Neutral Citation Number: [2022] EWCA Civ 1302

Case No: CA-2022-000488

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
His Honour Judge Paul Matthews (sitting as a Judge of the High Court)
[2022] EWHC 366 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/10/2022

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
LORD JUSTICE ARNOLD

- -

Between :

Brake & Ors	**Appellant**
- and -	
The Chedington Court Estate Ltd	**Respondent**

- -
- -

Alexander Learmonth KC and Jon Colclough (instructed by **Direct Access**)
for the **Appellant**
Andrew Sutcliffe KC and William Day (instructed by **Stewarts Law LLP**)
for the **Respondent**

Hearing dates : 26 July 2022

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Approved Judgment

Lord Justice Lewison:

Introduction

1. This appeal concerns West Axnoller Cottage ("the cottage") near Beaminster in Dorset. The parties are, on the one hand, Mr and Mrs Brake, and, on the other The Chedington Court Estate Ltd ("Chedington"), which is a company ultimately controlled by Dr Guy. The parties have been in litigation for many years and this is only the latest round in that ongoing dispute. The issues we have to decide are:

    i) Whether Mr and Mrs Brake are entitled to relief on the ground that they were unlawfully evicted from the cottage on 18 January 2018; and

    ii) Whether Mr and Mrs Brake are now entitled to recover possession of it.

    HHJ Judge Paul Matthews, sitting as a High Court Judge in the Business and Property Courts in Bristol, decided both questions against Mr and Mrs Brake. This was one of a large number of actions between these parties that the judge has tried. The trial of this action took place over many days between 12 and 29 October 2021. The judge's judgment is at [2022] EWHC 366 (Ch).

The background facts

2. The judge set out the facts in great detail, but for the purposes of this appeal the following summary (largely taken from the skeleton argument filed on the Brakes' behalf) will suffice.

3. In September 2004, Mrs Brake bought West Axnoller Farm, Dorset which included a substantial dwelling-house known as Axnoller House. Adjoining West Axnoller Farm, on the other side of the drive to Axnoller House, is the cottage. In February 2010 the Brakes entered into a partnership with Patley Wood Farm LLP, whose principal was Mrs Lorraine Brehme. The Brakes contributed West Axnoller Farm as partnership property. The partnership was in the business of holiday lettings and events such as weddings. The partnership was regulated by means of a partnership deed. The trading name of the partnership was Stay in Style.

4. The partnership acquired the cottage after the date of the partnership agreement, on 8 April 2010. It was registered in the names of Mr Brake, Mrs Brake and Mrs Brehme; but it was partnership property, as contemplated by the partnership deed itself. Until 2012, the cottage was used by employees. From 2012 onwards, it was used by the Brakes when Axnoller House was let.

5. A partnership dispute arose, which was referred to arbitration. Mr and Mrs Brake were the unsuccessful parties. Following a failure to pay costs orders, they were made bankrupt on 12 May 2015. The appointed trustee in bankruptcy was Mr Swift. He has since been replaced by Ms Kicks and Mr Nimmo, but since he was the trustee at the time of the events in question, that does not matter; and I will continue to refer to him as if he had remained the trustee. Mr Swift did not grant the Brakes any licence or consent to occupy the cottage. The partnership went into administration in 2016 and liquidation in 2017. Because the cottage was partnership property, the three registered

proprietors held their legal title on trust for the partnership and, after its liquidation, on trust for the partnership's creditors. On 6 January 2016 Chief Master Marsh made an order which recorded that the three partners had agreed that the cottage be sold as part of the winding up of the partnership.

6. Adam & Co, the mortgagee of West Axnoller Farm, appointed receivers in October 2014. West Axnoller Farm (but not the cottage, which was not mortgaged) was sold to a company called Sarafina Properties Ltd in July 2015. The sole shareholder of Sarafina was Saffron Foster, a friend of Mrs Brake, who was also its director.

7. Mrs Foster sold the single share in Sarafina to Chedington, a company owned and controlled by Dr Guy. Sarafina's name was changed to Axnoller Events Limited ("AEL"). The Brakes operated the business at West Axnoller Farm and continued to stay at Axnoller House; and at the cottage when Axnoller House was let out for weddings.

