Neutral Citation Number: [2020] EWHC 537 (Ch)
Case No: 21 of 2019 and 166 and 167 of 2015

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

IN THE MATTER OF STAY IN STYLE (IN LIQUIDATION)
AND IN THE MATTER OF NIHAL MOHAMMED KAMAL BRAKE
AND IN THE MATTER OF ANDREW YOUNG BRAKE
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Before HHJ Paul Matthews (sitting as a High Court Judge)

B E T W E E N :

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(as trustees of the Brake Family Settlement)
AND OTHERS

Applicants/Respondents

and

(1) SIMON LOWES
(2) RICHARD TOONE
(as joint liquidators of the Stay in Style Partnership (in liquidation))
(3) DUNCAN KENRIC SWIFT
(as former trustee in bankruptcy of Nihal Brake and Andrew Brake)
(4) THE CHEDINGTON COURT ESTATE LIMITED

Respondents/Applicants

APPLICATIONS HEARING ON 2 AND 3 MARCH 2020

AT THE ROLLS BUILDING

ANDREW SUTCLIFFE QC AND WILLIAM DAY (Instructed by **Stewarts**) appeared on behalf of The Chedington Court Estate Limited

STEPHEN DAVIES QC AND DAISY BROWN (Instructed by **Seddons**) appeared on behalf of Mr and Mrs Brake

Monday, 2 March 2020

(12.28 pm)

Ruling on striking out the Bankruptcy Application

HHJ PAUL MATTHEWS:

1. Because of the pressure of time, I will not give as full a judgment as I might otherwise have done, but I hope this will be sufficient to explain my decision. This is an application on behalf of the Chedington Court Estate Limited to strike out some parts of an application brought by Mr and Mrs Brake, dated 12 February 2019, which has been referred to by various names at different times, but for present purposes I will call the Bankruptcy Application.

2. This application seeks certain relief, in fact, quite a long list of different relief, but the points which are in issue in this application to strike out are the relief in respect of a transaction concerning a cottage known as West Axnoller Cottage and also a ransom strip of land adjacent. The ransom strip belonged to Mrs Brake personally until she became bankrupt in 2015. The cottage itself was vested in the Brakes and a Mrs Brehme, who was an investor (through another company) in a partnership, known as Stay-in-Style, on trust for for the benefit of that partnership. This partnership is also in liquidation.

3. The paragraphs in the prayer which are under attack are (a), (b), (f), and such parts of (c) as are ancillary to the relief concerning the transaction. S amended, they read as follows:

> "(a) An order reversing Mr Swift's decision to enter into the Contracts

(b) An order that the contract be set aside

(c) A declaration that the Licence is invalid and/or unlawful and/or of no effect and/or a direction that Mr Swift withdraw or otherwise terminate the Licence

(f) In the alternative to (d) and (e) above, a sale of Mr Swift's interest in the Cottage under the direction of the court".

4. There were proceedings between the Brakes and Mrs Brehme in 2012 and there was also a claim by Mr and Mrs Brake to the cottage by way of a proprietary estoppel. When Mr and Mrs Brake became bankrupt in 2015, that claim would have vested in their trustees in bankruptcy. There is an issue about the revesting of the claim to the cottage in Mr and Mrs Brake under section 283A of the Insolvency Act 1986, which will be dealt with partly at a trial in May before me and partly in other proceedings.

5. So, in the Bankruptcy Application, the Brakes say that the transaction concerning the cottage and the ransom strip should be set aside, and as a consequence they would have the opportunity to get back the cottage. The Chedington Court Estate Limited says that the Brakes have no sufficient standing to bring the bankruptcy application in relation to relief sought in relation to the cottage transaction. The bankruptcy occurred in 2015, and the Brakes were discharged from that bankruptcy after a year, in the usual way, but of course the property of the bankrupts would have vested in the trustee in bankruptcy.

6. The partnership was also in liquidation, and in early 2019 the liquidators entered into a transaction, and sold the cottage to the trustee in bankruptcy at

that time, Mr Duncan Swift. It is that transaction which is sought to be impugned. Mr Swift then immediately sold, or subsold, such interest as he might have had in the property to the Chedington Court Estate. It is obvious that, if the claim of the Brakes for revesting of the cottage in them under section 283A is successful, the property will not have been sold by the trustee in bankruptcy to the Chedington Court Estate Limited, and, so far as it goes, these present applications would have been largely if not wholly futile.

