuer and an aggregate amount equal to 25% of the value will be credited in that Accounting Period to the Current Accounts of the Founding Partners …

[…]

33.1. Except as otherwise provided, any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, or the legal relationships established by this agreement, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause.

[…]

Schedule 1 Partners and Profit Share

Partner	Profit Share
1. Andrew Young Brake and	
Nihal Mohammed Kamal Brake	67%
2. Patley Wood Farm LLP	33%

Schedule 2 Capital Contribution

Partner	Capital Contribution	Payable
Mr and Mrs Brake	£4,000,000	Paid
Patley Wood Farm LLP	£380,000	Paid
Patley Wood Farm LLP	£1,120,000	Admission Date
Patley Wood Farm LLP	£500,000	6 April 2010
	£6,000,000	

Schedule 4 Premises

West Axnoller Farm

Schedule 5

Part I Partnership Property

West Axnoller Farm

Fixtures and fittings in Voltaire and Burggraaf

Contents of Voltaire and Burggraaf

Mechanical digger (subject to finance agreement)

Part II Assets that are used in the Business but which are not Partnership Property

Two marble lamps and two tables located in Voltaire and Burggraaf

Horses and other livestock

Tractors and gardening equipment that is not the subject of finance agreements paid for by the Partnership

Contents of Axnoller House

All other assets save as mentioned in Part I above”

Acquisition of the cottage

41. At the date of the partnership agreement the purchase of the cottage was envisaged but had not yet taken place. That took place on 8 April 2010. Legal title was registered in the joint names of the applicants and Mrs Brehme, on trust for the partnership. Mrs Brehme was unaware that Mrs Brake was the owner of the two adjacent parcels of land, because, despite becoming partners in effect, Mrs Brake had never told her. She had assumed that the adjacent land was Vickery land. It was agreed that renovations would take place to the cottage at a cost to the partnership of about £40,000, and that the applicants would move into the cottage in about August or September 2010.

Occupation of the cottage

42. Clause 8.5 of the partnership agreement reflected the earlier understanding between the applicants and Mrs Brehme that the cottage would be acquired so as to give the applicants somewhere to live whilst the house was being renovated and then let. For this purpose (as the clause says) the applicants were to be entitled to live rent free in the partnership premises (including both the house and the cottage) as licensees of the partnership. However, in October 2010 the applicants decided that they did not want to live in the cottage. Mrs Brake said it was uninhabitable. She later said to Mrs Brehme that she (Mrs Brehme) had walked around the cottage when it was bought and said "it needed to be knocked down it was so damp and cold". Mrs Brehme denied this, and said it was Mrs Brake who had gone round the cottage at the time saying that. However, she did agree that once the business was prospering the cottage could be demolished and rebuilt as another letting unit. I prefer Mrs Brehme's evidence.

43. Mrs Brake also said the cottage was needed to house "staff". Mrs Brehme disagreed. Nevertheless, in October or November 2010, Mrs Brake hired a housekeeper, Hazel Apps, for the estate properties and installed her in the cottage. However, the housekeeper left suddenly over Christmas 2010. In February 2011, when Mrs Brehme was abroad, Mrs Brake hired a personal assistant, Simon Windus, as an employee of the partnership (though without reference to Mrs Brehme) and moved him and his family into the cottage, where they lived until June 2012 (by which time Mrs Windus had unfortunately become ill with cancer). Whenever the house was let during this time, such that the applicants could not stay in the house, they moved to a hotel or stayed with friends. They did not stay in the cottage.

Renovation of the cottage

44. When Simon Windus moved out of the cottage, Mrs Brake insisted that more work be done before it would be suitable for her to stay in. In an email from Mrs Brake to Mrs Brehme dated 30 November 2012, Mrs Brake said:

> "We did the minimum to make it okay for Simon to live in but the whole heating system and wiring of the house had to be redone because it was neither legal nor did it work. When Simon moved out we did what we could, this necessitated lifting floors et cetera to rewire and replumb. We now need to reinstate. This is why we need to have some money to make it habitable. This is what we need some of the money for. … We need to put floors down and carpet and replace the

kitchen which has no appliances and so we cannot use it. Simon brought and took his own stuff."

45. Renovation work on the cottage was carried out in the period 2012 to 2014. Some of this at least (it is not clear to me that exactly how much) was carried out at the expense of the partnership. Nor is it clear for how much of this period the cottage was habitable by anybody. The applicants did stay there from time to time, when the house was booked out. Even then certain rooms in the house were entirely private, and not available to guests. But it is also apparent that the applicants had bigger and grander plans for the cottage site. Mrs Brake's witness statement says this:

> "16. … With a sense of excitement, Andy and I contacted Mr Alan Konya, an architect who had helped us with some aspects of the design of West Axnoller Farm, and asked him to prepare some plans for the complete redesign of the Cottage. The idea was to cut it off visually and physically from the rest of the site by using the incline of the hill to sink it into an earth bund and to conceal its north side from the rest of the buildings while constructing the south side almost entirely of glass. It would be approached through a tunnel in the hill. … Mr Konya produced some wonderful plans and a model of the house for us."

There are photographs of the model in the trial bundle. It is, I have to say, an extraordinary model for an extremely modern house, hidden from the north side by an earth mound, and open on the south side with a hacienda-style courtyard, including swimming pool.

Arbitration and dissolution

46. Relations between the applicants on the one hand and Mrs Brehme on the other had deteriorated during 2011. There were partnership meetings in September and October 2011 to try to resolve matters. It is on discussions at these meetings that the applicants base their claim to a contractual right, alternatively proprietary estoppel equity, to the cottage. But it is not necessary for me to investigate, much less decide these claims now, or indeed what were the causes of the deterioration in the parties' relationship. In part, at least, this became the subject of the arbitration referred to earlier, which commenced in 2012. In the meantime the applicants continued to run the business, from 2012 including the hosting of weddings. The drawing room on the ground floor of the house was licensed for the holding of marriage ceremonies. In May 2012 the applicants instructed plans to be prepared for a more modest refurbishment of the cottage.

47. The arbitration concluded with an award in favour of Mrs Brehme and her corporate vehicle in June 2013. That award found that the applicants had breached the partnership agreement, they had excluded PWF from the management of the partnership business and failed to provide full and proper financial information to PWF. The arbitrator also held that there was evidence of misuse of partnership money by the applicants. The award accordingly dissolved the partnership and ordered that it be sold as a going concern. The arbitrator also made an award for the applicants to pay Mrs Brehme's costs of the arbitration, in the sum of £518,539.23. In July 2013, Mr Justice Newey granted a without notice freezing order in support of the awards. This order was continued after *inter partes* hearings by Mr Justice David Richards later in July and Mr Justice Birss in September.

48. The applicants challenged the arbitration awards in the High Court, but Mr Tim Kerr QC (as he then was) dismissed the application on 25 April 2014 in a reserved judgment, also ordering the applicants to pay the costs, assessed in the sum of £30,000.

Other events in 2014

Events of Default and appointment of receivers

49. In February 2014 PWF obtained an interim charging order on whatever interest the applicants might have in the cottage. On 10 September 2014 Chief Master Marsh ordered that this become a final charging order. In early September 2014 the bank served notice on the applicants alleging Events of Default under the loan agreements. The first of these Events was stated to be a failure to make all the payments due (£15,070.41 per calendar month) since September 2012. Over that two year period the applicants had paid a total of £85,000 instead of £361,689.84, a shortfall of £276,689.84. The bank also cited as Events of Default the actions taken by PWF, the outcome of the arbitration, and the failure to supply signed accounts for the business since 2010. In October 2014 the bank appointed fixed charge receivers under the Law of Property Act 1925 and instructed them to sell the Farm.

Statutory demands

50. On 27 October 2014, PWF served statutory demands on the applicants in respect of unpaid costs orders. Applications to set aside these demands were refused by the County Court at Bristol on 29 January 2015. Appeals against these refusals were dismissed by the High Court on 19 March 2015, as totally without merit.

Insurance and change of electoral address

51. In November 2014 the applicants sought and received an insurance quotation for the insurance of both the Farm and the cottage. This quotation (which was evidently based on information supplied by the applicants) shows the property use of the house as “Guest House/Bed And Breakfast”, and the property use of the cottage as “Main Home/Private Use”. Later in November 2014 the applicants applied to the electoral registration officer at the local authority to alter the address at which they were registered to vote from the house to the cottage. This change was effected by 20 November 2014. Yet in a witness statement made on 15 December 2014 Mrs Brake was still saying that the house was the applicants’ “home with our young son Tom” but that they “have to move into the cottage whenever the main house is let”. (She repeated the latter statement in a further witness statement of 23 April 2015.)

Use of the cottage and the house

52. Mrs Brake’s evidence in cross-examination at trial was that they lived in *both* places between 2010 and 2015, but that the house was their main residence, until 2015, when they lived in the cottage and elected for it to be their principal residence. She accepted that by the end of 2016 they had moved back to the house. I do not accept that they stayed in the cottage before 2012. I accept that they did not stay overnight in the house from May 2015 until October 2016, with some exceptions, such as Christmas

2015. I also accept that they told Mr Swift in December 2015 that their principal residence at the time of their bankruptcy was the cottage.

53. Mr Brake's written evidence was that it was clear to him from the appointment of the receivers in October 2014 that, although up until then the applicants had been able to use both the house and the cottage, the house would now be sold and they would be able to live only at the cottage. He further says that there

> "was no 'move' to the cottage in the normal sense because all our things were there already".

This is a reference to the applicants' apparently having two of everything, one at the house and the other at the cottage. Mr Bowyer's evidence (which I accept) was that, certainly at a later stage, staff were employed to move the applicants' personal effects from the house to the cottage (and back again afterwards) in order to make room at the house for guests. It may well be that the applicants had all the basics in both places, but moved only currently important things (such as overnight necessities) between properties. Nevertheless, Mr Brake says that as a result it was difficult

> "to put a date on the moment when the cottage took over from the house as our permanent home. As far as I am concerned, that moment had definitely arrived by the end of 2014."

54. In fact, in cross-examination Mr Brake said (and I accept) that the applicants were still using both properties (and could do so as much as they wanted) at least until the end of April 2015, and that it was only from then that he considered that they were resident only at the cottage. He explained the statement about the end of 2014 as that *by then* he was convinced that they would have to move to the cottage in due course. In November and December 2014 he painted the interior of the cottage. Later he moved some furniture, put down carpets, cleaned the windows and installed a wood burner.

Tom's GCSEs

55. The applicants' original evidence was that the academic year 2014-2015 was Tom's GCSE year. The truth is more nuanced. Tom (then aged 14) sat the core sciences GCSEs in this year, but the remainder of his GCSEs the following year. However, it remains the fact that Tom had some GCSE exams to sit in 2015. The applicants' position was that they were concerned that he should have a stable environment in which to study for his exams. So he spent more time at the cottage in any event. I accept that the house would have been busier than the cottage, though the cottage was being marketed with the house until May 2015, so it would still have been subject to visits by potential purchasers.

Sale by the receivers

56. The receivers appointed by the bank envisaged that, in accordance with the arbitration award, the Farm would be sold under a closed bidding mechanism between the applicants and PWF. The receivers did not seek possession of the Farm as against Mrs Brake or the partners. On the contrary, they permitted the applicants to continue in occupation of and trade from the Farm. However, on 19 November 2014 the arbitrator

made a direction that the applicants should not purchase, agree to purchase or negotiate for an agreement to purchase the Farm, nor enter into related negotiations or agreements. PWF applied to the High Court for an order backing the direction. On 16 January 2015, Sir William Blackburne, sitting as a High Court judge, at the suit of PWF made an order in effect endorsing the direction of the arbitrator prohibiting the applicants from purchasing the Farm or the cottage, "directly or indirectly", but subject to an exception if the applicants first paid £882,000 into court (or provided another agreed form of security) and also paid PWF (or provided security for) the various costs orders amounting to £132,124.73 and half the arbitration fees charged since the costs award, amounting to £80,000 plus interest.

57. The prohibition on the applicants' buying the Farm or the cottage *indirectly* was extended to nominee and similar transactions by the terms of the order. They could not, without the written consent of PWF (not to be unreasonably withheld) or the arbitrator, enter into any agreement to purchase the Farm and/or the cottage through a third party such as a nominee or limited company, or enter into or carry out any agreement to provide services directly or indirectly with any purchaser or prospective purchaser of the Farm and/or cottage. Thus a sale of either property to a nominee for them, or to a company which they beneficially owned, would breach the order. Even if the sale were to a person who is not their nominee and not a company beneficially owned by them, any provision of services to such a purchaser would also be a breach.

Simultaneous sale of the cottage?

58. The judge's order also provided that the applicants should agree to the sale of the cottage at the same time as the Farm if the receivers so requested. At this date, the partnership which owned the cottage, although in dissolution, was not in any form of insolvency procedure, and therefore the sale of the cottage was a matter for the partners alone. Since PWF had sought the order, it plainly wished the receivers to have the power to include the cottage in the sale of the Farm. This order achieved that. The judge also ordered that the applicants should give up possession of the Farm, and (if they were sold together) the cottage, on completion of the sale. The practical effect of the judge's orders was that from January 2015, first, the applicants' lack of funds meant that in practice they would be unable to bid for the Farm, whether in their own names or that a nominee, and second that their occupation of the cottage was as precarious as that of the Farm, because in effect the receivers now controlled the sale of both.

View by Mrs Brehme

59. Mrs Brehme wished to view the Farm in order to consider what bid to make herself. On 19 February 2015 she offered the receivers' agent 2, 4 or 6 March 2015 as dates when she was available for this purpose. The agent responded to say that these dates were not possible, as the property was then occupied with guests, and instead offered 16, 18 or 19. Mrs Brehme responded that those dates were far too far in the future and did not comply with the directions of the receivers. Moreover, in the booking documentation available to her there was no evidence of any bookings on 2 March. Following a telephone conversation between them, it was agreed that Mrs Brehme could view the property on 6 March at 10 AM. Mrs Brehme asked for confirmation that this would include the cottage.

60. On 6 March 2015 Mrs Brehme, together with her advisers, was given access to the Farm. They were accompanied by an agent from Strutt & Parker on behalf of the receivers, but also accompanied by two security men, who were said to be there to protect the applicants' "assets and chattels" and to make sure that Mrs Brehme "did not rifle through their personal belongings". The visitors were not allowed to separate during the visit. Mrs Brehme saw the main house, the two rental properties, the bungalow, the stables and the cottage. Her evidence was that there could not have been any guests staying at the Farm during the week of 2 March, as was obvious from the state of the letting houses and the main house. On the other hand, she noted that a shower in the applicants' bathroom in the main house was wet. She concluded that it had been recently used.

61. All furniture on the ground floor of the main house had been placed in the centre of the rooms and covered up. No furniture was visible. Bedding other than pillows and duvets had been removed from all the beds in the house, the cottage and the old tack room. There were no signs of recent occupation or use of the cottage, unlike in the house. A large bathroom upstairs was only half finished and the upstairs rooms contained only boxes. Turning to the equestrian accommodation, there were no horses on the site at all, although "the odour of horses was intense and could be identified around 100m from the building". There was also a large stock of hay and straw. Mrs Brehme's evidence as to the state of the cottage was unchallenged, and I accept it. Her evidence as to the state of the house was challenged, but I nevertheless accept that too.

Open market sale

62. By 23 March 2015 the receivers had been informed that the applicants were unable to purchase the property. Therefore they had decided that they could no longer proceed with the closed bid. Instead, they intended to offer the property for sale on the open market. A list of forward bookings sent by Mrs Brake to the receivers on 29 April 2015 showed that there were events and weddings booked in between the middle of May and the end of November 2015. December 2015 was free (and so the applicants were able to stay in the house at Christmas), and there were bookings again from January 2016 through to September 2016, though mostly weekends rather than weeks. As a result they would have had to spend almost all their time from May in the cottage even if the bank had not been selling the Farm. In addition, the Brakes knew that Mrs Foster was interested in bidding for the Farm, and that (because she was a friend) if she succeeded they would be able to stay on in the house. Mrs Foster had told Mrs Brake in early 2015 that if she was successful in her bid she would be happy for the Brakes to stay at the Farm.

The furnishings in the house

63. The number of future bookings known in April 2015 raises the question of the furniture needed in the house, without which the business could not be carried on. The applicants did not know at that stage what would happen to the house. Yet it is clear that they were anticipating continuing with the business if they possibly could. The majority of the valuable furnishings that had been used in the house for the purposes of the business, remained there, although Mr Brake took some small, breakable items to the cottage in boxes. At trial, Mrs Brake said (and I accept) that she had to leave her furniture in the house so that the business could continue. There were weddings

every weekend. In Mr Swift's interview with the applicants on 1 October 2015, nearly five months after the bankruptcy, they told him that the valuable furniture was still in the house. Mrs Brake said her ex-husband's father had given it to her ex-husband, and it had come to the house thereafter. But in 2013 Mr and Mrs Brake had settled it on a discretionary trust for the benefit of a class of objects including Tom. I have said elsewhere that I do not understand how this transaction worked ([2020] EWHC 1484 (Ch), [21]). But it does not matter now.

Events leading up to bankruptcy

IVA proposals

64. On 23 March 2015 each of the applicants proposed a voluntary arrangement with their creditors. The proposals were lodged at Yeovil County Court, and gave the address of each as "West Axnoller Farm". The proposals (one signed by each of the applicants) recorded that the cottage was a partnership asset. A meeting of creditors was called for 9 April 2015, though subsequently this was rearranged for 23 April 2015.

Bankruptcy petitions

65. On 24 March 2015, PWF presented bankruptcy petitions against both the applicants, based on the statutory demands that had been served in October 2014, and in respect of which applications to set aside had failed both at first instance and on appeal. They were listed for hearing at the County Court at Bristol on 12 May 2015.

Application for order for sale of the cottage

66. A week later, on 1 April 2015, PWF made an application to the High Court in London for an order pursuant to its final charging order that the cottage be sold. A hearing date for the application was set for 22 July 2015. On 7 April 2015 the receivers' solicitors wrote to PWF's solicitors noting that PWF had instructed them to apply for an order for sale of the cottage. The receivers' solicitors pointed out that PWF's action would

> "potentially have a materially detrimental effect on the overall site sale value and the marketing of it".

67. On the same day, Mrs Brake wrote to Mr Lee, the arbitrator, referring to the application by PWF for an order for the sale of the cottage and asking for a direction from him that the cottage should be sold with the house by the receivers. On 15 April 2015 Mrs Brake wrote to Mr Lee again, repeating her point about selling the house and the cottage together, and telling him (amongst other things) that the house was her home, it had been furnished by them, and they would not vacate it without a possession order being made against them. It is not clear to me how this stance was consistent with the order of 16 January 2015, by which the applicants were ordered to give vacant possession of the house (and, on request, the cottage) on a sale by the receivers.