8. Relations between the Brakes and Dr Guy broke down in November 2018. The Brakes' employment was terminated and they were ordered in a letter to leave Axnoller House. But the Brakes did not leave, and continued to stay in Axnoller House.

9. Until Mr and Mrs Brake's bankruptcies in May 2015, they used the cottage when Axnoller House was let, usually at weekends, in connection with weddings. It was relatively straightforward for them to move between the two as they had sufficient furniture, clothes and equipment in the cottage. Nearly all the Brakes' living expenses at the cottage were paid for by Sarafina apparently on the basis that the Brakes only stayed there in order to further the wedding and events business by making it possible to let the main house. Otherwise, they lived at Axnoller House. Following their bankruptcies in May 2015, the Brakes moved into the cottage and stayed there, rather than Axnoller House, with limited interruptions until at least October 2016. Thereafter, the Brakes moved back into Axnoller House and continued to use the cottage as they had done pre-2015, i.e. when Axnoller House was let. During the entire period (and, in fact, until the eviction on 18 January 2019), the Brakes had the only keys to the cottage. Initially, there were two keys, but one was lost and the remaining key was left in a variety of hiding places. Although the only people who stayed overnight at the cottage were the Brakes, the judge found that they stayed overnight, not when they wanted to, but "only when they absolutely had to". Indeed, at [60] the judge found that the Brakes "hated having to stay in the cottage for weddings." The Brakes' overnight stays at the cottage ceased on their dismissal on 8 November 2018. Although Mrs Brake's son Tom D'Arcy stayed overnight occasionally, those stays ceased on about 20 December 2018. Mrs Brake had had medical procedures which required her to take medication on a daily basis; but the judge found that she did not keep her medication in the cottage: it was kept in Axnoller House. As the judge found, she was living and sleeping entirely at Axnoller House. The Brakes did, however, make occasional daytime visits to the cottage and they continued to hold the only key. The judge also took into account (as he was entitled to do) statements made by or on behalf of the Brakes in related proceedings that Axnoller House was their sole residence. The judge concluded this section of his judgment at [50] by saying:

> "Taking into account also the evidence of Mr Lyons as to what he found on entering the cottage (as to which, see below) I find that neither of the Brakes nor Tom D'Arcy occupied the cottage *as a residence* at the time that Chedington entered on 18 January 2019." (Original emphasis)

10. On 2 January 2019 the liquidators of the partnership accepted an offer from Chedington to buy the partnership's interest in the cottage. But the liquidators were unwilling to take legal action (even if financed by Chedington) to take steps to remove the Brakes from the legal title. A new plan, which the judge described as Plan B, was then put into place. The judge described that plan at [70] as follows:

> "In its final form, Plan B was as follows. Chedington would put Mr Swift in funds so as to enable him immediately to buy such right and title to the cottage as the liquidator could sell. Mr Swift would then enter into a back-to-back conditional sale to Chedington of such right and title to the cottage as Mr Swift then had, but also clean registered title as a result of an application to the court by him (financed by Chedington). In addition, and in order to demonstrate an appropriate benefit to creditors of the partnership a facilitation fee would be paid by Chedington to Mr Swift, of £30,000 (plus VAT) on the execution of the contract, together with £3000 (plus VAT) per month until completion of the transfer enabling full registration, with a maximum of 12 successive months."

11. On 15 January 2019 two agreements were executed. The first was between the liquidators and Mr Swift by which the liquidators agreed to sell such right, title and interest (if any) as the partnership had and could transfer in the beneficial and/or equitable interest in the cottage. The second was a contract between Mr Swift and Chedington for the sale of the cottage. It was a conditional contract. The conditions were:

> "all of: (a) the receipt of the Court Order pursuant to clause 3.1; (b) the execution of the Transfer by [Mrs Brehme] pursuant to clause 3.2; and (c) the execution of the Transfer by [Mr Swift] pursuant to clause 3.3"

12. That material terms of that agreement were:

> "**2. Sale and Purchase**
>
> 2.1. Subject always to the satisfaction of the Conditions Precedent, [Mr Swift] will sell and [Chedington] will buy the Property, for the Purchase Price on the terms of this contract.
>
> […]
>
> **3. Condition Precedent**