7. The Brakes claim both as trustees of the Brake family settlement (first and second applicants) and *also* as the bankrupts, or now former bankrupts (third and fourth applicants). I mention in passing that this is an irregularity, because parties should not appear on the record in two separate capacities. There are a number of authorities which deal with that (see *eg Armstrong v Armstrong* [2019] EWHC 2259 (Ch), [8]-[9]), but I do not pause to deal further with it now. In the present case it does not make any difference in substance, at least for present purposes. The Bankruptcy Application is brought, firstly, as against the ex-trustee in bankruptcy, Mr Duncan Swift, and, secondly, as against Chedington Court Estate Limited. It is a claim under section 303 of the Insolvency Act, which is the relevant provision dealing with attacking the decisions of trustees in bankruptcy.

8. The arguments put forward by the Chedington Court Estate for saying that the Brakes have no standing in the bankruptcy application are these, in summary form. It says that the test for standing is that laid down by Lord Millett in *Deloitte & Touche v Johnson* [1999] 1 WLR 1605, 1611D-F, H. That was a liquidation case, and therefore fell under the equivalent of section 168 of

the Insolvency Act. I say "the equivalent of" because *Deloitte* was a Privy Council case and not actually under the UK insolvency legislation as all.

9. In that case Lord Millett said on behalf of the Board (at 1611D-F, H):

> "Where the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the plaintiff submits, that he 'has an interest in making the application or may be affected by its outcome.' It means that he has a legitimate interest in the relief sought. Thus even though the statute does not limit the category of person who may make the application, the court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor: see *In re Corbenstoke Ltd. (No. 2)* [1990] B.C.L.C. 60. This case was criticised by the plaintiff: their Lordships consider that it was correctly decided…
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> The company is insolvent. The liquidation is continuing under the supervision of the court. The only persons who could have any legitimate interest of their own in having the liquidators removed from office as liquidators are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors. The liquidators are willing and able to continue to act, and the creditors have taken no step to remove them. The plaintiff is not merely a stranger to the liquidation; its interests are adverse to the liquidation and the interests of

the creditors. In their Lordships' opinion, it has no legitimate interest in the identity of the liquidators, and is not a proper person to invoke the statutory jurisdiction of the court to remove the incumbent office-holders."

10. Chedington relies also on *Re Edennote Limited* [1996] BCC 718, CA, where Lord Justice Nourse referred to persons being outsiders to the liquidation and, therefore, not having standing. He said (at 721F-H):

> "It is neither necessary nor desirable to attempt a classification of those who may be persons aggrieved by an act or decision of a liquidator in a compulsory winding up. On the footing that the claims of secured creditors have been or will be satisfied, it is perfectly clear that unless and until there proves to be a surplus available for contributories (a most improbable event) 'persons aggrieved' must include the company's unsecured creditors. If the liquidator disposes of an asset of the company at an undervalue, their interests are prejudiced and each of them can claim to be a person aggrieved by his act. Such was the position of the applicants here. Mr Rayner James submitted that they brought the application not as creditors but as persons who had not been given an opportunity to make an offer for the asset. In the latter capacity alone, like any other outsider to the liquidation, they would not have had the locus standi to apply under s. 168(5)."

That was a case where the persons judged to be outsiders to the liquidation had (as is claimed in the present case) been denied the opportunity to purchase a particular asset of the company in compulsory liquidation.

11. I was also referred to the Court of Appeal's later decision in

Mahomed v Morris [2001] BCC 233, where Lord Justice Peter Gibson (at [24]) had agreed with the Court of Appeal in *Re Edennote* that persons who were denied the opportunity to purchase an asset who were outsiders could not attack the decision under section 168 (as it was there). The lord justice said that there was no authority cited that a person not being a creditor or contributory could challenge the decision of the liquidators with, he said, one exception. That was the case of *Re Hans Place Limited* [1992] BCC 737, where a liquidator disclaimed an onerous lease. Of course, that meant that the landlord ceased to be, or could not be, a creditor in the liquidation and, therefore, his financial interests *in the liquidation* were affected. Finally, I was referred to *Carter v Bailey* [2020] EWHC 123 (Ch), where (at [49]) Chief Insolvency and Companies Court Judge Briggs defined the test for standing as "a recognisable economic interest in the insolvent estate".