68. In a witness statement of 23 April 2015, Mrs Brake repeated the statement she had made in an earlier statement of December 2014 that "Andy and I have to move into

the cottage whenever the main house is let”. (The present tense is particularly significant.) Later in the same witness statement she said this:

> “111. As stated above, as a consequence of the extent of the usage of the main house at West Axnoller Farm, Andy and I have increasingly had to live in the cottage to the point that we now do so most of the time. This has been a gradual process, reflecting the commitments of the business.”

She also said this:

> “113. Also, Andy and I recognise that, unless the cottage is sold by the receivers together with the Farm, the Farm should shortly be sold by the receivers on behalf of the bank. The opportunity which Andy and I then have to stay at the Farm occasionally will be extinguished. If the receivers do not sell the cottage, the cottage will be our only residence. At present it is our principle place of residence”.

Sale on the open market

69. In early April 2015, the receivers appointed by Adam & Co put the Farm on the open market. On 21 April 2015 the receivers’ agents invited bids on a blind basis by 12 noon on 24 April 2015. Some bids were for both the Farm and the cottage, and others were for the Farm alone. On 7 May 2015 the agents asked for “best and final offers” to be submitted by noon on 15 May 2015. The email of 7 May also confirmed that the receivers had decided not to sell both the house and the cottage. So bids were invited only for the Farm, expressly excluding the cottage. Various persons, including Mrs Brehme and Mrs Foster, made bids.

70. As I have already said, in May 2015 there were wedding and other functions booked and the luxury furnishings remained in the house throughout. I do not accept that they were taken away. Although some personal possessions (on the evidence, small and fragile objects) had been taken to the cottage, many personal effects of the applicants were still in the house, but locked away so that guests had no access to them. Self-evidently the Brakes could not stay in the house when it was let for functions. But they continued to have a presence there, by reason of the furniture, some personal possessions, and the personal attendance of the applicants in running the events and serving the needs of their clients.

71. In cross-examination, Mrs Brake was asked:

> “If Mrs Foster bought the property, you and Andy had no intention of leaving the main house, did you?”

Her response was:

> “I think the most important word in that sentence is ‘if’.”

This is an evasive response. But it implies the answer Yes to the question. The applicants were required by court order to give vacant possession (if required) only *on* sale, and not before, as Mrs Brake emphasised in cross-examination. Every bidder other than Mrs Foster wanted vacant possession. But the applicants did nothing at this

time to move out of the house. As I have said, she had written to the arbitrator on 15 April 2015 to say that she and her husband would not vacate the house without a possession order being made against them.

Bankruptcy

72. On 12 May 2015, the County Court at Bristol heard and determined the bankruptcy petitions presented on 24 March 2015. The hearing lasted all day. The petitioning creditor was represented by counsel, and Mrs Brake appeared in person and also on behalf of Mr Brake. Mrs Brake made an application for an adjournment which was refused. Ultimately, both applicants were adjudicated bankrupt on that day at 5:45 pm. During that week (8-15 May) the house was occupied by guests and the applicants were living at the cottage.

73. Preliminary information questionnaires for the official receiver were filled in on 4 June 2015 by each of the applicants. They gave their address as "West Axnoller Cottage, West Axnoller Farm". In answer to a question about "Freehold land and property", each replied "Cottage held in trust for partnership 1/3 West Axnoller Cottage". Mr Swift's evidence was that he did not accept these answers as true, so far as they suggested that the applicants lived at the cottage rather than the house, because they were contrary to other documents which were made available to him after his appointment as trustee. I will come back to this. It is also to be noted that neither these questionnaires nor the notes of an interview with the official receiver on 9 June 2015 disclosed the existence of the proprietary estoppel claim to the cottage, although they did refer to the damages part of the claim against Mrs Brehme.

The preferred bid for the Farm

74. I do not have the precise date, but, at some point after the bankruptcy, the receivers informed Mrs Foster that hers was the preferred bid, and she told the applicants. The receivers wrote to the applicants on 5 June 2015 and again on 8 June 2015 to say that contracts were due to exchange (without mentioning the buyer), and that the applicants should make arrangements to vacate the Farm. At the same time the receivers instructed Tom Hyde of Michelmores Solicitors to carry out the precontract enquiries. For this purpose he contacted Mrs Brake, and made an appointment to visit her at the cottage to go through various questions. Mrs Brake had told him that the family had moved to the cottage in late 2014 or early in 2015 because they did not know who would ultimately purchase the Farm and whether they would be kept on or not. The precontract enquiries prepared by Mr Hyde thereafter stated that both the house and the cottage were currently occupied by the applicants.

Mrs Brehme's second visit

75. On 24 June 2015 Mrs Brehme visited the Farm again, with her then solicitor. Mrs Brake refused to allow them access to the house on the grounds that everything except a few beds belonged to her, and it was private. Of course, at that stage Mrs Brake was still the owner of the bare legal estate in the Farm. But, always subject to the charge in favour of the bank (by virtue of which the receivers were selling the Farm), Mrs Brake had made the house partnership property in 2010, so it is not clear on what basis she was in a position to prevent Mrs Brehme from having access to it. What is

clear is that the applicants kept their furniture and personal effects in the house, and were continuing to occupy the house and the rest of the Farm.

Official receiver's notes

76. On 1 July 2015 the official receiver completed a document headed "Trustee Notes". This recorded that the cottage was "currently the family home". The Notes do not refer to the main house. Nor do they refer to the proprietary estoppel claim. It is not clear on what basis this document was completed, but it seems likely that the information derived, directly or indirectly, from the preliminary information questionnaires completed on 4 June, and the interview on 9 June.

Injunction against the applicants

77. On 1 July 2015, Sir William Blackburne, sitting as a High Court judge, granted an order restraining the applicants for six months from the date of the sale of the Farm from providing any services to Mrs Foster or any company with which she was connected in respect of the Farm or any business operated from it which was conducted by the former partnership without PWF's consent. In fact Mr Brake was subsequently employed by Mrs Foster in a different capacity, dealing with farming and horses. During the time that the injunction was effective, the applicants were permitted by Mrs Foster on behalf of Sarafina Properties Ltd to occupy the house for their own purposes, though not for the purposes of the wedding and holiday letting business. Instead, this business was carried on by a lady called Rebecca Holt on behalf of Mrs Foster, until 23 January 2016, when (the injunction having lapsed) Mrs Brake took over in that capacity.

Valuation of the Farm

78. On 17 July 2015 Savills provided a valuation of the Farm for a company called Lendy Finance, who were to provide the finance for the purchase of the Farm by Mrs Foster. That company had been found for Mrs Foster by Mrs Brake. The valuation stated that "the Bank's customer and family" (that is, the applicants and Tom) were still living there.

Adjournment of hearing for order for sale of cottage

79. As I have said, a hearing date for the application for an order for possession and sale of the cottage under the charging order was set for 22 July 2015. Mrs Brake wrote to the court in a letter dated 9 July 2015 (from the cottage) asking for an adjournment of the hearing. This referred to the cottage as the applicants' "only home". The hearing was in fact adjourned, and was next heard on 6 January 2016.

Sale to Sarafina Properties Ltd

80. The Farm was sold to Sarafina Properties Ltd (the corporate vehicle of Mrs Foster) by Mrs Brake acting by the receivers by contract dated 23 July 2015. It appears that completion of the purchase took place on the same day. The receivers wrote also on the same day to the applicants, informing them that the completion had occurred,

> "the purchaser being Sarafina Properties Ltd. The buyer did not require vacant possession and no doubt will be in touch with you to sort day-to-day arrangements moving forward."

81. In fact, clause 6.3 of the contract provided:

> "The Seller and the Receivers do not give any warranty as to vacant possession and the Property is sold subject to the occupation of the Seller and any third parties whether or not they occupy pursuant to any Occupational Agreements as may exist at the date of Completion without obligation on the part of the Seller to identify or define the same and the Buyer having had the opportunity to inspect the property and carry out its own enquiries should be deemed to purchase with full knowledge thereof and shall not raise any objections or requisition in respect thereof."

This is an unusual provision for an arms' length purchaser to accept, unless that purchaser has already made a private arrangement with the occupier. It would have been unnecessary if the applicants had given up occupation and moved to the cottage. It is clear, as I have already said, that the applicants were permitted by Mrs Foster to occupy the house for their own purposes, even though they were not allowed to carry on the wedding business.

Appointment of trustees in bankruptcy

82. On 29 July 2015, at a meeting of the creditors of each of the applicants, Duncan Swift and Jeremy Willmont, both of Moore Stephens LLP, were appointed as joint trustees of the bankruptcy estates. On 28 August 2015 notices of the bankruptcies appeared in the London Gazette, giving the cottage as the applicants' address. There was email and postal correspondence between Mr Swift and the applicants thereafter. In the course of this Mrs Brake informed him of the proprietary estoppel claim. Mr Swift met the applicants on only one occasion, on 1 October 2015 at his firm's offices in London.

"Sole or principal residence"

83. Subsequently, on 18 November 2015 Mr Swift wrote to the applicants asking them whether the cottage was their "sole or principal residence" as at the date of the bankruptcy is, and asking them to complete an enclosed form and return it. There was no reply from the applicants by 30 November 2015 so a chaser letter was sent. Mrs Brake responded by email to Mr Swift on 2 December 2015 confirming

> "that West Axnoller Cottage was our principal residence when the bankruptcy order was made."

Mrs Brake's evidence at trial (at least at first) was that she had thereby conclusively elected on behalf of both of the applicants that the cottage was their principal residence at the date of bankruptcy. She accepted at trial that she could see that they were not going to be able to buy the house, so instead they chose the cottage. (However, later, in answer to questions from the bench, she appeared to resile from the 'election' idea, and explained instead that her statement was simply what the position was at the date of bankruptcy.)

Documentary evidence

84. Much of the documentary evidence available at trial however tended to show a different picture. For example, the electricity supply to the cottage was billed to Mr Brake at "West Axnoller *Farm*", though the cottage is stated to be the place of supply. I have seen bills dated 6 November 2014, 8 December 2014, 6 January 2015, 6 February 2015, 6 March 2015, 6 April 2015, 26 May 2015, but there may be others. That for August 2015 is however in the names of Mr and Mrs Brake. The declaration of trust of 28 January 2015 made by the applicants shows their address as West Axnoller *Farm*. Similarly, a notice of change of solicitor (from Michelmores to in person), in claim no HC-2012-000131, dated 12 February 2015, gives their address as West Axnoller *Farm*. It is signed by both applicants. In the bundle there is a Lloyds Bank statement of 3 March 2015 addressed to Mrs Brake at West Axnoller *Farm*. There are also Barclays Bank quarterly statements for the whole of 2015 addressed to Mr Brake at the same address. The signed IVA proposals of both applicants, dated 23 March 2015, gave the same address. Mrs Brake wrote letters to the arbitrator Mr Lee on 27 February 2015, 7 April 2015, 10 April 2015, 14 April 2015, and 23 May 2015, all from West Axnoller *Farm*. The letter of 14 April 2015 in particular refers to 'our home' but does not say that this was the cottage. The impression given is that it is the house. There is also a medical prescription for Mr Brake, dated 13 April 2015, addressed to him at West Axnoller *Farm*.

85. The applicants gave evidence that there was a single postbox for all the properties on the estate. This was an old breadbin on the private lane. The postcode was the same for all the properties too. So it did not in fact matter where post was addressed to or from. Any incoming correspondence would come to the same box. I accept this point, as far as it goes. But it is nonetheless odd that, if the applicants really had made up their minds that they would cease to live in the house and focus for the future on making the cottage their principal residence, they should continue not only to receive correspondence from others without alerting them to the change (which I accept would not be a priority, given the common mailbox), but also continue to write letters from the Farm, in some cases asserting in those letters that the Farm was their home. Nor does it explain why they should make a declaration of trust, give notice of change of solicitor, and make IVA proposals, all from the *Farm*, if they were really living in the cottage.

86. Mrs Brake said in evidence that 'West Axnoller Farm' referred to all the five residential properties: the main house, the cottage, a bungalow and two holiday houses. I accept that in some contexts (particularly historical) that expression could refer to all five properties and the other facilities and land included in the Farm, even though the cottage had been separated in ownership from the rest of the Farm since 2002. But, in the context used here, it is clear to me that the expression 'West Axnoller Farm' referred to the main house, as distinct from the cottage, as the place where the Brakes lived. This is supported by the fact that in letters to Chief Master Marsh dated 9 July 2015 and 17 December 2015, in which she claimed that the cottage was their only home, Mrs Brake wrote from the *cottage* and not from the Farm. She also wrote from the cottage to Mr Swift on 24 September 2015, but then she had given the cottage address to the official receiver and had received correspondence from the official receiver and the trustees in bankruptcy at the

cottage. I am satisfied that Mrs Brake knew well the difference between writing from the Farm and writing from the cottage.

87. There were also photographs which the applicants produced showing them apparently living in the cottage. Mr Bowyer's evidence was that of the 16 photographs only two were taken in 2015, in July and October respectively. The July photograph corresponded with a wedding taking place at the house. The October photograph did not appear to correspond with an event. I accept this evidence.

Visits by Ms Maslin

88. Ms Maslin gave evidence that she visited the applicants at the *cottage* on many occasions starting from the summer of 2013. She also gave evidence that she visited them there on many occasions from 25 April 2015 to 25 July 2015, that is, before and after their bankruptcy. However, she qualified this by saying that quite often Mr Brake was there on his own with Mrs Brake's son Tom upstairs in his room, whilst Mrs Brake was dealing with weddings at the house. She said she often watched show jumping or horse riding on the television with Mr Brake. Her evidence was that she did not go to the house because she was "too untidy for that". So she has no evidence to give about the applicants' occupation of the house, one way or the other. I accept that Ms Maslin saw the applicants at the cottage from time to time, and especially Mr Brake, when they talked about horses. Since they stayed in the cottage whenever the house was let, there would have been many opportunities for that. Ms Maslin said that she knew "that by the summer of 2015 they were living at the cottage". Ms Maslin's evidence is however suspect, as I have already explained.

89. In November 2015 Mrs Brake sent an effusive email to a lady called Charlotte Skene Catling, congratulating her on her design of a property for Lord Rothschild. Mrs Brake reminded Ms Catling that she came to the Farm in 2010 when they were thinking of rebuilding the cottage. She mentioned the dispute with Mrs Brehme, and said that they had emerged from it, and "will resurrect our plans to convert the cottage." However she gave no timescale for this, merely referring to "when we are ready to press go". So far as I can see, it was an isolated communication, as there is nothing further on this subject in the materials before me. It did not commit the applicants to anything.

Visit by Mr Swift

90. Mr Swift's evidence was that, on 23 December 2015, he happened to be in the area visiting another property a few miles away, so he made an unannounced visit to West Axnoller. He drove up the private lane, and approached the two properties, to the north and south respectively of the lane. The house to the north was clearly occupied, "lit up like a Christmas tree with lights on in all rooms and all external lights". On the other hand, the cottage to the south of the lane was not occupied, having no lights on either externally or internally, and none of the windows had any windows drawn, "it looked tired, cold and neglected". He did not call at either property. I accept his evidence. This is however many months after the bankruptcy date, and tells me virtually nothing about the position as at 12 May. On the other hand, it suggests that the applicants stayed in the house at Christmas 2015, when (according to the records available) there were no bookings in the main house. It is consistent with the view that

the applicants moved out of the house when there were bookings for it, but lived there when there were not.

Overnight stays at the house

91. Mr Brake gave evidence at the trial that, after April 2015, the next day that he stayed overnight in the house was September or October 2016. He explained that this was because the house was let until then. But the evidence of forward bookings available to me at the trial did not show any events at a number of dates, including Christmas 2015, and Mr Swift's evidence (which I have accepted) was that when he visited on 23 December 2015 the house was lit up whereas the cottage was dark. I conclude that although Mr Brake is right to say that there were long periods when he did not stay at the house, he has forgotten about Christmas 2015 (at least), and that he did stay then.

Subsequent events

92. On 6 January 2016 a hearing took place at the High Court in London of PWF's application for an order for the sale of the cottage, based on the final charging order granted in September 2014. PWF was represented by counsel and Mrs Brake appeared in person on her own behalf and on that of her husband. After a lengthy discussion between the parties, the Chief Master adjourned the application, pending a possible appointment of either an administrator or a receiver of the partnership estate. It appears that by that date PWF had already issued an application for the appointment of an administrator, and the applicants had made an application for the appointment of a receiver. So far as I can see from the transcript, the Chief Master made no findings on the application itself. In particular, he did not decline to make an order for sale on the grounds that the applicants were living there. In fact he did not decide at all whether the cottage was or was not the applicants' family home.

93. On 19 August 2016 the Weymouth office of the Land Registry wrote to Mrs Brake to inform her that Mr Swift had applied to register a restriction against the title to the parcels of land adjacent to the cottage. Her fee simple estate in these parcels would have vested in him as trustee in bankruptcy, but she was still shown as proprietor on the register.

94. On 17 February 2017, Chedington bought all the shares in Sarafina Properties Ltd from Mrs Foster. A disclosure letter provided by her as vendor on the same date said:

> "The Vendor has made the Purchaser aware that she did not purchase West Axnoller Farm with vacant possession and allowed Mr and Mrs Brake to live there between July 2015 and the present date".

95. Mr Brake built a gravel driveway on the easternmost part of the adjacent parcel on the west side of the cottage in November 2018. At that time the adjacent parcels were vested in the trustee in bankruptcy. It does not appear that any permission was sought for this. It appears that a track for vehicular access to the cottage existed along the same line to connect the rear of the cottage to the private lane running to the public highway. There are photographs in the bundle which show a driveway or trackway of some kind leaving the rear of the house, and others (in the brochure prepared for sale in 2009-10) showing a track over the eastern side of the adjacent parcel.

Other witness statements by the applicants

96. Chedington referred me to a number of statements made by the applicants in witness statements and statements of case in other proceedings which dealt with residence in the house and in the cottage. These statements said or implied that the applicants were principally resident in the house rather than the cottage. They were put to the applicants in cross-examination, who had some difficulty in dealing with them. The most significant of these statements were contained in a witness statement of Mrs Brake dated 8 January 2019, which was confirmed by Mr Brake in a short supporting witness statement. In that witness statement, Mrs Brake said that the acquisition of the Farm by Mrs Foster's company "made absolutely no difference to the lives of Andy and I". In particular, "all of our possessions would remain in [the house]", and, when there were guests staying in the house, they would lock certain rooms and take overnight things to the cottage. She then went on to say that the house "has at all times since its purchase in September 2004 been our home and principal place of residence". Later on, she said "at no time have we ever left [the house], nor have our chattels been removed, nor have the horses been removed … We have always remained in exclusive occupation of [the house]…"

97. In the same witness statement she also sought to retract evidence she had given in other proceedings, in which she had referred to *the cottage* as their principal residence. These other proceedings were brought by AEL as owner of the Farm to recover possession of the house from the applicants. Mrs Brake said:

> "I am aware the Claimant has made reference to a statement that I made in previous litigation in which I mistakenly referred to [the cottage] as our principal primary residence. This was at a time during which I was acting as a litigant in person and did not appreciate the proper definition of that phrase. As [the cottage] was the only house that we 'owned' and at which we were registered on the electoral role, I understood that to be our primary place of residence. I now know this to be incorrect."