> 3.1. [Mr Swift] agrees to make the Court Application as soon as is reasonably possible and thereafter use best endeavours to procure the Court Order.
>
> 3.2. Upon receipt of the Court Order:
>
> 3.2.1. [Mr Swift] shall supply a copy of the Court Order to [Chedington] within 10 working days of receipt; and
>
> 3.2.2. [Mr Swift] shall use best endeavours to procure [Mrs Brehme's] execution to the Transfer.
>
> 3.3. Once the Transfer has been executed by [Mrs Brehme] [the trustee] will execute it in such capacity as he shall be authorised to do so pursuant to the Court Order.
>
> […]
>
> **8. Vacant Possession**
>
> The Property is not sold with vacant possession but sold subject to any occupational interests that may exist at completion.
>
> **9. Title Guarantee**
>
> The Trustees will transfer the Property with no title guarantee and no covenants for title, whether express or implied.
>
> **10. Matters Affecting the Property**
>
> 10.1. The Trustee will sell the Property subject to all incumbrances … "

13. Mr Swift executed a further document on that day. It was a licence granted by him to Chedington in relation to the cottage. The terms of the licence provided that Chedington was permitted to occupy the cottage as a residential property in common with Mr Swift and all others authorised by him. Clause 2.2.3 of the licence contained an acknowledgement by Chedington that Mr Swift retained control, possession and management of the cottage; and that Chedington had no right to exclude him from it.

14. There was a hearing in the County Court at Yeovil on 17 January 2019 (i.e. one day before the eviction). The Brakes gave undertakings to the court that they would permit weddings to be conducted at Axnoller House. At the hearing, counsel for AEL told the Judge "if we are the owner of the cottage, we would permit the [Brakes] to occupy the cottage during the wedding". He also told the judge that AEL was in the process of acquiring it and that "if in the intervening period of time, we acquire title to it, then we will permit access to it on the occasion of the weddings."

15. Why Mr Swift did not apply to the court to remove the Brakes from the title and to claim possession from them is both mysterious and unexplained. Nor is there any evidence that he complied with his obligations under clause 3.1 of the sale contract;

which is again unexplained. Had he done it so, it is likely that the current litigation would have been avoided.

16. Instead, on 18 January 2018 a team assembled by Chedington took possession of the cottage without a court order by gaining entry and changing the locks. On gaining entry, the team taped a letter written by Mr Swift dated 15 January 2019 to the door. It read:

> "I am the trustee in bankruptcy in the bankruptcy estates of Mrs NMK (Alo) Brake and Mr AY (Andy) Brake, having been appointed on 29 July 2015. Copies of my certificates of appointment are attached.
>
> I have today purchased all title, rights and interest in [the cottage] from the Liquidators of the Stay in Style partnership. It has previously been accepted by all interested parties and the High Court, as recited in the order attached, that the Cottage was a partnership asset.
>
> Accordingly as from today I am entitled to possession and unfettered access to the Cottage. I am also entitled to use reasonable, lawful and appropriate measures to gain entry to, and to secure, the Cottage.
>
> On the basis of my interest in the Cottage, I have today granted a Licence to Occupy the Cottage to The Chedington Court Estate Ltd (company registered number: 10571885), with immediate effect.
>
> Please, therefore, take this letter as my confirmation that employees and agents of The Chedington Court Estate Ltd have my authority to enter and use the Cottage in accordance with the Licence to Occupy that I have granted, and this letter is evidence of that authority."

17. Mr Lyons, one of the members of the team, was the first to go inside. He found no-one inside. Mr Lyons said that there was no sign of anyone living there. He explained this conclusion by discussing what he found in each room. He said that there was no food or milk in the fridge, apart from some canned drinks, and the freezer was empty. In the downstairs bedroom there were some personal possessions and clothing. The ensuite bathroom had shower gel and deodorant, but no toothbrush or towels. The upstairs bathroom had uplifted floor beams because building work had not been finished. It had soap and shower gel, but no towels, toilet paper or toothbrushes. The drawers in the bedroom did not contain clothes. Although there were duvets on the beds they had no covers on them, and neither were there any sheets. The heating was not on. The cottage did contain some of the Brakes' personal possessions. Chedington produced an inventory of what they said was in the cottage and asked the Brakes to identify what they claimed belonged to them (as opposed to the bankruptcy estates) but apparently they did not do so.