12. The applicant here, Chedington Court Estate, says the position is no different when you are dealing with a bankruptcy, as opposed to a liquidation. It referred me to the decision of Mr Justice Harman, as he then was, in *Re a Debtor (No 400 of 1940)* [1949] Ch 276. There the judge held in terms that a bankrupt would only have standing to challenge the decision of the trustee in bankruptcy where there was likely to be a surplus in the estate. However, in the present case, there is no evidence that there is likely to be a surplus in this bankrupt estate.

13. It also referred to *Engel v Peri* [2002] EWHC 799 (Ch), a decision of Mr Justice Ferris, where the judge however said (at [18]) that the likelihood of a surplus was “not a universal requirement”, and that there could be cases

other than simply those where there was likely to be a surplus, where the bankrupt had "some substantial interest which has been adversely affected". In that particular case, the application was made by the bankrupt to challenge the fees and charges made by the trustee in bankruptcy because that would have an impact on the application for a conditional annulment of the bankruptcy. That bankrupt was held in those circumstances to have standing.

14. So, having looked at those tests, Chedington Court Estate Limited asks me to consider, separately, (i) the Brakes as trustees of the Brake family settlement and (ii) the Brakes as bankrupts. It says that the Brakes as trustees of the family settlement have no legitimate interest in any of this relief. They are outsiders. They are not creditors of or contributories to the bankruptcy estate. Their only complaint is that they were denied the opportunity to acquire the cottage, and Chedington says that *Re Edennote* and *Mahomed v Morris* are against them on this point.

15. In relation to the Brakes *as bankrupts*, of course they do have, and it is accepted that they have, a proper interest in the claim to the revesting of interests in the cottage under section 283A, which will be dealt with partly at the trial in May and partly in other proceedings, and they also accept that they are interested in relief in relation to boxes of documents which they say were taken from them. But Chedington says they have no legitimate interest in the relief which relates to the transaction about the cottage.

16. On the other side, the Brakes have put forward significant arguments to say why that is not right. There are also a couple of points of criticism of the way

in which the Chedington Court Estate has gone about making this application, and points have been made about the alleged enormity of what is said to have happened, the rigging, essentially, of the bidding process. All that is in the future. I am in no position to judge the truth of that at this stage.

17. So what the Brakes say is that, if you look at section 168 of the Insolvency Act, you see that the test is whether that person is "a person aggrieved". That is a person who has standing. They refer to cases like *Mahomed v Morris* and *Re Edennote*, and they say that it is not just creditors and contributories who can challenge the decisions of liquidators and trustees in bankruptcy, it is anyone directly affected by the exercise of the power who has no other right to challenge the exercise of that power. They say that they are persons aggrieved. They say there is no need to show that there will be, or is likely to be, a surplus in the bankruptcy. That is something that applies only when you are talking about negligence claims, which might increase the estate sufficiently to pay off the debts and give the bankrupt a financial interest in the estate.

18. But, over and above that, the Brakes say that a bankrupt, who is also a bidder for property, is entitled to challenge the decision of the trustee in bankruptcy when an allegation is made that the process was in some way unfair, let alone when, as is here alleged, it was rigged. A number of cases were referred to, including *Woodbridge v Smith* [2004] BPIR 247 and *Hellard v Michael* [2009] EWHC 2414 (Ch).

19. One problem that I think the Brakes did not face up to sufficiently was that there is, as indeed is shown by the way in which the Brakes approached

pleading this application, a difference between the Brakes as trustees of the family settlement and the Brakes as bankrupts. The Chedington Court Estate Limited were careful to distinguish between those two capacities. As trustees of the family settlement, the Brakes are essentially outside the insolvency process, because they are the trustees of property for the benefit of other people. It is a matter of chance that the same persons happen to be trustees of the settlement as happen to be the bankrupts themselves.