98. In cross-examination, Mrs Brake sought to explain this by saying that this evidence covered a 14 year period, and did not provide a specific view of the position as at the date of bankruptcy. But that is not what the witness statement said. It was perfectly clear, and I reject this explanation. She also said that she had given that evidence in response to evidence from Dr Guy to the effect that the applicants, having elected the *cottage* as their principal residence at the date of bankruptcy, could not later elect the *house* to be their principal residence. Yet (again) Mrs Brake's statement is perfectly clear that the house has "at all times" since 2004 been the applicants' principal residence. So I do not consider that the context changes anything. She also claimed to have been mis-advised at the time of her statement of 8 January 2019, and only realised this after she had had the benefit of advice from counsel. I fail to see why this makes any difference. The witness statement of 8 January 2019 makes a number of clear statements of fact, which could not have been changed by any advice of counsel.

99. In cross-examination on the same material, Mr Brake said that he simply did not understand the various statements in his wife's witness statement. I have already remarked that Mr Brake did not understand much of the complexity of this case, and I find it hard to avoid the conclusion that he simply signed whatever his wife put in front of him, whether he understood it or not. These inconsistent statements in other

proceedings are not evidence in these proceedings, and are of no probative value in the context of the present litigation and the question before the court. But they and their treatment of them by the applicants in cross-examination support my view that I should not put any weight on the uncorroborated evidence of the applicants.

LAW

100. So far as material, section 283 of the Insolvency Act 1986 provides as follows:

> "(1) Subject as follows, a bankrupt's estate for the purposes of any of this Group of Parts comprises –
>
> > (a) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, and
> >
> > (b) any property which by virtue of any of the following provisions of this Part is comprised in that estate or is treated as falling within the preceding paragraph.
>
> […]
>
> (3) Subsection (1) does not apply to …
>
> > (a) property held by the bankrupt on trust for any other person … "

101. Section 283A of the Insolvency Act 1986 was inserted by the Enterprise Act 2002, ss 261(1), 279, and brought into force in 2004. In its current form, it provides (so far as material to this case) as follows:

> "(1) This section applies where property comprised in the bankrupt's estate consists of an interest in a dwelling-house which at the date of the bankruptcy was the sole or principal residence of—
>
> > (a) the bankrupt,
> >
> > (b) the bankrupt's spouse [or civil partner], or
> >
> > (c) a former spouse [or former civil partner] of the bankrupt.
>
> (2) At the end of the period of three years beginning with the date of the bankruptcy the interest mentioned in subsection (1) shall—
>
> > (a) cease to be comprised in the bankrupt's estate, and
> >
> > (b) vest in the bankrupt (without conveyance, assignment or transfer).
>
> (3) Subsection (2) shall not apply if during the period mentioned in that subsection—
>
> > (a) the trustee realises the interest mentioned in subsection (1),
> >
> > (b) the trustee applies for an order for sale in respect of the dwelling-house,

(c) the trustee applies for an order for possession of the dwelling-house,

(d) the trustee applies for an order under section 313 in Chapter IV in respect of that interest, or

(e) the trustee and the bankrupt agree that the bankrupt shall incur a specified liability to his estate (with or without the addition of interest from the date of the agreement) in consideration of which the interest mentioned in subsection (1) shall cease to form part of the estate.

(4) Where an application of a kind described in subsection (3)(b) to (d) is made during the period mentioned in subsection (2) and is dismissed, unless the court orders otherwise the interest to which the application relates shall on the dismissal of the application—

(a) cease to be comprised in the bankrupt's estate, and

(b) vest in the bankrupt (without conveyance, assignment or transfer).

(5) If the bankrupt does not inform the trustee or the official receiver of his interest in a property before the end of the period of three months beginning with the date of the bankruptcy, the period of three years mentioned in subsection (2)—

(a) shall not begin with the date of the bankruptcy, but

(b) shall begin with the date on which the trustee or official receiver becomes aware of the bankrupt's interest.

[…]

Relevant definitions for this section are found in section 385(1). This reads as follows:

"(1). The following definitions have effect –

[…]

'dwelling house' includes any building or part of a building which is occupied as a dwelling and any yard, garden, garage or outhouse belonging to the dwelling house and occupied with it;

[…]."

102. It is clear that section 283A is limited to property which has been "comprised in the bankrupt's estate". If property is never comprised in the bankrupt's estate under section 283, it cannot revest in the bankrupt under section 283A: see *Stonham v Ramrattan* [2011] 1 WLR 1619, CA, at [39] per Lloyd LJ (with whom Rix and Longmore LJJ agreed). In the present case, the argument is essentially about the meaning of three phrases in subsection (1): (i) "an interest in", (ii) "a dwelling-house", and (iii) "sole or principal residence". I will deal with them in that order.

THE INTEREST ISSUE

Pleadings

103. In paragraph 12 of the particulars of claim in these proceedings, the applicants allege that at a meeting in October 2011 an agreement was reached between the partners and Mrs Brehme to transfer the cottage to the applicants, and that the applicants thereby became the owners in equity of the cottage or alternatively entitled to a beneficial interest in it (which is subsequently referred to as "Beneficial Interest"). In fact, there is no pleading in the 2012 claim that I can find to the effect "that the claimants thereby became the owners in equity of the cottage or alternatively entitled to a beneficial interest in it". But I do not think anything turns on this. As the applicants themselves say, it is not necessary to plead legal effects flowing from factual allegations: see *Metall & Rohstoff v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 436, CA.

104. The original particulars of claim in the 2012 action are dated "December 2012". But the particulars as they appear in the bundle for this trial (volume F/1) are *amended* particulars of claim. They are "Re-dated 19 July 2013", which I understand to be the date of the amendment. The facts alleged in the 2012 claim, as amended, include that the agreement to transfer the cottage was made in October 2011 ("the Cottage Agreement": paragraphs 45-46), and then that the claimants (the applicants) acted in reliance on this agreement in a number of ways, including applying for a mortgage and paying for a valuation, moving their possessions into one room of the house and staying in hotels to enable the house to be let, and spending money on repairing the cottage (paragraphs 47-48). Paragraph 49 alleges that the claimants (the applicants) have requested that Mrs Brehme executed a transfer of the cottage from them and her to them alone, but she has refused to do so "and thereby acted unconscionably".

105. Paragraph 50 states:

> "In those circumstances the Claimants are entitled to and do seek specific performance by the First Defendant of the Cottage Agreement. Further or alternatively, by reason of the matters set out above, the Claimants have, in addition to their pre-existing legal and equitable interests in the Cottage, acquired a further interest in it by way of an equity arising by proprietary estoppel. … "

And paragraph (3) of the prayer asks for

> "Specific performance of the Cottage Agreement; or, alternatively, by way of satisfaction of the further interest the applicants have in the cottage by way of proprietary estoppel, a transfer of the cottage to the applicants on the terms set out above, or such further or alternative relief as the court considers to be just and equitable".

106. Since the agreement alleged appears to be an oral agreement, the reference to "specific performance" does raise an eyebrow. In his extempore judgment given in the 2012 claim on 10 September 2014, Chief Master Marsh observed that the claim for specific performance

> "suffers from the rather obvious difficulty arising from section 2 of the Miscellaneous Law Reform Act and, no doubt, with that in mind, the claim has been amended to include, in the alternative, a claim by way of proprietary estoppel arising from that agreement…"

Nevertheless, I would regard the remainder of this pleading as a fairly typical factual foundation for a proprietary estoppel claim (the prayer itself is perhaps unusually phrased, but I do not think anything turns on that).

107. Then, in paragraph 31 of the particulars of claim in the *present* claim, the applicants say this:

> "The Beneficial Interest, the Brakes' registered title and the Cottage Access Land each constituted an interest in a dwelling house which at the Bankruptcy Date was the principal residence of the Brakes within the meaning of the revesting provisions in section 283A IA 1986."

108. So the claim under section 283A is based on each of *three* different interests (or claims to interests), namely (i) the "Beneficial Interest" said to arise under the alleged agreement in 2011, at least once relied on by the applicants, (ii) the Brakes' "registered title", *ie* the estate in the cottage registered in the joint names of the applicants and Mrs Brehme on its acquisition in 2010, and (iii) the adjacent parcels (the "Cottage Access Land"), the fee simple estate in which was acquired by Mrs Brake in her sole name in 2006.

The "Cottage Access Land"

109. In my judgment, there can be no argument about the last of these. Mrs Brake's fee simple estate in the adjacent parcels is plainly an "interest" in land which fell into her bankrupt estate in May 2015. Whether it satisfies the further conditions in section 283A, namely that it was an interest in a dwelling-house and that it was her only or principal residence at the date of the bankruptcy, is discussed later.

The Brakes' "registered title"

Registered legal estate

110. The second interest was "the Brakes' registered title". A property lawyer, looking at that expression, would think that it referred to the legal estate in the land, as registered at HM Land Registry, because what are registered at the land registry are legal estates in land and certain charges (see the Land Registration Act 2002, s 132(1)). Beneficial interests under trusts of land are not registered, and indeed cannot even be the subject of a notice on the register: see the Land Registration Act 2002, section 33(a). (In some circumstances a restriction may be entered on the register to protect a beneficial interest, but that does not indicate what the beneficial interest is, or to whom it belongs.) Chedington and its lawyers addressed the point on that basis. And, on that basis, I think they were right.

111. The legal estate in the cottage was still vested in the applicants and Mrs Brehme, as it had been since the cottage was acquired, as trustees for the partners, pursuant to clause 5.2 of the partnership agreement. Therefore, by virtue of section 283(3)(a) of

the 1986 Act, that legal estate in land was not part of the bankruptcy estate: see *eg Abdulla v Whelan* [2017] EWHC 605 (Ch), [33]-[39]. Since it has never been comprised in the bankruptcy estates, the legal estate cannot revest in the applicants under section 283A, but continues in the three joint tenants as before. (It would also be impossible under the Law of Property Act 1925, as section 36(2) of that Act forbids the severance of a legal joint tenancy in land, even if the severance is claimed to arise by operation of law: see *Re McCarthy (a Bankrupt)* [1975] 1 WLR 807, 809E-F.)

Beneficial interest of a partner in partnership assets

112. At the trial, however, the applicants' submission was developed far beyond this point by Mr Davies QC. By the end of the trial the applicants' submission was that the *beneficial* interest of a partner in a partnership asset was properly an "interest" within section 283A, and that, as a matter of fact, the applicants had had such interests in the cottage at the date of their bankruptcies, amounting to two thirds of the beneficial interest in the cottage. This therefore must have formed part of their bankruptcy estates. It could therefore revest in the applicants under section 283A. The applicants too referred to paragraph 5.2 of the partnership agreement (set out above), which provided for "a trust for sale for all of the Partners" and submitted that:

> "On the appointment of their trustee in bankruptcy on 31 July 2015, whatever beneficial interest the Brakes had under the trust of land vested in their trustee under ss 283 and 306 IA 1986."

113. The clear view expressed by Mr Swift in giving evidence as a witness at the trial was that he as trustee in bankruptcy of the applicants had nothing to do with partnership assets *as such assets*. He did not consider that any beneficial interest of the applicants in the cottage vested in him at all. He said that it vested in the partnership, and that was why he did not attempt to realise it during the three-year grace period. Mr Swift is not a lawyer and may not have been aware that in English law a partnership is not a legal person separate from its members. However, in my judgment, his instincts were not wrong. I may add that Mrs Brake herself had exactly the same idea when she sent an email to Mr Swift on 22 September 2015, in which she said

> "But the cottage is presently Partnership property until the High Court case is heard [*ie*, to deal with the proprietary estoppel claim]. If an administrator is appointed over the business … then surely he would have conduct of the sale if it is to be sold before the High Court case is heard?"

114. In the applicants' written opening submissions they say:

> "15. … In various formal documents, [Mr Swift] acknowledged that the Brakes' proprietary interest in the Cottage vested in him."

This is not correct. The applicants refer to two documents. One is a notice of the application in 2016 by Mr Swift for a restriction to be entered on the title of Mrs Brake as proprietor of the adjacent parcels of land. It is nothing to do with the cottage.

115. The other is the form TP1 for the transfer of the cottage to Chedington in January 2019. The applicants refer to paragraph 11.4 of that form, where there is the following statement:

> "The Trustee [*ie* Mr Swift] certifies that the part of [the] Property [*ie* the cottage] registered to the First Bankrupt and the part of the Property registered to the Second Bankrupt forms part of the Property comprised in the respective estates of the First Bankrupt and of the Second Bankrupt within the meaning of section 283(1) of the Insolvency Act 1986."

116. With respect, this is not an acknowledgement by Mr Swift during the bankruptcy of the applicants that any proprietary interest in the cottage vested in him as a result of the bankruptcy. It is a document dating from well after the bankruptcy, and following the back to back sale transaction with the liquidators of the partnership, under which Mr Swift bought the partnership's interest in the cottage for the benefit of the bankruptcy estates, and then immediately sold it on to Chedington. This is one of the transactions attacked by the applicants and referred to in my initial summary at the beginning of this judgment (see at [8] above). That is why Mr Swift certifies as he does. In any event, paragraph 11.5 of the form makes clear that Mr Swift transfers to Chedington only

> "such right title and interest (if any) that the First Bankrupt and the Second Bankrupt may have in the Property."

117. In this case, the cottage was purchased by the applicants and Mrs Brehme to be subject to the terms of the partnership between the applicants and PWF, and therefore to be partnership property. Section 20(1) of the Partnership Act 1890 provides that:

> "All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement."

In any event, by clause 8.5 of the partnership agreement, the cottage was part of the "Premises" and by clause 1.1 the "Premises" were "Partnership Property". As Lord Millett (with whom all the rest of their Lordships agreed) said in *Hurst v Bryk* [2002] 1 AC 185, 196,

> "By entering into the relationship of partnership, the parties submit themselves to the jurisdiction of the court of equity and the general principles developed by that court in the exercise of its equitable jurisdiction in respect of partnerships."

Assets belonging to a partnership

118. It is therefore necessary to see what happens to assets which belong to a partnership rather than to individuals who are not in partnership. Thus, in *Popat v Shonchantra* [1997] 1 WLR 1367, CA, Nourse LJ, with whom Evans LJ and Sir Ralph Gibson agreed, said:

> "On 29 September 1989, when the leasehold premises, fixtures and fittings and the goodwill of the business were acquired, they became 'partnership property' to be held and applied exclusively for the purposes of the partnership pursuant to section 20(1) of the Act of 1890. Although it is both customary and convenient to speak of a partner's 'share' of the partnership assets, that is not a truly accurate description of his interest in them, at all events so long as the partnership is a going concern. While each partner has a proprietary interest in each and every asset, he has no entitlement to any specific asset and, in consequence, no right, without the consent of the other partners or partner, to require the whole *or even a share* of any particular asset to be vested in him" (emphasis supplied).

119. In my judgment, that was the position from the moment of the acquisition of the cottage in 2010. No partner had any entitlement to require *any share of* the cottage to be vested in him or her. No partner could successfully apply for an order for the sale of partnership property, such as the cottage, under section 14 of the Trusts of Land and Appointment of Trustees Act 1996. The whole cottage was instead to be subjected to the *partnership* regime agreed upon by the partners, as supplemented by the general law. One important aspect of this, of course, was that the interests of creditors of the partnership assume a more important position than they do in the case of a simple beneficial trust for individuals. Essentially, once the asset becomes a partnership asset, it is subjected to a kind of statutory trust for the purposes of carrying on the partnership business and paying the partnership debts, for distributing any profits, and finally for returning any partnership capital to the partners once the partnership was dissolved and (if necessary) wound up. Just as an individual partner has (in the absence of agreement) no right to resort to any specific asset or share of an asset to satisfy his own partnership share, so his or her trustee in bankruptcy can be in no better position.

120. Here, following the award of the arbitrator in 2013, the partnership was *in fact* dissolved, and different provisions in the Partnership Act became applicable, even though the substantive result was similar. As Nourse LJ said in the *Popat* case,

> "On dissolution the position is in substance not much different, the partnership property falling to be applied, subject to sections 40 to 43 (if and so far as applicable), in accordance with sections 39 and 44 of the Act of 1890. As part of that process, each partner in a solvent partnership is presumptively entitled to payment of what is due from the firm to him in respect of capital before division of the ultimate residue in the shares in which profits are divisible: see section 44*(b)* 3 and 4. It is only at that stage that a partner can accurately be said to be entitled to a share of anything, which, in the absence of agreement to the contrary, will be a share of cash."

121. Section 39 of the Partnership Act 1980, referred to by Nourse LJ, provides:

> "39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm;

and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm."

122. And section 44(b) of the Partnership Act 1890, also referred to by Nourse LJ, relevantly provides:

> "In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:
>
> […]
>
> (b) The assets … shall be applied in the following manner and order: 1. In paying the debts and liabilities of the firm to persons who are not partners therein: 2. In paying to each partner rateably what is due … to him for advances … 3. In paying to each partner rateably what is due … to him in respect of capital: 4. The ultimate residue, if any, shall be divided among the partners in the proportions in which profits are divisible."

123. In *Sandhu v Gill* [2006] Ch 456, Neuberger LJ referred to *Popat*, and said this:

> "19. In the current (eighteenth) edition of *Lindley & Banks on Partnership,* the topic of 'partnership shares' is dealt with in Chapter 19. Lord Lindley's 'classic definition' is quoted in paragraph 19-05. He said that 'the *share* of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the debts and liabilities have been paid and discharged.' In the following paragraph, the editors effectively endorse this definition, albeit stating that 'it would be more accurate to speak of a partner's entitlement to a proportion of the *net proceeds of sale* of the assets'… "

Effect of bankruptcy

124. As I have said, a trustee in bankruptcy can be in no better position than the bankrupt was. It is clear law that the purpose of the bankruptcy regime is to reallocate existing property rights, and not to alter those underlying property rights: *cf Cambridge Gas Transportation Corporation v Creditors of Navigator Holdings plc* [2007] 1 AC 508, PC, [14]. *Lindley and Banks on Partnership*, in the current 20th edition, puts the matter this way:

> "27-72. All that vests in the liquidator or trustee is the insolvent partner's share in the partnership, subject to the liens and other rights of the solvent partners. Accordingly, he can claim nothing until all the partnership debts have been paid and the accounts as between the partners duly settled."