18. The judge concluded at [89]:

> "I am satisfied on the evidence that the cottage was not the Brakes' home, or even a part of their home, as at 18 January 2019. It was a kind of annex, in which they stored things, where Tom D'Arcy went to play computer games, and where the Brakes had reluctantly stayed overnight in the past when there was a wedding, and did not intend to do so again until there was another wedding, some months away."

19. On the other hand, at [176] the judge said:

> "I take into account all the evidence, including the evidence of control of the cottage and its access by the Brakes, which was well known to AEL's employees, the negotiations conducted by Mrs Brake on behalf of Chedington to acquire the cottage, and the significant use that was made of the cottage for the benefit of AEL's business (by freeing up the house for letting). In my judgment, on the whole of the evidence before me, I find that the Brakes *did* have, and did unequivocally demonstrate, the intention "in [their] own name and on [their] own behalf, to exclude the world at large, including the owner with the paper title … so far as reasonably practicable". They had not abandoned possession of the cottage as at 18 January 2019." (Original emphasis)

20. The current action was begun when the Brakes issued a claim form on 3 April 2019. The claim form asserted that the Brakes were the registered proprietors of the cottage and entitled to exclusive possession of it. It pleaded their forcible exclusion from the cottage on 18 January 2019. The relief relevant to this appeal claimed was:

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

    ii) Immediate delivery up of possession of the cottage.

    iii) A declaration that Chedington is a trespasser on the cottage.

    iv) An injunction restraining Chedington from interfering with the Brakes' right to occupy the cottage.

    v) An enquiry into damages.

21. The defence relied on the licence granted to Chedington by Mr Swift as entitling Chedington to change the locks to the cottage and to exclude the Brakes.

The judge's judgment

22. Although it will be necessary to refer to some of the judge's reasoning in greater detail later, I can summarise his conclusions as follows.

23. There is a distinction between a claim in trespass and a claim in ejectment. The former is only available to a person who is still in possession. The latter is the proper

claim for a person who has been ousted from possession. The former cause of action concentrates on possession. The latter requires the person out of possession to establish a better title than the person in possession. The Brakes' claim is the latter.

24. The Brakes had no licence to occupy the cottage, because it is not legally possible for two out of three co-owners to grant a licence to two of their number. Even if a licence had been granted it could not have survived the liquidation of the partnership. Moreover, all that the Brakes claimed to have was a licence, which was not enforceable against third parties. Although the court had the power to grant a remedy to a licensee for the purpose of vindicating the rights granted by the licence, since the Brakes had no remaining beneficial interest in the cottage, it was not necessary for the court to grant any remedy in order to vindicate that licence.

25. So far as the Brakes' title based on possession was concerned, they were in possession of it at the date of the eviction. That was sufficient to enable them to bring an action for the recovery of land. The question, therefore was whether Chedington had a better title.

26. Although the Brakes also claimed to be entitled to the benefit of the Protection from Eviction Act 1977, that claim failed for a variety of reasons; not least because they were not continuing to reside in the cottage at the date of the eviction.

27. Chedington's title was as licensee of the beneficial owner of the cottage (the trustee in bankruptcy). If trust property is occupied by the sole beneficiary with an interest in possession, and the trustees brought proceedings to recover possession of it, the beneficiary would have a good equitable defence to that action. If the beneficiary would have had a good equitable defence, then a person to whom he delegates the exercise of that right, such as a licensee has the same rights as the beneficial owner. His occupation is occupation on the beneficiary's behalf.

28. Even if the beneficiary was out of possession, and brought an action against the trustees seeking possession, he would be entitled to an order for possession. In addition, the court may grant a remedy to a licensee against a trespasser so far as is necessary to vindicate his rights under the licence.