20. So in that respect, there is an important point, because the trustees of the family settlement, as I say, are not the bankrupts as bankrupts. You test their situation in a different way from the bankrupts. But the bankrupts personally are not the bidders, so you do not look at the bankrupts as if they were the bidders.

21. I think that, in these circumstances, it is much more difficult for the Brakes to show that they are persons with a sufficient interest. It is true, as Mr Davies QC said, the decision of the (two-judge) Court of Appeal, in *Faryab v Smith* [2001] BPIR 246, proceeded on the basis that the bankrupt had standing to challenge a decision of the trustee in bankruptcy, even though there was no suggestion -- and indeed it was not even mentioned -- that there was likely to be a surplus in the bankruptcy. So the argument is that the test laid down in cases like *Re a Debtor* cannot be a sufficient test for this purpose. But it is also true that the case of *Re a Debtor* was not cited to the Court of Appeal in that case, so we do not know how the court would have dealt with it.

22. In any event, however, it seems to me that such force as the *Faryab v Smith* decision may have is compromised by two things. First there is the fact that

the matter of standing was not raised or dealt with, and a decision where a point is not argued or decided is not a strong authority in the first place. And, secondly, the Court of Appeal was not referred to its own decision in *Mahomed v Morris* some ten months earlier, in which that Court had made clear that there was a need for some substantial financial interest in the outcome. So I respectfully put on one side the case of *Faryab* as not assisting the Brakes in their arguments.

23. The Brakes also said that they were interested because of the interest they had in the property under section 283A. Here I am afraid that I simply disagree. That is a claim which may or may not be good. It is being dealt with in other litigation. The application put forward in this case by Chedington does not touch the relief being sought in relation to section 283A. In any event, it seems to me that if the Brakes are right about this, as of course they may turn out to be, then they will have the property, and the contract, of which they complain so bitterly, will, in fact, not operate on anything because the sale by the trustee in bankruptcy to Chedington was only of such interest as the trustee in bankruptcy might have in the property. Accordingly, if the trustee in bankruptcy never had an interest because it had already revested, then the contract is nothing and it is all irrelevant. If, on the other hand, the Brakes do not have an interest under section 283A, then it does not add anything to the question of standing. That is not a question which will be decided in this hearing.

24. Mr Davies did, however, make an interesting point about the revesting argument. He says that the point here is not just that they get back the

property, it is also that they get back the property *free of partnership interests*. In other words, because they are acquiring the property, they will get the property. If they were able to acquire the property from the liquidators of the partnership in the bidding process, as they say they should have done on their case, then they will take free of the creditors of the partnership and they will be effectively masters of the cottage, entirely free of other interests.

25. The problem with that argument, as it seems to me, is that the transaction itself occurred in the liquidation, and indeed that is what is complained of, that the bidding occurred in the liquidation, and that they did not get a fair crack at bidding for it because the trustee in bankruptcy came in with a rigged bid on behalf of Chedington. That is the allegation. So it did not happen *in the bankruptcy*. It seems to me, therefore, that this point made by Mr Davies is not relevant to the bankruptcy application, although it may be relevant to the liquidation application.

26. Mr Davies also made the point that, in the Court of Appeal's decision in *Re Edennote*, there is stated to be an exception to the rule about requiring a substantial financial interest for standing where there is fraud and bad faith, and he sought to persuade me that this exception would include fraud on a power. It seems to me that it does not. What Lord Justice Nourse was saying, in the context in which he said it, in my judgment was confined to fraud in the normal, if you like, common law sense of the word, where there is deception or deceit being practised. As is well known from all the authorities, including, for example, the decision of the Privy Council in *Vatcher v Paull* [1915] AC 372, 378, a fraud on a power does not need to involve any such

fraud. So in my respectful opinion, this point does not assist Mr Davies QC.

27. So, overall, I am of the opinion that the application made by Chedington Court Estate to strike out the bankruptcy application in relation to relief (a), (b) and (f), and such parts of (c) as are ancillary to that concerning the transaction, succeeds and, therefore, I will strike out the bankruptcy application to that extent.

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