125. Accordingly, when the applicants became bankrupt, what fell into their bankrupt estates, and later vested in the trustee in bankruptcy, was not a two thirds beneficial interest in the cottage, but their respective shares of the partnership. In my judgment, it is not the law that the beneficial interests in the cottage, being partnership assets, can on the dissolution of the partnership be somehow released from the partnership regime so as to vest on the Brakes' bankruptcies in their trustee as if it were an ordinary beneficial co-ownership trust of land. On the contrary, all that vested in Mr Swift was the contingent right to receive a cash payment in respect of partnership

capital, *if* there should be a surplus. It appears to be common ground that there is no prospect of such a surplus here. The Brakes' (and PWF's) partnership shares are therefore worthless. Since it was the shares that were comprised in their bankrupt estates, rather than beneficial interests in the cottage, section 283A is simply irrelevant. Even if I were wrong, and the beneficial interests somehow vested in Mr Swift, plainly they were still subject to the partnership regime, and, until all the creditors of the partnership had been paid, there was nothing of any value for him to deal with, and equally nothing of value to revest in the applicants under section 283A.

126. I only add that Mrs Brake analysed the situation at the time in her email to Mr Swift of 23 September 2015, where she said:

> "The starting point is that the cottage is held by the 3 Partners in trust for the Partnership until our estoppel claim is decided (clause 8.5 of the Partnership Agreement). The Partnership was dissolved and its assets (including the cottage) ordered to be sold by Mr Lee pursuant to his award in 2013. He also ordered that the assets of the Partnership are to be distributed, in accordance with sections 39 and 44 of the Partnership Act 1890. This means that they are to be distributed to the partnership's creditors first and then (and only then) will it be possible to determine whether any partner including either of us has any beneficial interest in the cottage. If we do not (which is very likely to be the case if we do not win the estoppel claim, given that there is a large negative in the partnership's asset/liability position), then the LLP's charge which is over only <u>my</u> beneficial interest would be zero. Therefore the asset would be sold to be distributed between the partnership's creditors only. In short there is a very significant interest for the partnership creditors."

In substance, at least, this analysis seems to me to be correct, although the order of 10 September 2014 made clear that the LLP's charge was over *the applicants'* beneficial interests, and not just that of Mrs Brake. But nothing turns on that.

127. In my judgment Mr Davies QC has approached the position as if, on the acquisition of the cottage by the applicants and Mrs Brehme, it was simply held by them on trust for themselves as tenants in common in equal shares, like an ordinary trust of land, and nothing more. If that were so, then on the applicants' bankruptcies their two thirds beneficial interests in the cottage would indeed have vested in their trustee in bankruptcy. But in my judgment it is not so, for the reasons already given. In addition, as I have already said, the partnership agreement provided:

> "8.4. The Partners hereby agree that the Founding Partners are entitled to reside in the Premises as Licensees rent-free."

If Mr Davies QC were right, this provision would be quite unnecessary, as the applicants would prima facie be entitled to occupy the cottage pursuant to section 12 of the Trusts of Land and Appointment of Trustees Act 1996, not as *licensees*, but as beneficiaries under a trust of land, of which they were two of the three trustees (and therefore able to prevent section 13 being operated against them).

Authorities relied on

128. Mr Davies QC cited *Wild v Southwood* [1897] 1 QB 317, and *Re Dennis (a Bankrupt)* [1996] Ch 80 for the proposition that

> "A bankrupt partner's interest in partnership property vests in his trustee in bankruptcy".

I must therefore consider each of these two decisions. I deal with them in turn.

129. *Wild v Southwood* was a case where the plaintiff had obtained a money judgment against the defendant, who was a partner in a firm carrying on business with two other persons. He obtained a charging order for the judgment debt under section 23 of the Partnership Act 1890. This relevantly provides:

> "(1) A writ of execution shall not issue against any partnership property except on a judgment against the firm.
>
> (2) The High Court, or a judge thereof, … [or the county court in England and Wales or a county court in Northern Ireland,] may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.
>
> (3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.
>
> […]"

As I understand the matter, the introduction of this new form of execution was one of the reforms made to partnership law by the 1890 Act.

130. The plaintiff took out a summons to enforce the charging order by a sale of the defendant's "interest in the partnership property and profits" (as section 23 puts it), and then obtained an order under the section by which the partners were directed to pay into court a sum sufficient to pay the judgment debt and costs. The partners complied with this order. Unknown to the plaintiff at that time, the defendant had committed an act of bankruptcy prior to the judgment on the strength of which the plaintiff had obtained the charging order. The defendant was then adjudicated bankrupt. When the plaintiff subsequently applied for the money in court to be paid out to him, he was faced with the effect of the then doctrine of "relation back", by which the title of the trustee to the property of the bankrupt vested *from the date of the act of bankruptcy*. The question therefore was whether the charging order was a transaction protected by what was then section 49 of the Bankruptcy Act 1883.

131. Vaughan Williams J held that it was not. I am not concerned with that aspect of the decision. But on his way to that conclusion, the judge said (at 319):

> "The first step towards obtaining the charging order was the taking out of the summons on April 20, 1896, and at that time the bankrupt's interest in the partnership had ceased to be his interest. It had vested in the official receiver, and became the property of the trustee in bankruptcy in the events which happened."

The judge did not say that the *partnership property* (or any fraction of it) had vested in the official receiver. He said that "the bankrupt's interest in the partnership" had vested in the official receiver. It is true that there are references earlier in the judgment to "the interest of the bankrupt in the partnership property". But this is simply a shorthand reference to the actual words used in section 23 of the 1890 Act, namely "that partner's interest in the partnership property and profits", or, as we would now say, his or her share of or interest in the partnership. This was a decision on section 23, and about whether the sum paid into court by the partners in satisfaction of the charging order could be paid out to the plaintiff. It was not about the vesting of any particular partnership *assets* in anyone. In my judgment this is not an authority which supports Mr Davies' argument.

132. *Re Dennis (a Bankrupt)* [1996] Ch 80 was a much more recent case, about severance of a beneficial joint tenancy in land. Nevertheless, the facts occurred before the reform in 1985 abolishing the doctrine of relation back, and so the court needed to discuss that too. A husband and wife owned two properties as beneficial joint tenants. They were not in a partnership. The husband committed an act of bankruptcy, and a bankruptcy petition was presented. Before the petition was heard, however, the wife died, having by her will left her property to the couple's children. Subsequently, the husband was adjudicated bankrupt. At first instance, the judge decided that it was only at the moment of *adjudication* of bankruptcy that any severance of the beneficial joint tenancy occurred. Since the wife had died before that moment, the trustee in bankruptcy was entitled to the beneficial interest in the *whole* of the two properties. On appeal, the Court of Appeal reversed that decision, holding that the trustee in bankruptcy's title related back to the first available act of bankruptcy, which in this case *preceded* the death of the wife. Accordingly the severance had taken place before the death of the wife, and their children were entitled to her beneficial tenancy in common in the properties.

133. In itself, this case is not of assistance to me, because it does not concern a bankrupt partner. But Mr Davies' interest in citing it lies in the fact that, in considering *when* severance of the beneficial joint tenancy occurred, Millett LJ (with whom Sir Thomas Bingham MR and Kennedy LJ agreed) examined a number of old cases in which this question arose, and some of them *were* partnership cases. So this is really a question of citation by reference. The cases on which Mr Davies QC relies are four in number: *Fox v Hanbury* (1776) 2 Cowp 445; *Fraser v Kershaw* (1856) 2 K & J 496; *Ex parte Smith* (1800) 5 Ves 295; and *Smith v Stokes* (1801) 1 East 363. It will be noted that they all precede the Partnership Act 1890 and (so far as land is concerned) the Law of Property Act 1925. They must be read on that basis.

134. What is common to all these cases is that the bankrupt was a member of a partnership, and the partnership property was held by the partners as joint tenants *at law* (though not in equity). And, at this date, there was nothing to prevent a joint tenancy of a legal estate in land from being severed so as to produce a legal tenancy in common. What was also in issue in three of these cases was the (legal) title of some person to bring an action in trover or detinue (which, as a general proposition, could not be brought by

one tenant in common against another). The fourth case, *Ex parte Smith*, which Millett LJ found "as reported virtually unintelligible", was about which of two commissions of bankruptcy of the same person should take precedence. It does not assist in the present case.

135. In none of these cases was there any express statement by the court to the effect that a *beneficial* interest in partnership property, untrammelled by the partnership regime, vested in the assignees in bankruptcy. They were instead about the severance of the *legal* estate in the partnership property, thereafter held by the partners as tenants in common, so that (as a result) each of the partners had a separate undivided share at law. This mattered because what was in issue in three of the cases, as I have said, was whether the assignees in bankruptcy had a sufficient (legal) title to bring a claim in trover or detinue against the sheriff who had executed a judgment on partnership property or against the purchaser from the sheriff. (This kind of execution was prohibited for the future by section 23 of the Partnership Act 1890, which as I have said introduced a new method of executing a judgment against an individual partner.) Insofar as there are any statements by the court about the relationship after bankruptcy between the solvent partner or partners and the assignees in bankruptcy, necessarily reflecting the then possibility of severing a legal estate, they reflect the rules already stated, which is that the assignees (now trustees) in bankruptcy take over the share and rights of the insolvent partner under the partnership, *and are subject to the same regime as he was*.

136. Thus, in *Fox v Hanbury*, Lord Mansfield said (at 449):

> "This leads me to consider what right in law and justice one partner has against another, after a dissolution of the partnership. It clearly is not to change the possession, or to make an actual division of specific effects. One partner may be a creditor of the partnership to ten times the value of all the effects. The other partner in that case can only have a right to an account of the partnership, and to the balance due to him, if any, on that account. No person deriving under the partner can be in a better condition. … The assignees, under a commission of bankruptcy against one partner, must be in the same state. They can only be tenants in common of an undivided moiety, subject to all the rights of the other partner."

When Lord Mansfield refers to "undivided moiety", he means an undivided moiety *at law*. In my judgment, none of these cases supports the proposition argued for by Mr Davies QC. What the applicants had at the date of their bankruptcies in right of their partnership was not an interest in a dwelling-house within section 283A, but an interest or share in a partnership which (unless agreed otherwise between the partners) gave them merely a right to a return of capital on a winding-up. And here there is no real prospect of such a return.

137. I was also referred to the decision of Chief Master Marsh in the 2012 Cottage Claim, given on 10 September 2014, when he was asked to make final an interim charging order in favour of Patley Wood Farm LLP. The judgment debt secured by the interim charging order was of the order of £537,000, arising from the arbitration award made by Mr Lee in August 2013. That order was made on the interest that the defendants in that case (the applicants in this) claimed to have in the cottage. As to that, the Chief Master observed that:

> "15. … It is, however, common ground between the parties that, even if [the cottage] was not, as is likely, partnership property at the outset, it certainly became partnership property at the date of purchase or subsequently. …
>
> 16. In this case, title to the cottage is held in the names of the two defendants [the applicants in the present case] and also Mrs Brehme, not the LLP. It seems to be plain in those circumstances that clause 5.2 of the Partnership Deed is operative and the cottage is, therefore, held by the defendants on trust for sale for all the partners; that is the defendants and the LLP.
>
> […]
>
> 22. The defendants' position is not entirely clear, but it is not seriously in dispute that the only substantial asset they hold is their share in the partnership…
>
> […]
>
> 25. That very long introduction leads me to the application for the interim charging order, which was made expressly on the basis that it was without prejudice to the fact that it is the claimant's case that the property (that being the cottage) is partnership property. Reference is made to the High Court proceedings [*ie* the 2012 cottage claim] to which mention has just now been made. The claimant's position at the date that they made their application was that they sought the charging order to guard against the eventuality that the defendants might be successful in that claim. They were not seeking the charging order on the basis that they sought to secure any sum as against the defendants' interest in the partnership. That position has now changed. The claimant now seeks to assert that, relying on clause 5 of the Deed, the defendants have an interest which is capable of being the subject of an order under the 1979 Act."

(I should just observe that these quotations – and the others below – are taken from a transcript of the judgment, made from the original recording, and approved by the Chief Master pursuant to a request made over four years after delivering it, and without the benefit of any papers.)

138. The Charging Orders Act 1979 relevantly provides:

> "1(1). Where, under a judgment or order of the High Court [or the family court] or [the county court], a person (the "debtor") is required to pay a sum of money to another person (the "creditor") then, for the purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.
>
> […]
>
> 2(1). Subject to subsection (3) below, a charge may be imposed by a charging order only on—
>
> (a) any interest held by the debtor beneficially—

(i) in any asset of a kind mentioned in subsection (2) below, or

(ii) under any trust; or

[…]

(2) The assets referred to in subsection (1) above are—

(a) land,

[…].”

139. The Chief Master then considered passages in the decisions of the Court of Appeal in *Popat* and *Sandhu*, and said this:

> “28. There is now no real difference between the parties as to the application of the 1979 Act. With clause 5 of the Partnership Deed in play, the interest which could be subject to a final order is either that which arises if the defendants’ High Court claim is successful or that which arises under clause 5 of the Deed. … ”

Then, after considering submissions about the financial position of the partnership, the Chief Master said:

> “37. In those circumstances, I can see no basis for concluding that there is a real risk of there being an insolvency. … Here, I can see no such risk [*ie* of insolvency] and, therefore, the position of the partnership creditors, when discounted to remove Mrs Brehme’s debt, falls out of the picture. There is no reason to suppose that they will not be paid whether or not a final charging order is made.”

140. Ultimately, the Chief Master made the interim charging order final. In my judgment, the Chief Master was not making any decision as to exactly *what* interest, if any, the present applicants had in the cottage. He was simply saying that, on the claims made in the various pieces of litigation between the parties, there could be an interest as claimed in the 2012 proceedings, or there could be an interest arising under the (dissolved) partnership, *which on the evidence before him could not be considered to be insolvent*. If there was a surplus after paying debts, the partners could expect a return of capital. It is to be remembered that this decision was made in September 2014, eight months before the applicants became bankrupt, and three years before the partnership went into insolvent liquidation. In my judgment, this decision does not assist the applicants in showing that, as at the date of their bankruptcies in May 2015, they had a beneficial interest in the cottage *in specie*. At best, it shows that they had an interest in some asset which could be the subject of a charging order. Indeed, the Chief Master made this point during a further hearing (for an order for possession and sale of the cottage) on 6 January 2016:

> “ … The fundamental point in relation to charging orders is that it does not normally determine what the interest is. It is simply a charge on whatever the interest may be.”

The Brakes’ “Beneficial Interest”

141. I turn lastly to the first of the three kinds of interest argued by the applicants to fall within section 283A, namely the 'Beneficial Interest' said to arise under the alleged agreement in October 2011 between the partners and Mrs Brehme to transfer the cottage to the applicants, so that the applicants thereby became the owners in equity of the cottage or alternatively entitled to a beneficial interest in it. What I must decide is whether the claim to a beneficial interest, as currently pleaded, could as a matter of law constitute an interest within section 283A. There appear to be three aspects to this claim. The first is a claim to specific performance of the alleged agreement. The second is a claim to a proprietary estoppel equity on the basis of acts of detrimental reliance carried out by the applicants on the faith of a promise by PWF and/or Mrs Brehme. The third is a claim that the partners of Stay in Style agreed that the cottage should cease to be partnership property and become the exclusive property of the applicants. I will deal with them separately.

The claim to specific performance

142. As to the claim to specific performance of the alleged agreement, no authorities were cited to me by the parties, but perhaps I can take as an uncontroversial summary of the relevant law two paragraphs from the recent decision of the Court of Appeal in *Ezair v Conn* [2020] EWCA Civ 687, where Patten LJ (with whom Henderson and Rose LJJ agreed) said:

> "47. It is well established on authority that in the case of an unconditional contract for the sale of real property the vendor is treated as a trustee of the property for the purchaser pending completion: see *Shaw v Foster* (1871-72) LR 5 HL 321 and 349; *Lysaght v Edwards* (1876) 2 Ch D 499 at 506-7 per Jessel MR. The relationship is described in some of the judgments as a bare trust but it is clear that it exists as an incident of the contractual relationship and is no more than a consequence of the principle that equity treats as done that which ought to be done. It is therefore dependent upon the contract remaining specifically enforceable and (Mr Lander contends) remains at all times subject to the terms of the contract.
>
> 48. In *Jerome v Kelly* [2004] 1 WLR 1409 the House of Lords held that an uncompleted contract for the sale of land did not have the same effect as a declaration of trust. After reviewing the authorities I have mentioned, Lord Walker of Gestingthorpe (at [32]) said:
>
>> 'It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provisional assumptions may be falsified by events, such as rescission of the contract (either under a contractual term or on breach). If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full'."

143. In that case, the question for the court was whether, if A contracted in 1999 to sell land to B, but although the consideration passed the parties deliberately did not complete the contract (in order to avoid stamp duty), and B contracted in 2003 to sell the same land to C (and again the purchase price was paid but the matter was left in contract rather than proceeding to completion), C was then entitled to call upon A directly to transfer title to the land to C, without the need for serving notices to complete pursuant to the contracts. The Court of Appeal answered this question in the negative:

> "49. Whatever may be the precise nature of the beneficial interest enjoyed by a purchaser under the contract of sale, it is clear that prior to completion of the contract the purchaser does not have an equity in the property which he can transfer to a sub-purchaser so as to be binding against the vendor. …
>
> […]
>
> 51. I think that we are therefore bound by authority to reject Mr Cawson's submission that the effect of the 2003 Agreement was by operation of law to transfer to [C] a beneficial interest in the Properties which is enforceable directly against [A]."

144. It is not necessary to consider the question further, however, because as a matter of law the agreement alleged in the present case cannot give rise to a claim for specific performance and therefore to any equity which could amount to an interest within section 283A. This is because the agreement pleaded is not alleged to be an agreement in writing and signed by the parties so as to satisfy the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Accordingly what is alleged is not a valid agreement in law, and it cannot be relied on to produce an interest in the cottage.

A proprietary estoppel equity

145. The more substantial question relates to the second aspect of the claimed Beneficial Interest, arising by virtue of the claim to a proprietary estoppel equity. Here there is no requirement that the promise relied upon should have been in writing, so the problem referred to with the claim to specific performance does not apply. The applicants say that the pleaded facts in the 2012 cottage claim are "sufficient for the court to make findings of constructive trust or proprietary estoppel" amounting to a beneficial interest or an enhanced beneficial interest in the cottage. Hence the applicants had an interest in a dwelling house for the purposes of section 283A. They rely on section 116 of the Land Registration Act 2002, *Snell's Equity* (34th edition) at paragraph 12-054, and on the decisions in *Webster v Ashcroft* [2012] 1 WLR 1309, *Walden v Atkins* [2013] EWHC 1387 (Ch).

146. Chedington says that an "interest" within section 283A is confined to the beneficial interest which accompanies sole legal ownership or a beneficial interest under a trust of land in a domestic property. This, it says, is consistent with the policy behind the section, which was to protect the bankrupt's home from trustees in bankruptcy waiting many years (perhaps in the hope of a rising market) before realising the interest vested in them in respect of that home. So it should be construed restrictively. In particular, they rely on *Young v Official Receiver* [2010] BPIR 1477. The claims in

the 2012 proceedings amount only to a *claim* to an interest in a dwelling house and not an interest itself. They say that

> "a remedy for proprietary estoppel only comes into existence on the making of a court order. All that exists before that date is a mere equity, much like the mere equity that exists in respect of property subject to a claim for rescission by reason of misrepresentation or undue influence".