29. Accordingly the Brakes claim to possession failed, and no question of damages arose.

The grounds of appeal

30. The Appellant's Notice raised three grounds of appeal:

    i) The judge was wrong in dismissing the Brakes' unlawful eviction claim brought on the basis that they had better title than Chedington.

    ii) The judge was wrong to dismiss the claim under the Protection from Eviction Act 1977; and his finding of fact that the Brakes were not residing in it was one that no reasonable judge could have made.

    iii) The judge was wrong not to have granted the Brakes an order for possession of the cottage.

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

The action in ejectment: a brief history

32. In medieval times, disputed claims of title were dealt with by an array of complicated actions called the "real actions". They all revolved round the concept of "seisin" which was essential to medieval land law. The procedure got ever more complicated and dilatory. So the lawyers looked for an escape route. They found it in the action of ejectment ("*de ejectione firmae*") which was an action which did not require seisin. It only required possession; and an allegation that the person with possession had been dispossessed. Under the medieval scheme of things, a lessee for a term of years did not have seisin, but he did have possession. Freeholders began to press this form of action into use; but they first needed to create a lease. At the inception of the use of this procedure, the lease was a real lease, but over the course of time it became entirely fictional.

33. Windeyer J gave a lucid account of the history of the action in *Commonwealth of Australia v Anderson* (1960) CLR 303:

> "Although it is trite to say so, it is important to remember that ejectment is not so called because it is a process whereby a plaintiff seeks to have the defendant ejected from his land. It got its name because it was an action in which the plaintiff complained that he had been wrongfully ejected by the defendant from land of which he was rightfully possessed. For this he claimed damages in an action of trespass *de ejectione firmae*. The plaintiff was a lessee, for a term of years, a termor. His complaint was that he had been ousted by the defendant, *vi et armis*, from his ferm or farm. A freeholder could not bring this action. A freeholder who was disseised had to bring a real action. This action *de ejectione firmae*, of the more humble leaseholder who had been ousted, originally only enabled him to recover damages and mesne profits lost; he could not by it get back into possession. But from the time of Henry VII, perhaps from much earlier, a successful plaintiff in ejectment could have a writ of *habere facias possessionem* directing the sheriff to restore him to possession of the land for the remainder of his term. This corresponded with the *habere facias seisinam* by which a freeholder who had judgment in a real action, such as an assize of novel disseisin, could have his estate restored to him (See Reeves, History of English Law (1787), vol. 4, pp. 164-170). The rest of the story is well known. The freeholder by enlisting the aid of friends - who in time became fictitious persons - could use the leaseholder's remedy and avoid the pitfalls and delays of a real action. After Rolle, who was Chief Justice under Cromwell, had worked out the elaborate device, an ordinary ejectment action was no longer in reality a complaint by a lessee who had been turned

> out of possession. It was a process by which a landowner could recover his land or establish his title. The nominal plaintiff was one of those ever ready brothers in the law Doe or Roe or of their friends Goodright, Goodtitle or Fairclaim against some obliging casual ejector, Styles, Shamtitle or Thrustout. The old writ *de ejectione firmae* had then indeed, in the words of Wilmot CJ, been 'licked into the form of a real action' (*Goodtitle v Tombs* (1770) 3 Wils KB 118, at p 120). But it was still a writ of trespass. The allegation, formal and false, on which it depended was that the nominal plaintiff Doe, the lessee of the real plaintiff, had been ejected by the casual ejector, who had retired from the contest leaving the real defendant to defend the action, he being allowed to do so only on admitting lease, entry and ouster and contesting only the question of title."

34. So the fictitious lessee and the equally fictitious casual ejector both dropped out of the picture, leaving the real fight between the two claimants to the title. With two irrelevant exceptions, the real actions were abolished by the Real Property Limitation Act 1833; and the Common Law Procedure Act 1852 did away with the need for the fictitious lease and the fictitious casual ejector. The reformulated action for ejectment was embodied in the Rules of Court scheduled to the Supreme Court of Judicature Act 1875.

35. It is also to be noted that in Windeyer J's description of the original writ, the plaintiff asserted that he had been ousted "*vi et armis*", that is to say, forcibly. Thus even in the case of a forcible eviction, the action of ejectment was the proper procedure.