They then argue "that no estoppel was even pleaded at the date of bankruptcy". Then they say that there is no market in proprietary estoppel claims, so that the trustee cannot realise such an interest. And they assert, with something of a rhetorical flourish, that "One cannot live in an estoppel claim".

147. **Pleading:** I can deal straight away with the argument that no estoppel was pleaded at the date of bankruptcy. In fact, the proprietary estoppel claim was introduced into the 2012 claim with the amendment to the points of claim in July 2013, nearly two years before the bankruptcy. The claim as amended makes factual allegations that the relevant parties agreed that the cottage would be transferred to the applicants, and that the applicants relied on this in stated ways, to their detriment. No more is needed. In particular, it is not necessary to say that this amounts to a claim in proprietary estoppel, because, as I have already said above, it is not necessary to plead legal conclusions. In fact there is an express reference to a proprietary estoppel equity in the prayer to the claim as amended.

148. **General law:** I now turn to consider the place of a proprietary estoppel in the general law. Under the general law, the equity is constituted when all of the preconditions are met. That is something which happens before the court hears the case and decides whether the equity has been established on the evidence, and how, if at all, it should be satisfied. As Hoffmann LJ once said, instead of looking forward, like a contract, proprietary estoppel looks back, "and asks whether, in the circumstances that have actually happened, it would be unconscionable for the promise not to be kept": *Walton v Walton*, Court of Appeal, 14 April 1994, para 21; see also *Thorner v Major* [2009] 1 WLR 776, [38].

149. It is well known that a specifically enforceable contract relating to the sale or lease of land is treated *in equity* as transferring the fee simple or as creating that lease, by virtue of the principle that "equity looks on as done that which ought to be done". As I have already noted, in *Shaw v Foster* the House of Lords treated the vendor of land as a trustee of the property for the purchaser pending completion (albeit a trustee of a special kind, so that you cannot rely on this trust to avoid contractual obligations: *cf Ezair v Conn*, above). And, in *Walsh v Lonsdale* (1882) 21 Ch D 9, the Court of Appeal treated a contract for a lease which had been implemented (by taking possession and paying rent, but not actually granting the lease) as if in equity the lease had been granted, long before any legal proceedings were launched. So there is no especial problem with the fact that the court has not yet dealt with the matter. The rights of the parties are to be considered as at the time of the facts concerned, and not when the court adjudicates upon them.

150. There are vigorous ongoing debates today about the doctrine of proprietary estoppel. I do not need to decide any of those debates in this litigation. In order to avoid some of the more complicated aspects, I will simply say that, for present purposes, claims in

proprietary estoppel are of two main kinds. One arises when a person makes a *statement* (intending it to be relied upon) *as to the current legal position*, such as “I do not own this land” or “you own this land”. The person to whom this statement is made in fact relies upon it to his or her detriment. If it is unconscionable for the representor to go back on the representation a proprietary estoppel equity arises (see *eg Hopgood v Brown* [1955] 1 WLR 213, CA). In some cases, for example where the first person sees another person labouring under the mistaken impression of the true position, and realises what the mistake is, but says nothing to disabuse that other of the mistake, equity treats the silence of the first person as equivalent to a representation of the present legal position (see *eg Ramsden v Dyson* (1866) LR 1 HL 129, 140-41).

151. The other kind of proprietary estoppel arises where there is no statement made about the present legal position, but a *promise* is made or an *expectation created* as to the *future* position. It is not a contract enforceable at law, because there is no consideration. Hence the promise is not enforceable at that point. But if the promise, being intended to be acted upon by the promisee, is so acted upon by the promisee to his or her detriment, and it becomes unconscionable for the promisor to resile from the promise, then the proprietary estoppel equity comes into existence (*eg Crabb v Arun DC* [1976] Ch 179, CA). This kind of proprietary estoppel equity is generally satisfied by requiring the promisor to perform the promise or make good the expectation, provided at all events that this is not disproportionate in the circumstances (*eg Jennings v Rice* [2003] 1 P & CR 8, CA, [50]). If it is disproportionate, then some lesser remedy may be ordered. In the present case, it is this kind of proprietary estoppel equity which is in play. It is a promissory form of the doctrine, rather than a propositional form.

152. The proprietary estoppel equity has the single most important characteristic of a property right or interest, that is, that *it binds third parties*. It also takes effect from the point in time at which all the elements of the right are complete, even though the court has not at that stage adjudicated upon it. Thus, in *Re Sharpe (a Bankrupt)* [1980] 1 WLR 219, Browne Wilkinson J, dealing with a proprietary estoppel claim by one family member against another, who had become bankrupt, said (at 225H):

> “The introduction of an interest under a constructive trust is an essential ingredient if the plaintiff has any right at all. Therefore in cases such as this, it cannot be that the interest in property arises for the first time when the court declares it to exist. The right must have arisen at the time of the transaction in order for the plaintiff to have any right the breach of which can be remedied. Again, I think the *DHN Food Distributors Ltd* case [1976] 1 WLR 852 shows that the equity predates any order of the court.”

153. During the argument I referred to my own decision in *James v James* [2018] EWHC 43 (Ch), which discussed this point. There I said:

> “54. Sam argues that he has a proprietary estoppel equity, which arose before the 2007 transfers to Karen (and therefore before the transfer to the testator and Sandra jointly in 2009). He relies on *Voyce v Voyce* (1991) 62 P & CR 290. That was a simple case, where a mother made an informal gift of land consisting of a cottage, to her elder son on condition that he did it up (as it was agreed he had), and then subsequently purported to make a second gift of the same land by formal deed to her younger son. It was held, both at first instance and in the Court of

> Appeal, that the elder son had an equitable interest by way of proprietary estoppel which was binding on his brother, now the legal owner. This was because the latter was a volunteer and also was aware of his brother's occupation of the land (thereby having at least constructive notice of the elder brother's rights).
>
> 55. Dillon LJ (with whom Nicholls and Russell LJJ agreed) said (at 294):
>
>> 'The court of equity has habitually sought to protect a purchaser for value without notice of an equitable interest, but I do not find any indication that the court has sought to protect a volunteer successor in title from a donor who has notice of the circumstances from which an equity has arisen and notice that the claimant to an equity is, and was at the time of the deed of gift to him, in occupation of the property.'
>
> In other words, a proprietary estoppel equity prevails over a volunteer successor in title of the legal estate, at any rate if the successor has notice of the circumstances and notice that the other party is in occupation. For myself I do not quite understand why it is necessary for anything more than being a volunteer. If the successor is not a purchaser of the legal estate for value, on unregistered land principles any equity attaching to the property binds the successor, even if the successor has no notice of the equity. No authority for such a proposition was referred to at the trial, but perhaps *Eyre v Burmester* (1862) 10 HLC 90, 104, 111, will do."

154. In my judgment there can be no doubt that a proprietary estoppel equity is a property interest for the purposes of the general law of property. As I said in *James v James*,

> "63. … In accordance with *Voyce v Voyce* and other decisions it is clear that a proprietary estoppel equity arises at a certain point, *ie* when it becomes unconscionable for the landowner not to give effect to his promise or assurance. This will be only once the reliance has taken place and the detriment incurred. Although the court has to decide this question retrospectively, it decides what was the position at that point in time. … "

155. **Section 116:** As I have said, the applicants also referred me to section 116 of the Land Registration Act 2002. This provides:

> "It is hereby declared for the avoidance of doubt that, in relation to registered land, each of the following–
>
> (a) an equity by estoppel, and
>
> (b) a mere equity,
>
> has effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority)."

The applicants say that this "constitutes a declaratory statement of the law". This not, however, a statement of the *general* law of property. It is expressly a statement in relation to *land*, and only to *registered* land at that. Even if it were a statement as to

the general law of property, applying to personalty as to realty, it would still not be conclusive as to the meaning of "interest" in section 283A of the Insolvency Act 1986. Every word, and especially every technical word, used in a statute must be construed in its own context: see *eg Lewis v Metropolitan Properties Realisations Ltd* [2010] Ch 148, [10]. Nevertheless, since the Land Registration Act received the Royal Assent on 26 February 2002 and the Enterprise Act received the Royal Assent on 7 November 2002, I accept section 116 as part of the general legal background against which section 283A was enacted and must be construed.

156. The applicants also rely on *Snell's Equity*, 34th edition 2020, paragraph 12-054. The relevant part of this paragraph reads:

> "An objection to this approach might be that, until a court order is made in B's favour, B's right is too uncertain to be permitted to bind C, as it is unclear how a court might respond to B's proprietary estoppel claim. On this view, the mere fact of B's having met the test for such a claim at the time of C's involvement would never permit B to assert a right against C: unless B could show some independent or ancillary claim, C would take C's right free from any claim of B. That view, however, has never been accepted by the courts and is also flatly inconsistent with s.116(a) of the Land Registration Act 2002, which states that, in registered land, an 'equity by estoppel', like a 'mere equity', 'has effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority)'. The difficulty with s.116(a) is that, on its face, it may seem to go too far in the other direction, and to mean that C is always prima facie bound if acquiring a right in A's land before a court order in B's favour, as it can be argued that, in all such cases, B has an 'equity by estoppel'. This causes no difficulty in cases where, at the time of C's involvement, A would in any case have been ordered to grant B a property right in the land. The problem, it is submitted, arises if, at that point, A would simply have been ordered to pay B a sum of money, or to allow B a licence. Certainly, as C would not have been bound if acquiring a right in the land after such a court order in B's favour, it is very hard to see why C might be bound before such a court order. This difficulty may, however, be capable of resolution if the term 'equity by estoppel', as used in s.116(a), is interpreted so as to refer only to cases where a court would, at that point, have ordered A to give B a recognised property right; after all, the term 'mere equity' in s.116(b) must similarly be limited to cases where B had a power to acquire such a recognised property right, as it cannot apply in every case where some equitable protection would have been available to B against A."

157. The quotation from this paragraph relied upon by the applicants ended with the words "effect of dispositions on priority", about two fifths of the way through the extract given above. Chedington however points to the remainder of the paragraph, down to the words "a recognised property right", as qualifying that first part. For my part, it is not necessary for me to give any view, much less a concluded view, about the scope of section 116 of the Land Registration Act 2002. It is sufficient for me to say that, in my judgment, the only proprietary estoppel claims which can properly be regarded as 'property' rights under the general law, binding third parties in the appropriate circumstances, are those of claims to already recognised property rights or interests. I am satisfied that that is the case for the claim put forward here, even though the

applicants have so far only asserted their claim, and the court has not yet adjudicated upon it.

158. **Insolvency Act 1986:** I turn then to the meaning of 'property' for the purposes of the Insolvency Act 1986. As I have said, the applicants cite two cases. *Webster v Ashcroft* [2012] 1 WLR 1309 was a case in which a claim to a proprietary estoppel or constructive trust was made in relation to a country estate near Taunton in Somerset. However, the claimant's claim was that his late father had been entitled to a proprietary estoppel equity in relation to the estate, and that he claimed as a successor in title to him, either through his grandmother's estate or through a trust created by his father in respect of his proprietary estoppel equity. The father had been made bankrupt in December 1992, being discharged one year later. The first and second defendants applied for summary judgment to dismiss the claim. One ground for this application was that any claim by the father to a proprietary estoppel would be vested in his trustee in bankruptcy, and not in the claimant, so that the claimant had no title to sue.

159. The deputy judge, Nicholas Strauss QC, referred to the wide definition of "property" vesting in a trustee in bankruptcy under section 436 of the Insolvency Act 1986, and said:

> "26. … On the basis of the facts alleged, either [the father and mother of the claimant] jointly, or [the father] alone had an equity interest in [the estate], which would take effect on the death of his father. The precise extent of the equity might depend on the circumstances at that time, as the court will assess the minimum that is necessary to give effect to the promise and avoid unconscionability … However the assurances are to be interpreted, assuming that they, and the necessary reliance and detriment, are established on the evidence, [the father] had by December 1992 either a joint or sole interest in the estate. Its existence did not depend on any future uncertain event.
>
> 27. [Counsel for the claimant] submitted that [the father] had not acquired any property by December 1992. In cases of this kind, no property interest arose until the death of the promisor, unless the promisor did something inconsistent with the promise in his lifetime to the knowledge of the promisee: if he did, the promise she had an immediate claim, as in *Gillett v Holt*.
>
> 28. This seems to me to confuse the right with the circumstances in which the right is enforced. Normally, the promisee would not bring proceedings unless and until the promisee's personal representatives refused to give effect to the equity. … But the property here is not the cause of action but the equity, described by Slade LJ in *Jones v Watkins*, unreported, 26 November 1987 as 'a right in equity to a transfer of the whole property'. On the facts pleaded in this case, [the father and the mother], alternatively [the father] alone, had acquired such a right long before December 1992. Although there is no authority directly in point, in my view [the father]'s right was property which passed to the Official Receiver as his trustee in bankruptcy."

160. The other case, *Walden v Atkins* [2013] EWHC 1387 (Ch), was similar to *Webster v Ashcroft*. There a claimant making a claim for a proprietary estoppel equity had become bankrupt before the claim could be vindicated before the court. HHJ Simon

Barker, sitting as a judge of the High Court, followed *Webster v Ashcroft*, and held that any claim which the claimant had had was now vested in his trustee in bankruptcy, and accordingly a claim made in his own name failed. The judge said:

> "45. In my view, the flaw in Mr Willetts' argument is that it proceeds on the basis that because examination of an equitable estoppel is a retrospective process, "look[ing] backwards from the moment when the promise falls due to be performed and ask[ing] whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept", it follows that there is no property until that process may be undertaken. However, the examination in fact being undertaken is one of measurement or valuation of an equitable interest which already exists or has existed.
>
> 46. The examination relevant to determining whether the subject matter of the equitable estoppel is property for the purposes of s.436 IA 1986 requires consideration of the circumstances at an earlier point in time, namely as they were at the time of the bankruptcy.
>
> 47. The fact that it may not be possible to say, until after the happening of some future contingent event, whether or not an equity has been satisfied and, if not, to identify the minimum relief necessary to satisfy the equity does not mean that the equity did not come into existence, or that it could not have existed, unless and until the future contingent event occurs.
>
> 48. The equity comes into existence, if at all, as the result of a promise being made to and relied upon by and a detriment being suffered by a promisee. It is at that point that the promise becomes irrevocable, the equity is recognised, and it is this equity to which the definition of property at s.436 IA 1986 is to be applied."

161. I respectfully agree with both decisions. They show that such a proprietary estoppel equity is property at least for the purposes of falling into the bankrupt estate under section 283 of the Insolvency Act 1986.

162. **Section 283A:** Section 283A derogates from section 283, by taking certain property *out* of the bankrupt estate in stated circumstances. The question therefore is whether there is anything special about section 283A to require a different or narrower meaning to be given to the word "interest" compared to section 283. Chedington says that there is. First of all, it says that a *claim* to an interest in the dwelling house is not *itself* an interest in the dwelling house for the purposes of section 283A. For this purpose, it refers to the decision of Mann J in *Young v Official Receiver* [2010] BPIR 1477.

163. In that case the claimant and his wife had bought land in about 1999 and built a house upon it. They encountered planning problems and the house had to be demolished. In 2006 the claimant and his wife began legal proceedings for damages against their own solicitors for negligence, the vendors of the land for misrepresentation, and a neighbour for obstruction of a right of way and harassment. Shortly before doing so the claimant presented a petition for his own bankruptcy, which resulted in an adjudication of bankruptcy shortly after the proceedings were commenced. A few months later, the official receiver executed a disclaimer of the land. A question arose thereafter as to whether the damages claims had also been disclaimed, or whether that

was still vested in the official receiver. Both the Chief Registrar at first instance and on appeal Mann J held that it was still vested in the official receiver.

164. On appeal (though not at first instance) the claimant also relied on section 283A to say that the land, and therefore the claim associated with the land, had re-vested in him, more than three years having passed since his bankruptcy, without its being disposed of in the bankruptcy. The judge said this:

> "35. … But even if Mr Young is correct that he has reacquired his interest in the matrimonial home via the operation of s 283A, notwithstanding the disclaimer, and I can see some merits for such an argument, he has not thereby reacquired the cause of action as well for all the reasons given above. I have already determined that the cause of action takes a separate route if the one step into the hands of the Official Receiver amounts to anything as grand as a route. It is a separate item of property from the beneficial interest in Mr Young's matrimonial home."

165. These were, of course, claims for damages for misrepresentation, negligence, obstruction of a right of way and harassment. These claims were (nearly) all directly connected with the land, but they were not claims to *an interest in* the land. They were claims for damages. The interest in the land which the claimant had had (with his wife) was that of ownership of a fee simple estate, and this claim was not to recover or vindicate that. It is of course possible to conceive of a claim in misrepresentation which has a proprietary objective, to undo a transfer, for example. However, *Young* was not such a case.

166. But if the subject matter of the 'interest' said to fall within section 283A was itself a *claim* to another 'interest' in land, in my judgment that claim can itself be an 'interest' for the purposes of that section. As I have said, a claim under a specifically enforceable contract to purchase land, or to take a lease of land, is an interest in the land under the general law, and I can see no reason why it should not also be for the purposes of section 283A. If a bankrupt lived in a house which he or she had purchased, and for which the purchase price had been paid in full, but for some reason the bankrupt had never actually completed the contract and taken a conveyance, I can see no reason at all why the *claim* to the fee simple or lease (as the case may be) under the executory contract should not itself be an interest under the section. And, if that is so, it is hard to see why a claim to a proprietary estoppel equity (at least under the promissory version of the doctrine, which is this case) should be any different.

167. Chedington says "One cannot live in an estoppel claim". With respect, this is quite meaningless. You cannot live in a fee simple absolute in possession, or a term of years absolute, either. What you can live in, and people do live in, is a house or flat built on land in respect of which you have an estate or interest, such as a fee simple or a lease. But it might be a beneficial interest under a trust of land, or (as I pointed out above) pursuant to an uncompleted contract for the sale and purchase of the house. The law reports are littered with cases where people were living in properties in respect of which they had a claim to a proprietary estoppel equity, and succeeded in that claim, to obtain the remedy of an order for the transfer of some estate or interest in the property.

168. A further argument made by Chedington is that section 283 implements the policy of the insolvency law that as much of the bankrupt's property as possible should be

collected in and realised for the benefit of creditors. Section 283A derogates from that policy by releasing a particular kind of property back to the bankrupt under certain conditions after three years, in order to remedy an abuse which was perceived to have been taking place before 2002. Accordingly, they say that, as section 283A is a derogation from section 283, it should be construed restrictively. I accept the submission as far as it goes. Since the section is designed to prevent the abuse of section 283 by unfairly depriving bankrupts of their home after a considerable time has elapsed without the trustee in bankruptcy realising or attempting to realise that home, the section should be confined to remedying that abuse.

169. Accordingly, the courts have interpreted "realisation" as requiring an immediate cash payment (*Lewis v Metropolitan Properties Realisation Ltd* [2010] Ch 148, CA), and restricted claims to the part of the property which constituted a dwelling house (*Re Hunt (a Bankrupt)* [2014] 1 WLR 254; *Hunt v Withinshaw* [2015] EWHC 3072 (Ch)). Chedington says there is no market in proprietary estoppel claims, so the trustee cannot have been expected to 'realise' the value of the claim. Hence it does not count as an 'interest' within the section. I accept that the market is restricted. But there will still be potential buyers. These include (i) the putative defendant, who will pay something to have the claim on his or her title removed, (ii) the putative claimant, who has after all the greatest interest (as this case shows) in prosecuting it, (iii) the friends and relatives of the putative claimant (in case the claimant is still a bankrupt or without sufficient resources), and (iv) neighbours of the disputed property, who may be affected and have their own reasons for wanting either to prosecute or to stifle the claim. I do not accept that there is nothing that a trustee can do to 'realise' the claim. Overall, and despite the restrictive approach taken to the construction of section 283A, I can see no good reason why a claim, by way of a proprietary estoppel equity, to a recognised property right enabling a person to occupy a property in relation to a dwelling house which was the home of the bankrupt at the date of bankruptcy should not amount to an interest within section 283A. And (subject to the residence issue) that is this case.

An agreement about partnership property

170. The third aspect of the claim to the 'Beneficial Interest' is a claim (made clear in the applicants' written opening submissions) that the partners of Stay in Style agreed that the cottage should cease to be partnership property and become the exclusive property of the applicants. Chedington complains that this claim is advanced for the first time. However, and as I have already said, the applicants are not obliged to plead conclusions of law. Here, the conclusion argued for arises on the facts which are alleged, namely that the partners in the firm agreed to transfer the cottage out of the partnership property to the applicants' beneficial ownership. Chedington says that a deed would be required for any disposition of land such as the cottage, even in the context of a partnership. They refer to paragraph 16.46 (but evidently meaning 18-46) of *Lindley and Banks on Partnership*, 20th edition, 2017.

171. Paragraph 18-46 relevantly provides:

> "Whilst all the partners remain solvent, they may at any time agree, both as between themselves and as against their creditors, either to remove assets from or to introduce assets into the common pool of partnership property. Lord Lindley wrote of such agreements:

> ‘It is competent for partners by agreement amongst themselves to convert that which was partnership property into the separate property of an individual, or vice versa. And the nature of the property may be thus altered by any agreement to that effect; for neither a deed nor even a writing is absolutely necessary; but so long as the agreement is dependent on an unperformed condition, so long will the ownership of the property remain unchanged.’
>
> To this must, of course, be added one important qualification, to which Lord Lindley briefly referred in a footnote, namely that a written disposition will normally be necessary in order to effect a transfer of an interest in land. …”

172. If therefore there is to be a change in the beneficial ownership of the cottage as between the partners, by moving the cottage out of the partnership and into the applicants alone, then there must be signed writing, as required by the Law of Property Act 1925, section 53(1), and the Law of Property (Miscellaneous Provisions) Act 1989, section 2. (Chedington is wrong to refer to the need for a *deed*, but in the event nothing turns on this. There is also a stray reference in the applicants' submissions to *Strover v Strover* [2005] EWHC 860 (Ch), but that was not a case involving land, and so the point could not arise.) This means that the case is in practical terms the same, and stands on the same footing, as the first of the three aspects examined, namely an agreement to dispose of an interest in land, required by section 2 of the 1989 Act to be in writing. Since there is no allegation here of a written agreement, this cannot be treated as an interest within section 283A.

Conclusion

173. Accordingly, the conclusion which I reach in relation to the “interest” point is that Mrs Brake satisfies the threshold condition for an interest within section 283A in respect of the adjacent parcels, and that the applicants satisfy the threshold condition for an interest within section 283A only in respect of that part of the “Beneficial Interest” which consists of the proprietary estoppel claim. They do not satisfy it in relation to the contractual (specific performance) or the transfer of partnership assets aspects. Finally, in my judgment, the applicants do not satisfy the threshold condition in respect of their “Registered Title”.

THE DWELLING HOUSE ISSUE

The issues between the parties

174. I now turn to consider the “dwelling house” issue. In substance, this is whether at the date of her bankruptcy Mrs Brake's undoubted interest in the two small parcels of land adjacent to the cottage was “an interest in a dwelling house”. I begin with the relevant issues as defined by the statements of case. In the particulars of claim, the applicants say:

> “1. The property known as West Axnoller Cottage … registered as a freehold title under title number DT 302107 (Cottage) and the contiguous land providing access to the Cottage, registered as a freehold title under title number DT 344200 (Cottage Access Land) are used together and form part of the same place of residence.

[…]

11. For all practical purposes … the Cottage and the Cottage Access Land should be sold/owned together.

[…]

31. The Beneficial Interest, the Brakes' Registered Title and the Cottage Access Land each constituted an interest in a dwelling house which at the Bankruptcy Date was the principal residence of the Brakes within the meaning of the revesting provisions in section 283A(1) IA 1986 … "

175. Somewhat curiously, the applicants' written submissions states that the above paragraph 31 is actually contained in the amended defence of Chedington. They also go on to say that Chedington is "correct to assert in [their] pleading that the Cottage and the Cottage Access Land 'each constituted an interest in a dwelling house'." I assume that this is just a mistake. It is the *applicants* who say that. So far as I can see, Chedington has not asserted any such thing, as is shown by its amended points of defence. These provide (in part) as follows:

"13. Paragraph 1 is admitted.

[…]

20. Paragraph 11 is admitted.

[…]

26. Paragraph 31 is denied. … ."

176. The applicants submit that, as a result, there is no issue in the present proceedings that the two adjacent parcels of land do not constitute a dwelling house for the purposes of section 283A. Chedington denies this. It says that the interest under section 283A must be "*in*" a dwelling house, and that there is no dwelling house on either parcel. Even if they were part of the same place of residence (as paragraph 1 of the points of claim asserts), it is only the "unit of accommodation" which revests. The applicants object that these arguments have not been pleaded. But they are matters of law, which (as the applicants themselves argued in this case) do not need to be pleaded. Even if Chedington pleaded a legal result, it is

"not bound by or limited to the legal result … alleged, but may rely on any legal consequences of the pleaded facts which may properly flow from them": per Ralph Gibson LJ (with whom Sir John Megaw agreed) in *Denyer v Jones*, unreported, 23 September 1991.

177. The facts pleaded by the applicants in paragraph 1 and admitted by Chedington are that the cottage and the adjacent parcels are contiguous, are used together and form part of the same place of residence. That does not preclude arguments of law as to whether Mrs Brake's interest in the parcels was an interest in a dwelling house. I doubt whether the statements in paragraph 11 of the points of claim are strictly matters of fact at all. They add little, and seem more like an expression of opinion than a statement of fact. But in any event Chedington's admission of paragraph 11

does not in my judgment shut out Chedington from arguing matters of law of this kind either. And paragraph 31 of the points of claim is denied. So the applicants are not in any way taken by surprise to find that they must deal with legal arguments as to whether Mrs Brake's interest in the parcels was an interest in a dwelling house.

The test to apply

"Unit of accommodation"

178. Chedington says that the test is whether the parcels of land comprised a "unit of accommodation". It relies on the decision of Morgan J in *Hunt v Conwy BC* [2015] EWHC 3072 (Ch). In that case Mr Hunt had been the owner of the fee simple estate in a seaside pier. On the pier there was a small apartment in which it was accepted Mr Hunt had his principal residence at the time he was made bankrupt. Just before the expiry of the three-year period, the trustee in bankruptcy made an application for possession, and thus prevented the automatic revesting under section 283A. Subsequently, however, the trustee disclaimed his interest in the pier. Mr Hunt sought to argue that the disclaimer was invalid, and that the pier should have revested in him under section 283A. Morgan J held that this was wrong. He said:

> "43. As to the fifth issue, Mr Hunt argued that if the case came within section 283A(4), then the freehold in the whole pier vested in him. That seems to me to be wrong. Sir William Blackburne has already held that the extent of any dwelling house, as that term is defined by section 385(1) of the 1986 Act did not extend to the whole of the pier. On the true construction of section 283A, the interest which would vest under section 283A(4) would be the dwelling house alone. … ."

179. The reference to the decision of Sir William Blackburne is to a decision at an earlier stage in the same proceedings, on appeal from the county court: *Re Hunt (a Bankrupt)* [2014] 1 WLR 254. On that appeal Sir William said:

> "44. … Section 385(1) of the 1986 Act defines 'dwelling house' as including 'any building or part of a building which is occupied as a dwelling and any yard, garden, garage or outhouse belonging to the dwelling house and occupied with it'. Judge Jarman QC dealt succinctly with the matter in para 28 of his judgment:
>
> > ' … [Mr Hunt] maintained that having a regard to … the definition of a dwelling house in the definition section in the 1986 Act, the whole of the pavilion, the pier and foreshore should come within the definition of the dwelling house. He likened the decking and the struts of the pier to a yard within that definition and that part of the foreshore on which the pier stands as a garden within that definition. I cannot accept those submissions. That is not in my judgment what the statutory provision contemplated when it defined a dwelling house to include a yard and a garden. In my judgment the dwelling house in this case is confined to that part of the pavilion which is adapted for use and occupation as a dwelling.'
>
> I am in complete agreement with what is said there."

180. In my judgment, the decisions of Sir William Blackburne and Morgan J do not show that the test to apply is whether the parcels of land comprised a "unit of accommodation". However, they are decisions on the interpretation of section 283A and I should take them into account in reaching my decision in the present case.

Other authorities

181. Chedington also relies on other authorities which, however, arise in different contexts, including planning (*Gravesham BC v Secretary of State for the Environment* (1984) 47 P&CR 142), commons registration (*In re 1-4 White Row Cottages, Bewerley* [1991] Ch 441), and residential landlord and tenant (*Uratemp Ventures Ltd v Collins* [2002] 1 AC 301, HL). The first two concerned the meaning of the phrase 'dwelling house', and the third the meaning of the word 'dwelling', in the various contexts of their respective governing legislation. In considering the meaning of 'dwelling house' in the very different context of section 283A of the 1986 Act, I do not think I can derive much benefit from these apart from a general sense of what use has been made of this word or phrase in the past.

182. As Chedington itself says in written submissions, in meeting an argument of the *applicants* based on (i) the meaning of the words "belonging to and occupied with" in a tax statute (the House Tax Act 1808), and (ii) the extent of a 'dwelling house' for capital gains tax purposes:

> "*Westminster v Reith* does not assist the Brakes. It was construing a different statute … where the language of 'belonging' was being used in an entirely distinct context. Nor were the same policy considerations as are behind section 283A in play. The same is true of section 222 of the 1992 Act, where the provision is about relief on capital gains tax on a person's main residence. Section 283A has to be construed in the context of the scheme of the 1986 Act, rather than by reference to tax legislation".

I agree. In the present case I must be guided by what is in the 1986 Act itself, both in section 283A and also in the definition section, as interpreted in the case law (the two *Hunt* cases). In my judgment, what this means is not whether the land is a unit of accommodation, but whether the interest in the land is an interest in a dwelling house, as defined by the Act.

Factual matters

Separation of ownership

183. There are a number of factual matters which must be borne in mind in considering this problem. The first is that until 2002 the Farm, the cottage and the adjacent parcels were all in the same ownership, *ie* that of the Vickerys. The parcels would not have been regarded as belonging particularly to the cottage (or to the main house). They were all part of the same undivided ownership. In 2002 the cottage was sold off to Mr and Mrs White. In 2004 the Farm north of the lane was sold to Mrs Brake. In 2006 Mrs Brake also bought the parcels. So at that stage the parcels were in the same ownership as the Farm, not the cottage. In 2010 the Whites sold the cottage to the partnership, conveying to the applicants and Mrs Brehme as trustees for the partnership.

Use of parcels

184. Secondly, after 2010, and despite being in two different legal and beneficial ownerships, the two adjacent parcels were *in fact* used by the applicants together with the cottage. In particular, the applicants used the eastern parcel as part of the garden of the cottage, and used a track over the easternmost part of the western strip to access the cottage. As to the latter, as I have said, the previous owners of the cottage (Mr and Mrs White) did not own the adjacent parcels or have any right in relation to them. On the material before me, it is not clear how they in fact accessed the cottage. They could access the lane directly from the front of the cottage. And the cottage had a garden already. So the parcels were not *necessary* in order to access the cottage or to provide a garden. Photographs in the brochure prepared by estate agents who sold the cottage in 2010 appear to show a track over the adjacent parcel leading to behind the cottage. But on any view the parcels were additional land which enhanced the amenity and utility of the cottage.

Encroachment by cottage

185. A further point is that an extension to the cottage built by the Whites before 2010 may physically extend over the 4-foot strip to the south of the cottage and onto the land further south. This is apparently disputed by the applicants, who contend that the land registry plan is inaccurate. But that dispute is not before me now. Subject to that dispute, that was the position as at the date of the bankruptcies, 12 May 2015. The Farm was sold to Sarafina Properties Ltd (now AEL) in July 2015. Chedington bought the adjacent parcels from Mrs Brake's trustee in bankruptcy (Mr Swift) in 2018. In early 2019 the disputed transactions involving the cottage itself took place, by which Chedington claims to be the owner of the cottage, but I am not concerned with that in these proceedings.

The definition of dwelling house

186. The definition of dwelling house in section 385(1) of the 1986 Act (set out earlier) is an inclusive rather than exhaustive definition. However, the structure of the definition is itself useful in understanding the scope of the concept of dwelling-house. It begins with the idea of a building (or part) occupied as a dwelling. The second part expressly extends beyond the building (or part) to (i) land which is not built on (yard and garden) and (ii) separate structures (garage and outhouse). But, to qualify, any of these must *belong* to the dwelling-house, and be occupied *with* it. Here the concept of 'belonging' does not refer to ownership, or necessarily mean that they are in the same ownership (though they probably will be). In my judgment it has more to do with being useful to or serving the dwelling-house, and thus being parts of a coherent whole. On the other hand, the idea of occupation *with* the dwelling-house refers to occupation of the same quality by the same person or persons. The fact that the definition is structured in this way (basic idea + extension) means that there is no scope for treating the basic idea (building occupied as a dwelling) as *already* extending to lands or other structures surrounding the building. If that were so the extension would be unnecessary. The fact that the definition is inclusive rather than exclusive simply reflects the draughtsman's desire not to shut out from a highly fact-sensitive concept a situation which he or she could not foresee.

187. In the *Hunt* cases, the bankrupt owned a fee simple estate in a seaside pier. On the pier there was a unit of accommodation in which it was accepted he had his principal residence. He said the non-living accommodation part of the pier was like a yard and a garden, and so the whole pier could revest in him under section 283A. The courts refused to accept this, and the dwelling-house within section 283A was confined to the unit of accommodation alone. That is a rather extreme example, and the result is unsurprising. But it does illustrate the important point that the extension beyond the basic idea (the unit of accommodation) must serve or be useful to the accommodation, and must be capable of being realistically described as a yard, garden, garage or outhouse. In that case the rest of the pier was neither. The purpose of the section is to enable bankrupts to get back their homes if they have not been dealt with in the bankruptcy within three years. There is no need to expand the notion of the bankrupt's home artificially in order to achieve that purpose.

The present case

188. In the present case, the cottage and the parcels were acquired separately, by different people, at different times and for different purposes. They were in different ownership and different occupation. The partnership owned and occupied the cottage, whilst Mrs Brake owned and occupied the parcels. Since Mr and Mrs Brake used the cottage on behalf of the partnership, in that factual sense the applicants used both the cottage and the parcels (as is pleaded and accepted). But the Brakes' *occupation* of the cottage was as licensees on behalf of the partnership, whereas that of the parcels was as beneficial owner (by Mrs Brake). The parcels themselves were not essential to living in the cottage (as the Whites did without them), although both added amenity value, the western parcel by enabling a more convenient access to be obtained, and the eastern by allowing an extension of the garden.

189. The western parcel beyond the drive is long and thin, extending alongside the lane. In general terms, it is not obviously within the words of extension "yard, garden, garage or outhouse" at all. However, that easternmost part that was used as a track (and later a gravel drive) leading from the lane to the rear of the cottage could conceivably be regarded as within the term "yard". The encroachment by the cottage extension to the south onto a few feet at most of the western parcel does not alter matters. That is a question of title, trespass and possibly of acquiescence, as between neighbouring landowners. The eastern parcel can properly be regarded as falling within the word 'garden'. But, in my judgment, neither parcel could properly be regarded as 'belonging to' the cottage at the relevant time, not then being in the same ownership, or forming parts of a coherent whole. Nor indeed was either parcel 'occupied *with'* the cottage at the relevant time. The occupiers were different.

Conclusion

190. No policy of section 283A will be frustrated by confining the applicants' claim to revesting under section 283A to the cottage itself. To put it the other way round, there is no policy reason why the separately owned parcels need to be included in a revesting under section 283A. If an interest in the cottage (which is a dwelling-house) revests in *the applicants*, there is no need for the parcels (not themselves a dwelling-house) to revest in *Mrs Brake alone*. But that is what the applicants seek. In my judgment they cannot be combined in this way. I conclude that the parcels are not a

'dwelling-house' within section 283A, and further that an interest in these parcels is not an interest in a dwelling-house.

THE RESIDENCE ISSUE

191. I have already set out section 283A(1) of the Insolvency Act 1986. It applies to an interest in a dwelling-house which "at the date of the bankruptcy was the sole or principal residence" of one of certain persons, including the bankrupt and the bankrupt's spouse. If the dwelling-house was the cottage, the question is whether on 12 May 2015 the cottage was the "sole or principal residence" of Mr or Mrs Brake (or both of them). There is no definition or further elucidation in the Act of the meaning of the phrase "sole or principal residence", and so far as I am aware, there is no judicial decision on this section as to its meaning.

192. I was referred, however, to a number of authorities dealing with the same or similar phrases in the context of other legislation. These include *Frost v Feltham* [1981] 1 WLR 452 ("only or main residence" in the Finance Act 1972, Sch 1 para 4(1)), *Crawley BC v Sawyer* (1988) 20 HLR 98, CA ("only or principal home" in the Housing Act 1985, s 81), *Williams v Horsham DC* [2004] 1 WLR 1137, CA ("sole or main residence" in Local Government Finance Act 1992, s 6(5)); *Islington BC v Boyle* [2012] PTSR 1093, CA ("only or principal home" in the Housing Act 1985, s 81). Mr Davies QC pressed me in particular with *Frost v Feltham*. I will return to that case (among others). In addition, I was referred to other authorities dealing with the more limited concept of residence itself. These include *Brown v Brash* [1948] 2 KB 247, CA, and *Tickner v Hearn* [1960] 1 WLR 1406, CA (both "residence" for the purposes of the Rent Acts). Thirdly, I was referred to passages from the Official Receiver's manual dealing with this situation. I will come back to this, too.