36. So far as damages are concerned, they were not awarded in an action for ejectment, but only after the claimant had actually re-entered. Damages for trespass were then claimed by means of a second action: see Mitchell and Rostill *Making Sense of Mesne Profits: Causes of Action* (2021) CLJ 130, 139-140. But once the action of ejectment evolved further, damages became recoverable in the same action. Wilmot CJ explained this in *Goodtitle v Tombs* (1770) Wils KB 118, 120:

> "By the old law and practice in an action of ejectment (as I before said) you recovered nothing but damages, the measure whereof was the mesne profits; no term was recovered; but when it became established that the term should be recovered, the ejectment was licked into the form of a real action; the proceeding was in rem, and the thing itself; the term only was recovered, and nominal damages, but not the mesne profits; whereupon this other mode of recovering the mesne profits in an action of trespass was introduced, and grafted upon the present fiction of ejectment; and I take it, that the present action is put in the place of the ejectment at common law, which was indeed a true, and not a fictitious action, and in which the mesne profits only, and not the term, were recovered, for it was no other than a mere action of trespass. You have turned me out of possession, and kept me out ever since the demise laid in the declaration, therefore I desire to be paid the damages to the

> value of the mesne profits which I lost thereby; this is just, and reasonable."

37. Nevertheless, the claim for damages was dependent on the claim in ejectment. This is reflected in section 214 of the Common Law Procedure Act 1852, which provides for a jury to assess mesne profits *after* the claimant has proved "his right to recover possession of the whole or of any part of the premises mentioned in the writ in ejectment."

38. The claim in ejectment was a pure common law claim; and the common law courts did not allow equitable rights to be set up by way of defence to a common law claim. What the common law required was that the person with legal possession or entitled to legal possession was a party to the action. But a defendant who did have an equitable right to possession was able to apply to the courts of Chancery to restrain the prosecution of common law claims where to do so would be against conscience.

39. Lord Blackburn described the interplay between law and equity in *Danford v MacAnulty* (1883) 8 App Cas 456, 462:

> "For a long time an action for the recovery of land at law was brought by ejectment, and it was so established as to be trite law—a commonplace expression of law—that in ejectment, where a person was in possession those who sought to turn him out were to recover upon the strength of their own title; and consequently possession was at law a good defence against any one, and those who sought to turn the man in possession out must shew a superior legal title to his. If, however, they did shew that, still if the person who was in possession could shew that although they had shewn a superior legal title to the possession, yet he had an equitable ground for saying that they should not turn him out, he as the law stood was obliged to go to a Court of Equity, and as the plaintiff there, as the "actor" (to use a civil law expression), to make out that there was a sufficient reason for a Court of Equity to interfere, and to prevent his being turned out of possession, on this equitable ground."

The effect of the Judicature Act

40. Importantly, however, the common law courts and the courts of equity were brought together in the High Court under the Judicature Act 1873. Both now administer law and equity concurrently; and in the event of conflict, the equitable rules prevail: Senior Courts Act 1981 s 49. As Sir George Jessel MR put it in *General Finance Mortgage and Discount Co v Liberator Permanent BS* (1878) 10 Ch D 15:

> "…considering especially that the jurisdiction in equity and common law is now vested in every Court of Justice, so that no action for ejectment or, as it is now called, an action for the recovery of land, can be defeated for the want of the legal estate where the Plaintiff has the title to the possession…"

41. Megarry & Wade on Real Property (9th ed) explain at paragraph A-027:

> "… the amalgamation of legal and equitable jurisdiction meant that the same form of proceedings could be used to assert either a legal or an equitable title, thus consummating a reform which Lord Mansfield had unsuccessfully attempted in the 18th century when the action of ejectment was confined to claims at law."

42. These statements are all concerned with what the court will do in proceedings brought before it. They do not say that the bringing together of the common law and rules of equity under one common judicial roof for the purposes of resolving disputes altered the substantive law. Sir George Jessel MR explained in *Salt v Cooper* (1880) 16 Ch D 544, 549:

> "Then we are thrown back upon the Act itself, and we must recollect, first of all, what the main object of the Act was. It is stated very plainly that the main object of the Act was to assimilate the transaction of Equity business and Common Law business by different Courts of Judicature. It has been sometimes inaccurately called "the fusion of Law and Equity"; but it was not any fusion, or anything of the kind; it was the vesting in one tribunal the administration of Law and Equity in every cause, action, or dispute which should come before that tribunal. That was the meaning of the Act. Then, as to that very small number of cases in which there is an actual conflict, it was decided that in all cases where the rules of Equity and Law were in conflict the rules of Equity should prevail. That was to be the mode of administering the combined jurisdiction, and that was the meaning of the Act."