The relevance of decisions on other statutes

193. I have already referred to the problem of authorities on similar phrases to be found in other contexts. The policy which leads the legislature to provide for some consequence to flow from a phrase like "sole or principal residence" in the context of (say) a residential tenant holding over after a contractual tenancy has come to an end is not the same as the policy which provides for the revesting in a bankrupt of an interest in a dwelling-house three years after the bankruptcy, that interest not having been disposed of in the meantime for the purposes of the bankruptcy. That does not mean that the other authorities are of no assistance at all. But it does mean that the court has to be careful in the way that those authorities are used.

194. Section 283A is designed to prevent trustees in bankruptcy from abusing their position, and depriving the bankrupt of a home after (for example) simply waiting for the market to rise, instead of getting on with the realisation of that asset for the benefit of the creditors. It is not designed to protect the home from realisation for the benefit of creditors at all. If the claims of the creditors outweigh all other interests (as is generally the case after one year into the bankruptcy), then it is likely that the court will order a sale under section 335A of the Insolvency Act 1986. Unlike (say) cases of protected tenancies, there is therefore no need for a generous or expansive approach to the concept of "sole or principal residence".

Two or more residences

195. The phrase “sole or principal residence” itself contemplates that a person may have two or more residences at the same time. This is the approach taken in the authorities cited to me in relation to other statutes, and in the Official Receiver’s technical manual (available on the Insolvency Service website). In the technical manual, it is set out thus:

> **“31.3.79 Bankrupt may have more than one family home**
>
> The bankrupt may have more than one family home where, for example, he/she lives in one, his/her estranged spouse live in another, and a former spouse lives in a third. If the bankrupt has an interest in any of these properties, they would each re-vest after the three year period (see paragraph 31.3.80) unless dealt with by the official receiver as trustee (see paragraph 31.3.83).
>
> Similarly, the bankrupt or spouse/civil partner, estranged spouse/civil partner, former spouse/civil partner may have more than one residence (for example one in the city for work and another in the country for weekends and holidays) – in which case, he/she would have to elect which property was the principal residence (see paragraph 31.3.63) and, therefore qualifies as the, family home.”

196. The first of these two sub-paragraphs is referring to the unusual case where there are three different people who qualify under section 283A(1) and each has a separate “sole or principal residence”, namely the bankrupt, the bankrupt’s spouse or civil partner, and a former spouse or civil partner. But the second paragraph is the more conventional case where the bankrupt has more than one residence. It will be noted that the technical manual there refers to the need in such a case for an *election* by the bankrupt as to which property was the “principal residence”. I will have to come back to this question of election later.

Constant physical presence not required

197. The phrase “sole or principal residence” also shows that the concept of “residence” does not require physical presence at all times in the property, since a person having more than one residence can be physically present in one but not in both or all at the same time. By extension, it also shows that one of a number of dwelling-houses in which a person resides may continue as that person’s residence even during absences from *all* such dwelling-houses. Questions may arise as to the need for that person to have the intention to return to reside again, and the need for some symbolic occupation in the meantime (*eg* a licensee or furniture). In *Tickner v Hearn* [1960] 1 WLR 1406, CA, for example (a Rent Act case), Ormerod LJ said at 1410:

> “I think there must be evidence of something more than a vague wish to return. It must be a real hope coupled with the practical possibility of its fulfilment within a reasonable time.”

And, at 1416, Upjohn LJ said:

> “If a tenant is out of occupation for some time he must at least prove an intention to return; but if the circumstances of the case are such that by reason of mental or physical illness or for some other reason the intention, even if clearly and bona fide held, seems most unlikely to be achieved within a

> reasonable time, it must surely be open to the judge in a case to find as a fact that the tenant is not in occupation."

198. This approach was adopted much more recently, by the Court of Appeal in *Islington LBC v Boyle* [2012] PTSR 1093. This was a case concerned with the concept of a secure tenancy within the Housing Act 1985, section 81, which refers to a tenant's occupying a dwelling-house "as his only or principal home". The tenant and her partner had three children, one of whom was severely autistic, attending a special school near the flat. The relationship broke down and the partner moved out, and bought a house about 100 miles away. The autistic child became aggressive towards the other two children, and the tenant and the partner effectively swapped homes, the tenant taking the other two children and the ex-partner returning to the flat to care for the autistic child. Although this was intended only as a temporary arrangement, it lasted for several years, until the local authority landlord discovered the arrangement and served the tenant with a notice to quit. It then claimed possession on the basis that, since the tenant was no longer occupying the flat as her principal home, the tenancy was no longer secure. The judge dismissed the claim and the landlord authority appealed. The Court of Appeal allowed the appeal on the basis that the judge had failed to consider the proper question, and remitted the case to be retried.

199. Etherton LJ (with whom Mummery and Patten LJJ agreed) said:

> "55. … I would summarise as follows the relevant principles to be applied in determining whether a tenant continues to occupy a dwelling as his or her home, for the purposes of the 1985 Act, despite living elsewhere. First, absence by the tenant from the dwelling may be sufficiently continuous or lengthy or combined with other circumstances as to compel the inference that, on the face of it, the tenant has ceased to occupy the dwelling as his or her home. In every case, the question is one of fact and degree. Secondly, assuming the circumstances of absence are such as to give rise to that inference: (1) the onus is on the tenant to rebut the presumption that his or her occupation of the dwelling as a home has ceased; (2) in order to rebut the presumption the tenant must have an intention to return; (3) while there is no set limit to the length of absence and no requirement that the intention must be to return by a specific date or within a finite period, the tenant must be able to demonstrate a 'practical possibility' or 'a real possibility' of the fulfilment of the intention to return within a reasonable time; (4) the tenant must also show that his or her inward intention is accompanied by some formal, outward and visible sign of the intention to return, which sign must be sufficiently substantial and permanent and otherwise such that in all the circumstances it is adequate to rebut the presumption that the tenant, by being physically absent from the premises, has ceased to be in occupation of it. Thirdly, two homes cases, that is to say where the tenant has another property in which he or she voluntarily takes up full-time residence, must be viewed with particular care in order to assess whether the tenant has ceased to occupy as a home the place where he or she formerly lived. Fourthly, whether or not a tenant has ceased to occupy premises as his or her home is a question of fact. … "

200. The phrase in question in the *Islington* case was almost the same as the phrase in section 283A of the 1986 Act. And in his judgment Etherton LJ referred specifically to the problem of two home cases. It is also an example of a two-home case where a

person has a property interest (a tenancy) in one, and simply a licence in the other. Of course, the policy behind the secure tenancy legislation and the policy behind the revesting provisions of the 1986 Act are not the same. Under the former, the question is whether the tenant can keep his or her principal home as such. Under the latter, the question is not whether the principal residence is available for creditors or not (because it is), but whether it needs to be dealt with within three years of the bankruptcy, in order to avoid abuse by trustees in bankruptcy. This suggests the need for a test for 'principal residence' that does not depend on a subjective intention to return, but instead on objective criteria, so that both the bankrupt and the trustee in bankruptcy know where they are, and can plan accordingly. The reference in Etherton LJ's judgment to "some formal, outward and visible sign of the intention to return, which sign must be sufficiently substantial and permanent" does provide a degree of objectivity in this respect.

No need for property rights

201. It is also clear from the authorities on other statutes (for their statutory purposes, at least) that it is not necessary for a person to have an *ownership* interest in a property in order for it to amount to one of two or more residences, one of which is the principal residence. In *Williams v Horsham DC* [2004] 1 WLR 1137, CA, for example, the taxpayer schoolmaster owned a cottage which was furnished and available for his use, but was also licensee of furnished residential accommodation provided at the school where he was employed. For council tax purposes, he was held to have his principal residence at the school, where he as simply a licensee.

202. Another instructive example is *Frost v Feltham* [1981] 1 WLR 452. This was a case about the deductibility of mortgage interest paid on a loan to purchase the taxpayer's "only or main residence". The taxpayer was the licensee of a public house in Essex, but with mortgage finance had bought a house in Wales. It was the only house he owned. But he visited it only for two or three days a month and sometimes for longer in the summer. He said it was his main residence, despite the fact that he spent much more time at the public house where he worked. The Inland Revenue refused him tax relief, and he appealed to the general commissioners, who allowed the appeal. The Inland Revenue appealed to the High Court, but their appeal was dismissed. Nourse J said (at 455):

> "If someone lives in two houses the question which does he use as his principal or more important one cannot be determined solely by reference to the way in which he divides his time between the two."

203. It is easy to see why that should apply to tax. No property rights were in contention. But I consider that similar considerations apply under section 283A. The concept of residence or principal residence is simply a gateway for the claim. If a person has no interest in a particular property which is his or her principal residence, then the trustee in bankruptcy cannot realise it for the benefit of creditors, and the bankrupt cannot claim a revesting under section 283A.

Objective test

204. In a case like the present, where the bankrupts occupied two different dwelling-houses as their residence in the period leading up to the bankruptcy, the first problem is to

decide whether they still had two residences at the date of the bankruptcy. If yes, the second problem is to distinguish one of them from the other so as to be able to call it the "principal" or "main" residence as at the critical date.

Authorities

205. In *Frost v Feltham* (discussed above) Nourse J said at 475G:

> "[Counsel for the Crown] said, in my view quite rightly, that it was not enough for the taxpayer to take the view that it was his principal or more important residence. The matter must be decided objectively. [Counsel for the taxpayer], on the other hand, said that it was something which the commissioners were entitled to take into account as part of the picture as a whole. I agree with both those contentions. It seems to me that on its own the taxpayer's view could not carry much weight. But again it seems to me that it is something which can be thrown into the balance."

206. The case of *Williams v Horsham DC* also adopts an objective test for determining which of two or more residences is the principal one. Lord Phillips MR, giving the judgment of the court, said:

> "26. … We think that it is probably impossible to produce a definition of 'main residence' that will provide the appropriate test in all circumstances. Usually, however, a person's main residence will be the dwelling that a reasonable onlooker, with knowledge of the material facts, would regard as that person's home at the material time. That test may not always be an easy one to apply, but we have no doubt as to the conclusion to which it leads in the present case."

The present case

207. In the present case, even though *Williams* arose in the context of council tax, the parties were agreed that this test was the appropriate one for me to apply in the context of section 283A. As I have said, there is much to be said for an objective test. An important matter such as principal residence, which has consequences for the bankrupt, the trustee in bankruptcy and the creditors, should not depend on the unknowable contents of a person's mind, but rather on objectively ascertainable phenomena. Since the parties do not disagree about this, I will apply that test. But, whatever the correct test in law that must be applied, I remind myself that this is the applicant's claim for revesting under section 283A, and the burden lies squarely on the applicants to demonstrate on the balance of probabilities that the cottage was their principal residence on 12 May 2015.

The question of election

208. Earlier in this judgment I referred to the Official Receiver's technical manual, and in particular to a reference contained in paragraph 31.3.79 (second subparagraph) to the need for a bankrupt having more than one residence "to elect which property was the principal residence". The concept of election as to which of two or more residences is the main residence is not unknown to the law. In the context of capital gains tax, section 222(1) of the Taxation of Chargeable Gains Act 1992 provides an exemption from capital gains tax on capital gains realised by the disposal of a dwelling house

which has been the taxpayer's only or main residence throughout the period of ownership. Where it is necessary to determine which of two or more residences is an individual's main residence for any period, the individual may conclude that question by written notice to HMRC, electing that one particular residence should be treated as the individual's main residence for the period stated: see section 222(5) of the Taxation of Chargeable Gains Act 1992.

209. Section 283A, however, contains no such provision for any election to be made (by anybody) in the case of a bankrupt's having two or more residences. Yet the Official Receiver's technical manual assumes the existence of such a procedure, without citing any authority for it. Counsel were unable to help me as to where this might be found. As at present advised, therefore, I consider that there is no such authority, and that any such "election" under section 283A has no immediate legal effect.

210. It is clear from the evidence of Mr Swift that it is usual for incoming trustees in bankruptcy to require the bankrupt provide information about residences, and if there is more than one, to state which is the principal one. As I have said earlier, Mr Swift did this, and Mrs Brake responded on behalf of both applicants. In my judgment, however, providing this information to the trustee in bankruptcy does not bind the trustee in bankruptcy so that he or she is unable to attribute the description of principal residence to any other of the bankrupt's residences. *A fortiori*, it does not bind the court. As set out above, the test is not a subjective one depending on the intentions of the bankrupt, or on his or her desire to select one particular property for revesting if not disposed of in three years' time, although that is a relevant consideration. Instead it is an objective test, dependent on the view of the "reasonable onlooker, with knowledge of the material facts".

211. I add a footnote to this. I said that a purported election would have "no immediate legal effect". By this I mean that it would not immediately bind either the bankrupt or the trustee in bankruptcy. It may perhaps be that a statement by the bankrupt in answer to a question from the trustee in bankruptcy as to which of two or more residences was the principal one could found an estoppel as against the bankrupt, if the trustee in bankruptcy relied on that representation to his or her detriment. And even vice versa. But that question does not arise in this case, and I say no more about it.

Evidence before and after the date of bankruptcy

212. The crucial date in this case is 12 May 2015, the date on which the applicants were adjudicated bankrupt. It is as at that date that I must judge the question whether the applicants had their sole or principal residence at the cottage. The evidence I have before me relates in large part to periods before and after the crucial date. I should therefore say something about the relevance of such evidence. Evidence tending to show that the applicants were solely or primarily resident in a particular place on a date *other* than 12 May 2015 is only relevant to the extent that it sheds light on the question whether they were resident or primarily resident in the cottage on *12 May 2015*. For example, evidence that they were solely or primarily resident in the cottage the day before (or the day after) would be relevant as supporting the assertion that on the crucial date they were also solely or primarily resident there, because of the inherent unlikelihood that (in the absence of some physical move) there was a change

between that day and the next one (or the preceding one). But evidence about the position six months earlier (or later) is much less probative.

Failure to call other evidence

Principle

213. Chedington complains of a failure by the applicants to call other relevant evidence. In particular, it points to Mrs Foster, Mr Peter Williams (their former solicitor), and other friends and neighbours who would have visited them at the cottage and be able to say that they were living there at the material time. Chedington relies on *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, CA. In that case, Brooke LJ (with whom Roch and Aldous LJJ agreed) said:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

214. However, as Sir Ernest Ryder SPT (with whom Sales LJ agreed) made clear in *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882:

> "30. … *Wisniewski* is not authority for the proposition that there is an obligation to draw an adverse inference where the four principles are engaged. As the first principle adequately makes plain, there is a discretion *ie* 'the court is *entitled* to draw adverse inferences'." [Emphasis added]

215. More recently, in *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm), Cockerill J, dealing with the same point, said:

> "154. In my judgment the point can be dealt with relatively briefly thus:
>
> > i) This evidential 'rule' is, as I have indicated above, a fairly narrow one. As I have noted previously ([2018] EWHC 1768 (Comm) at [115]), the drawing of such inferences is not something to be lightly undertaken.
> >
> > ii) Where a party relies on it, it is necessary for it to set out clearly (i) the point on which the inference is sought (ii) the reason why it is said that the 'missing' witness would have material evidence to give on that issue

and (iii) why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue.

iii) The Court then has a discretion and will exercise it not just in the light of those principles, but also in the light of:

a) the overriding objective; and

b) an understanding that it arises against the background of an evidential world which shifts - both as to burden and as to the development of the case - during trial.

[…]"

Application

216. The first question is whether Chedington can point to witnesses who might be expected to have material evidence to give on an issue in this case. In my judgment Mrs Foster is one such. In the trial bundle are two witness statements from Mrs Foster at earlier stages in these proceedings. Since she was not called, those are not evidence at this trial (although they were used as material for cross examination). However, those witness statements are in themselves material to the question of the principal residence at the time of the applicants' bankruptcies. And they also indicate that Mrs Foster may have further evidence which bears on this question. I do not think the same is true of Mr Williams. Although he was intimately involved with the applicants' affairs, and wrote numerous letters on their behalf, it does not appear that he had any first hand evidence of his own as to where the applicants were in fact living at any given time. There is (for example) no evidence that he visited the estate at a relevant time (unlike his partner Mr Hyde). So far as concerns the failure to call other friends, Chedington does not identify any particular candidates, and it is impossible for me to assess whether there is anyone else who would have had the necessary relevant evidence.

217. No explanation has been advanced for the failure to call Mrs Foster. It is clear that she has been willing in the past to assist the applicants, to the extent not only of buying the farm at a crucial time, but also later making two witness statements in their support in these proceedings. Her evidence would in my judgment be material to the question whether the cottage was the applicants' principal residence or not. This is an issue on which Chedington has adduced evidence and there is a "case to answer". Accordingly I have a discretion in the matter. In my judgment, bearing in mind the overriding objective and the whole background to this present litigation, I consider it would be just to draw an inference adverse to the applicants arising from their failure to call Mrs Foster. This goes to strengthen the case put forward by Chedington that the house rather than the cottage was the applicants' principal residence at the time of their bankruptcies.

Failure to give proper disclosure

Authorities

218. A further point is raised by Chedington, and this relates to alleged failures to give proper disclosure in this case. Chedington submits that, where a party has failed to provide proper disclosure, and that appears to be a conscious decision, it is open to the court to draw adverse inferences. In *Gray v Haig & Son* (1855) 20 Beav 219, Gray was the agent for the defendant distillers, to sell their products on commission. On the termination of the agency an account was ordered. But Gray had destroyed his books, essential to the taking of the account, *after* the dispute had arisen. Sir John Romilly MR said (at 226 and 229):

> "In a case before me this year, one partner, several years before the institution of the suit, and upwards of twenty years after the closing of the partnership business, and when the accounts had been settled between him and his partners by arbitration, and never afterwards opened or disputed, had destroyed the books which contained the accounts of that partnership, I treated lightly the circumstance of that destruction, and did not suffer it to prejudice his case. But the case is very different when the transactions to which they relate are recent, where the accounts arising from them have not been finally adjusted, or the balance ascertained or paid, and still more when that destruction takes place by the person who has actually filed a bill to have the accounts taken of those very transactions to which these books relate. In such a case some very cogent reason must be given to satisfy the Court that the destruction was proper or justifiable, and, in the absence of any such reason, which is the fact here, I am compelled to act on the principle laid down in the well-known case of *Armory v Delamirie*, and presume, as against the person who destroyed the evidence, every thing most unfavourable to him, which is consistent with the rest of the facts, which are either admitted or proved.
>
> […]
>
> But in all cases of contradictory evidence, whether between a witness and a Defendant, or between two witnesses who give evidence in direct contradiction to each other, with regard to a matter equally within the knowledge and cognizance of both, it is the duty of the judicial tribunal to search for facts which may corroborate or invalidate the testimony of either witness. In this case there were books containing the account of the transactions, which would have afforded clear and distinct evidence to enable the Court to judge which of the two was to be believed. This evidence Mr. Gray has himself removed, and removed, as I consider proved by his own evidence, after the contest relating to these accounts had arisen between himself and Haig & Son. He must suffer the necessary consequence of the absence of that evidence so occasioned; and I consider myself bound to believe that these books, if now forthcoming, would prove the truth of the statements contained in Rikey's evidence."