43. Similarly, in *Joseph v Lyons* (1884) 15 QBD 280, 285 Cotton LJ said:

> "The law stood in this position before the Supreme Court of Judicature Acts, 1873, 1875. It has been argued before us that the difference between legal and equitable interests has been swept away by those statutes. But it was not intended by the legislature, and it has not been said, that legal and equitable rights should be treated as identical, but that the Courts should administer both legal and equitable principles. I think that the clause enacting that the rules of equity shall prevail (Supreme Court of Judicature Act, 1873, s. 25, sub-s. 11) shews that it was not intended to sweep away altogether the principles of the common law."

44. Lindley LJ added at 287:

> "Reliance was placed upon the provisions of the Supreme Court of Judicature Acts, 1873, 1875, and it was contended that the effect of them was to abolish the distinction between law and equity. Certainly that is not the effect of those statutes:

> otherwise they would abolish the distinction between trustee and *cestui que trust*."

45. In more recent times, Mummery LJ said in *MCC Proceeds Inc v Lehman Brothers International (Europe)* [1998] 4 All ER 675, 691 (dealing with the right of a beneficial owner to sue in the tort of conversion):

> "In brief, the position is that an equitable owner had no title at common law to sue in conversion, unless he could also show that he had actual possession or an immediate right to possession of the goods claimed; this substantive rule of law was not altered by the Supreme Court of Judicature Acts, which were intended to achieve procedural improvements in the administration of law and equity in all courts, not to transform equitable interests into legal titles or to sweep away altogether the rules of the common law, such as the rule that a plaintiff in an action for conversion must have possession or a right to immediate possession of the goods."

46. The judge was correct, at least in principle, to say at [198]:

> "But if a trustee brought an action in ejectment against a beneficiary having the right under the trust to occupy the land, before 1875 the beneficiary might obtain an injunction in Chancery to restrain the action in ejectment, on the grounds of the failure to allow the beneficiary to occupy. After 1875 the beneficiary would not even need to cross Westminster Hall to obtain an injunction from the Court of Chancery. The new unified High Court could regulate the equities in the ejectment claim, and simply dismiss it."

47. But the problem in this case is that when Chedington took possession, it did so without the intervention of the court. The essence of the Brakes' argument is that in the quoted paragraph, the judge asked himself the wrong question. He should have asked himself: did the beneficiary have a right to possession entitling them to enter without recourse to the court? But instead he asked himself a different question; namely whether if a trustee brought a claim for ejectment against a beneficiary in possession, the beneficiary would have an equitable defence under the law of trusts.

The claim for wrongful eviction

48. The first ground of appeal asserts that the Brakes are entitled to damages at common law for wrongful eviction, consisting of their dispossession from the cottage on 18 January 2019. There is no doubt, on the judge's findings, that until they were dispossessed on that day, they were in possession of the cottage. It is common ground that, for the purpose of determining who had the better right to possession, what matters is what the parties' respective rights were on that day. Ground one of the grounds of appeal asserts that the judge was wrong "in dismissing the Brakes' unlawful eviction claim brought on the basis that they had better title than" Chedington. The question who has the better title is quintessentially the subject of an action in ejectment.

49. A person who is in possession of land, but is subsequently dispossessed, is entitled to reclaim possession against any person other than one with a better title to possession than his own. Thus, at common law, in an action for ejectment, what matters is who, as between the parties, has the better title to the land. Lord Diplock explained in *Ocean Estates Ltd v Pinder* [1969] AC 19, 25:

> "Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land. It follows that as against a defendant whose entry upon the land was made as a trespasser a plaintiff who can prove any documentary title to the land is entitled to recover possession of the land unless debarred under the Real Property Limitation Act by effluxion of the 20-year period of continuous and exclusive possession by the trespasser."