219. In *Malhotra v Dhawan* [1997] 8 Med LR 319, CA, Morritt LJ (with whom Saville LJ and Sir Patrick Russell agreed) set out these passages from *Gray v Haig & Son*, and said that counsel for Mr Malhotra

> "accepted that Rattee J had extracted the correct principle from *Gray v Haig & Son*. Accordingly, the only issue on this appeal was whether the principle had been properly applied to the facts of the case. However, before considering

that issue it may be helpful to indicate some of the limits on the application of the principle.

First, if it is found that the destruction of the evidence was carried out deliberately so to as hinder the proof of the plaintiff's claim, then such finding will obviously reflect on the credibility of the destroyer. In such circumstances it would enable the Court to disregard the evidence of the destroyer in the application of the principle. But that is not this case.

Second, if the Court has difficulty in deciding which party's evidence to accept, then it would be legitimate to resolve that doubt by the application of the presumption. But, thirdly, if the judge forms a clear view, having borne in mind all the difficulties which may arise from the unavailability of material documents, as to which side is telling the truth, I do not accept that the application of the presumption can require the judge to accept evidence he does not believe or to reject evidence he finds to be truthful."

220. In *Earles v Barclays Bank* [2008] EWHC 2500 (Mercantile, [28]) HHJ Simon Brown QC referred to this principle, saying:

> "*Documentary Evidence* by Charles Hollander QC … suggests in paragraph 10-06 of the 10th edition that *'there might be cases where it was appropriate to draw adverse inferences from a party's conduct before the commencement of proceedings.'* In my judgment there would have to be some clear evidence of deliberate spoliation in anticipation of litigation before one could legitimately draw evidential 'adverse inferences' in those circumstances. There is no such evidential basis in this case."

This case

221. Chedington relies on four alleged failures to give disclosure. The first alleged failure was not to disclose witness statements of Mrs Brake made in December 2014, January 2015 and April 2015, all of which refer to the house (rather than the cottage) as the family home, and referred to the cottage as used only when the house is booked up. The second alleged failure was not to disclose the letters sent by Mrs Brake to the arbitrator on 7 and 15 April 2015, arguing that the cottage be sold by the LPA receivers with the house and that house was their home. The third alleged failure was not to disclose any of the "everyday" documents such as bank statements, utility bills, communications from school, the GP and so on. The fourth alleged failure was to disclose the TP1 transfer form from the Vickerys to Mr and Mrs White in 2002 less than one week before the trial.

222. All of these may well be failures to disclose known adverse documents (the last would be a failure to disclose in accordance with the time limits under the CPR and court orders). And, if so, they were certainly convenient for the applicants. Chedington invites me to infer that they were deliberate failures. However, on the limited evidence before me, I cannot be satisfied that they were such deliberate failures. Accordingly, I do not consider that I may properly rely on this principle in the present case.

Drawing the threads together

The position before 2014-15

223. On the evidence before me, it is clear that the applicants' only residence before 2012 was in the main house. The cottage was not acquired until 2010 (by the partnership), the applicants required works to be done to make the cottage habitable, and until Simon Windus left in 2012 it was not in practice available for the applicants to stay in. From 2012 the applicants used the cottage to stay in when the main house was let. But they accept, and in any case I find, that from 2004 to 2014-15 their principal residence remained the main house.

The position in 2014-15

224. The applicants say their principal residence moved from the main house to the cottage in the period late 2014 to early 2015. However, the evidence is confused. Moreover, the applicants themselves were unable at trial to be clear as to when exactly they say that the change took place. Mrs Brake said in her evidence (written and oral) that their principal residence changed from the house to the cottage (i) in November 2014, (ii) in April 2015, (iii) after 7 May 2015 but before 12 May 2015 (when they were made bankrupt), and (iv) at no definite date, because it was a question of election. Mr Brake said in his evidence (written and oral) that their principal residence changed from the house to the cottage (i) at the end of 2014, (ii) during March 2015, (iii) in mid April 2015, and (iv) at the end of April 2015.

225. The applicants say that this is an unusual case, because they accept that they used both the house and the cottage to live in during the period running up to their bankruptcies. But they say that they stopped living in the house at some point before the date of bankruptcy. They also point to the fact that the two properties are less than a hundred yards apart, and that they had enough furniture, domestic appliances and personal effects in each of them to be able to move from one to the other without having to engage a removals firm.

226. They rely on a number of factors to show that they changed their principal residence before 12 May 2015 from the house to the cottage. These include (i) the insurance policy effected in November 2014, (ii) the change to the electoral address at which they were registered to vote, also in November 2014, (iii) the movement of personal items between the house and cottage in March 2015, (iv) the need for Mrs Brake's son Tom to be able to study for his GCSEs in peace and quiet during 2014-15, (v) the applicants' response in December 2015 to the enquiry from Mr Swift as to which was their principal residence as at the date of their bankruptcies, (vi) the fact that the bank's receivers were proposing to sell the house but not the cottage, (vii) visits from their friend Ms Maslin to them at the cottage in the period before and after their bankruptcies, (viii) the visit at the cottage by Mr Hyde of Michelmores in early June 2015, and (ix) the fact that the applicants did not stay overnight in the house between May 2015 and September or October 2016. I will deal with each of these points in turn.

Insurance

227. The insurance policy could only have been based on information supplied by the applicants themselves. So, in that sense, it is self-serving. But, more importantly, the cost of insurance of this kind depends very much on the use to which the property

insured is put. So that is the important question. The applicants were insuring both the main house and the cottage. The main house was undoubtedly used for business purposes, in taking paying guests. The applicants no doubt ticked a box (or chose from a drop-down menu) which showed the kind of use to which the main house was put, as "Guest House/Bed and Breakfast". They also made the choice for the cottage as "Main House/Private Use". No reasonable onlooker would accept, and I do not accept, that this shows that the cottage was their main home at this date. I *do* accept that at this date it was used (from time to time) for private residential purposes, and not for paying guests.

Change to electoral address

228. The change to the electoral address is an odd feature of this case. No change was involved in the parliamentary constituency concerned, or even the local government ward. But, at the time that the annual voter registration forms were sent out in the autumn of 2014, it was known that there would be a general election in May 2015, pursuant to the Fixed Term Parliaments Act 2011. Given that the bank had appointed receivers over the Farm in October 2014, and that there might be a sale at any time over which the applicants would have no control, it is possible that, *at that stage*, the applicants saw the cottage as the more likely of the two residences still to be available to them in May 2015. Again, no reasonable onlooker would accept, and I cannot accept, that this was part of a general policy of the applicants in consolidating their principal residence in the cottage. On the evidence before me, the applicants did not stop living in the house until May 2015, and then only because the wedding season had begun and they had bookings which meant the main house was let from then on.

Movement of personal effects

229. Mr Brake gave evidence about the movement of personal effects between the house and the cottage in March 2015. However, his evidence was that he moved small, fragile ornaments such as lamps and rugs. None of the larger, valuable furnishings required to stay in, or to run the business at, the house was removed, and the applicants retained a great many of their smaller personal effects in the house, which, when the house was let, they kept in locked rooms. The visits by Mrs Brehme on 6 March 2015 and 24 June 2015 show that they still had a great many personal effects there, both before and after the date of bankruptcy. On the latter occasion, Mrs Brake was at pains to say that there was nothing belonging to the partnership in the house, and forbade them access to it. Whether that was justified in law or not, it means that in Mrs Brake's opinion what was there belonged to the applicants. No reasonable onlooker with knowledge of the facts would accept that moving small ornaments to the cottage, whilst leaving large and valuable furniture and other personal effects in the house, so they were still able to stay in the house, showed that the principal residence of the applicants was being changed to the cottage.

Tom's GCSEs

230. So far as concerns the examinations for which Mrs Brake's son Tom was studying, it is clear that there were GCSE examinations which he was preparing to take in May-June 2015, though only in the core science subjects. It was sensible for him to have somewhere quiet to study, and the cottage suited the purpose. But I cannot accept that this would have been a sufficient or even a good reason for the applicants to move

their principal residence from the house to the cottage. On the contrary, if they move their principal residence to the cottage, then the applicants themselves would be present there more often, and thus potentially disturb the quiet to which Tom needed. No reasonable onlooker, with knowledge of the material facts, would regard Tom's studying in the cottage rather than at the house as of any importance in considering which was the applicants' principal home at the material time.

Election

231. I have already held that, as a matter of law, there is no right of a bankrupt to make an election as to which of two or more residences is to constitute the principal residence for the purposes of section 283A. Nevertheless, Mrs Brake certainly put forward the view at the trial that she thought she had elected for the cottage, and that this concluded the matter. In fact, she then modified her position, and said that her statement to the trustees in bankruptcy in December 2015 was an election of the cottage *because* it was their principal residence as at 12 May 2015. Finally, in answer to my final question, "So you were not making a choice, you were simply saying this is what the position is?" she answered "Exactly". I accept that what the bankrupt subjectively thinks and intends is a factor to be taken into account in deciding what is the principal residence at a particular time. I am also satisfied that Mrs Brake, certainly by December 2015, had decided that it would suit their purposes best for the future if their principal residence as at the date of bankruptcy were the cottage. But it is at best a factor, and by no means conclusive. It must be weighed in the balance against the other factors and in particular the objective phenomena which everyone can see.

Sale by receivers

232. The receivers were appointed over the Farm in October 2014. They permitted the applicants to continue in occupation of the house and to continue to operate their business. But it would have seemed likely that the house was going to be sold at some point in the future. The arbitrator was keen that, if the house was sold, the cottage should be sold with it, and the order of Sir William Blackburne in January 2015 gave the receivers the power to include the cottage in the sale of the Farm. The receivers marketed the properties together. Early in 2015 the applicants' friend Mrs Foster had indicated that she would try to help them and that if she was successful in buying the property they could stay on. On 1 April 2015 PWF issued a claim for an order that the cottage be sold under the terms of the charging order which it had previously obtained against the interests of Mrs Brake in the cottage.

233. It was only on 7 May 2015 that the receivers informed the applicants and others that they no longer intended to proceed with the sale of the cottage at the same time as that of the Farm. Until that point, it would have seemed just as likely that the cottage was to be sold as that the Farm was to be sold. On the other hand, if Mrs Foster was successful in her bid, the applicants would not have to move at all. It was only as at 7 May 2015 that the position changed, and then only in part. Even then (1) there was still the application by PWF for an order for that sale of the cottage and (2) Mrs Foster might be successful in her bid. Final bids were not due until 15 May 2015, after the date for the hearing of the bankruptcy petitions. No reasonable onlooker with knowledge of the facts would have considered in the run up to 12 May 2015 that the cottage was a better prospect in the medium to long term as a home for the applicants.

No such onlooker would have considered that the sale arrangements supported the view that the applicants were changing their principal residence from the house to the cottage.

Visits by Ms Maslin

234. I have already commented on the unsatisfactory nature of Ms Maslin's evidence in general. So far as concerns the particular evidence of her visits to the applicants at the cottage, most of these were after the date of bankruptcy, and mostly they were visits to Mr Brake, Mrs Brake being absent. Given that during this period there were many bookings at the house, it would have been normal to find the applicants there, because they could not stay at the house when it was let. In this respect it would not have been a different situation from, say, the year before. A reasonable onlooker knowing the material facts would not think that these visits demonstrated that the applicants had changed their principal residence from the house to the cottage, particularly in respect of the period after the bankruptcy orders when it became known that Mrs Foster had been the successful bidder.

Visit by Mr Hyde

235. Mr Hyde's visit in early June 2015 is similar to those of Ms Maslin, in that it took place at a time when there were bookings at the house and the applicants could be expected to be at the cottage anyway. The fact of the visit and the fact that the meeting was at the cottage and not the house is therefore not probative of a change in principal residence to the cottage. So far as Mr Hyde gives evidence of what Mrs Brake told him, this adds nothing to her own evidence.

Absence overnight

236. Mr Brake's evidence was that from May 2015 until September or October 2016 the applicants did not stay overnight at the house. As I have already said, I find that Mr Brake is mistaken, because they stayed at the house at least at Christmas 2015. Much of this lengthy stay in the cottage is of little probative value in deciding what was the position on 12 May 2015. But in any event the forward bookings show that in the period between May and September 2015 there would not have been much opportunity for the applicants to stay at the house anyway. It would have been peak wedding season. Again, this would be an annual pattern repeating itself. During the daytime, both applicants would have been at the house and elsewhere on the Farm directing business operations (at least until 22 July 2015, after which Mrs Brake was prohibited from doing so for six months). In my judgment, a reasonable onlooker knowing the facts would not ascribe this lengthy stay at the cottage to a change in principal residence from the house to the cottage as at the time of the bankruptcy orders on 12 May 2015. I remind myself again of what Nourse J said in *Frost v Feltham* (at 455):

> "If someone lives in two houses the question which does he use as his principal or more important one cannot be determined solely by reference to the way in which he divides his time between the two."

Discussion

237. All in all, I do not think there is anything much in the way of objective phenomena to support the reasonable onlooker, with knowledge of the material facts, in forming the view that the Brakes changed their principal residence from the house to the cottage by 12 May 2015. I have no doubt that, subjectively, Mr Brake did regard the cottage as his principal residence by May 2015. But I do not accept that Mrs Brake did. She much preferred the house to the cottage. It was bigger, grander, more comfortable and had the luxury furnishings which she was used to, as well as the equestrian facilities for their horses. It suited her lifestyle. She was prepared to stay at the cottage when necessary, because that was how she gained an income, but in my view she never ceased to regard the house as her principal residence.

238. Sometime after the bankruptcy, and certainly by July 2015, she began to assert that the cottage was their principal home, or their only home, because it suited her purpose to do so. Perhaps she had been alerted to the significance of section 283A, or perhaps she was simply concerned to prevent an order for the sale of the cottage being made. I do not know, and for present purposes it does not matter. For a long time she held the view that she had elected for the cottage to be their principal residence for the purposes of section 283A, although at the trial she told me, first, that she elected for the cottage *because* it was their principal residence, and then simply that she had made a statement of what the present position was (see [231] above).

239. Weighing up the factors, I start with the fact that the applicants' principal residence was in the house for many years, and it was only in late 2014 or early 2015 that they say they changed it from the larger, more comfortable house to the smaller less comfortable cottage (without being able to agree when this happened). I accept that the appointment of the receivers would have prompted a consideration of what would happen in the future. However, the receivers were from an early stage proposing to deal with the cottage as well, and only renounced this intention a few days before the bankruptcy date. Accordingly, I cannot see that any reasonable onlooker would regard this as a good reason for changing one's principal residence from one of the properties to be sold to another (even if there were any outward sign at that time). This was particularly so once Mrs Foster had expressed her interest in seeking to acquire the whole estate so that the applicants could stay there. As it happens, Mrs Foster was successful, and the applicants did stay there.

240. In my judgment, there is nothing in any of the matters relied upon by the applicants (whether taken separately or together) which shows objectively that they had changed their principal residence from the house to the cottage by 12 May 2015. On the contrary, they still had all their luxury furniture and furnishings in the house, they continued to occupy it by day, and to live in it overnight when it was not let (for example at Christmas 2015), and, when it was let, they locked up rooms with their personal effects in.

Conclusion on the residence issue

241. In my judgment, on the evidence before me the applicants had not changed their principal residence from the house to the cottage by 12 May 2015. Accordingly, for the purposes of section 283A, I hold that their principal residence as at the date of their bankruptcies was the house. That means that the claim to revesting under that section must fail, whatever the result in relation to the interest issue and the dwelling-house issue.

OVERALL CONCLUSION

242. For the reasons I have given, I dismiss this application under section 283A. I am very grateful for all counsel and solicitors involved for their assistance in this complex but interesting dispute. I will hand down this judgment remotely, in accordance with the Covid-19 Protocol, and deal with consequential matters thereafter, in the first instance on paper. I should be grateful to receive written submissions by 4 PM on 14 July 2020, with written submissions in reply by 4 PM on 17 July 2020.

Postscript

243. After I had circulated this judgment in draft, both sides made suggestions for correction. Chedington asked me to remove short passages from paragraphs 77 and 81 above. These were:

> "77. … for their own purposes, though not for the purposes of the wedding and holiday letting business. Instead, this business was carried on by a lady called Rebecca Holt on behalf of Mrs Foster, until 23 January 2016, when (the injunction having lapsed) Mrs Brake took over in that capacity."

and

> "81. … for their own purposes, even though they were not allowed to carry on the wedding business."

The request was made on the basis that

> "this was not an issue in these proceedings (since it postdates bankruptcy) but is a central issue in the Documents Claim which should not be pre-judged."

244. The applicants were able in their own suggestions to comment on this suggestion because they did not serve their list of suggested corrections at the same time as Chedington, but only on the following day. They said that, if prejudice by reference to other proceedings were a criterion for correcting the draft judgment, they would have made several similar suggestions, but they considered that this went beyond the scope of review of a draft judgment. They also said that these were

> "core findings based on the evidence led at trial … about the quality and purpose of the Brakes' occupation of the house from the time it was purchased by Mrs Foster. This relates back to and complements the findings about intention (objectively assessed) as at the date of bankruptcy."

245. I do not agree that what I said in the passages objected to were *core* findings, but they were certainly findings on the evidence before me. They were marginally relevant to the factual issue which I had to determine about the principal residence of the applicants as at 12 May 2015. However, they were not issues in themselves and, as I observed above, since they relate to the period after 12 May 2015, their probative weight was small. I do not think that either passage was *necessary* to my decision, but I was telling the story as I found it on the evidence. In these circumstances I see no prejudice to Chedington, and no reason to remove them. Accordingly, they have been

retained. I do not need to decide whether, if they had caused prejudice to Chedington, it would have been right to entertain the application to remove them.

246. I should also add that the applicants in their suggestions asked me to alter some passages in paragraphs 228 and 234 (now 231 and 238), by reference to an extract from the transcript. Having considered that passage, I consider that what I wrote was strictly accurate, but I have added some more words to make the points clearer, and so that the applicants do not think that I have ignored the transcript.

247. Finally, I mention that, in finalising this judgment for hand-down, I have taken the opportunity to subdivide some longer paragraphs. This means that the paragraph numbers from the draft and the final versions do not coincide all the way through. I am sorry if this causes any inconvenience.