50. At this point it is necessary to distinguish between different causes of action. There is, in my opinion, no cause of action at common law for wrongful eviction as such. Nor does section 3 of the Protection from Eviction Act 1977 create such a cause of action: *McCall v Abelsz* [1976] 1 QB 585; *Smith v Khan* [2018] EWCA Civ 1137, [2019] 1 P & CR 4. (There is now a statutory liability, in the nature of a tort, for unlawful eviction of a residential occupier under section 27 of the Housing Act 1988; but that is not relied on in this appeal). In many cases, where the parties are or have been in a contractual relationship, the claim will be based on a breach of the express or implied covenant for quiet enjoyment. In other cases, where there has been no such relationship it will be based in trespass. But even in such cases it is necessary to distinguish between different forms of trespass. On the one hand there is a cause of action in simple trespass. The purpose of that cause of action in trespass (originally brought by writ of *quare clausum fregit*) was to vindicate an existing possession. As Jervis CJ put it in *Wilkinson v Kirby* (1854) 16 CB 430: "possession in fact in the plaintiff … is necessary to support an action for a trespass."

51. I should mention in passing that "possession in fact" does not disappear at the moment when the person in possession of the land is excluded from it by a trespasser. There must be some element of acquiescence by the person in possession before possession actually passes to the trespasser: Clerk & Lindsell on Torts (23rd ed) para 18-19; *Browne v Dawson* (1840) 12 Ad & E 624. In *Smith v Khan* [2018] EWCA Civ 1137, [2019] 1 P & CR 4, for example, where Mrs Smith was evicted on 15 April 2015 and brought proceedings on 11 May 2015 following a letter before action sent on 20 April 2015, her claim was a simple claim in trespass. The judge decided the case squarely on the basis of ejectment (originally brought by writ of *de ejectione firmae*). But it is necessary to consider trespass (*quare clausum fregit*) as well.

52. In the case of an action for the recovery of land, it does not matter how the claimant came to be dispossessed. As we have seen, in its origins the plea was that the claimant had been dispossessed by force of arms. That is why the action has been so frequently used against squatters who have taken possession of land, often by breaking locks and entering.

53. The Brakes are two out of the three registered proprietors of the cottage; but they have no beneficial interest in it. In so far as the partnership had a beneficial interest in the cottage the liquidators have agreed to sell it to Mr Swift. In so far as the Brakes had a personal beneficial interest in the cottage (either through their shares in the partnership or by way of proprietary estoppel) it passed to the trustee in bankruptcy. The judge held that they are, therefore, bare trustees. His analysis is not disputed in that respect.

54. The Brakes rely not only on their position as two of the three registered proprietors of the land entitled to the legal estate in the land; but also on their actual possession of it. From the perspective of the common law it does not matter what equitable interests there may be in the land. The common law simply does not recognise their existence. If the trustee in bankruptcy had sought the intervention of the court in the exercise of its jurisdiction to administer equity, the position might, indeed probably would, have been very different. But not only did the trustee in bankruptcy not ask the court to intervene, he is not even a party to the current action. Nor, indeed, does Chedington advance any counterclaim in the action which seeks to rely on the principles of equity.

55. It is clear in the present case that Chedington was authorised by the trustee in bankruptcy to take possession. Mr Swift's letter of 15 January 2019 which was affixed to the door on taking possession made that clear. Chedington's factual possession is the trustee's vicarious possession. As Lord Briggs put it in *Bannerman Town v Eleuthera Properties Ltd* [2018] UKPC 17 at [54]:

> "Possession may be vicarious in the sense that A may occupy land on behalf of B, such that B rather than A is in possession of it: see eg *Bligh v Martin* [1968] 1 WLR 804. Vicarious possession may arise where, for example, A is the licensee, agent or agricultural contractor of B. Again, this will depend upon the existence of some agreement or arrangement between them."

56. In my judgment, therefore, this ground of appeal poses the question whether the trustee in bankruptcy had the right at common law to dispossess the Brakes through the agency of Chedington without the intervention of the court.

57. The Brakes' argument is that, in those circumstances, even though they were bare trustees for the trustee in bankruptcy, the latter had no common law right to dispossess them, still less to do so by means of a self-help remedy. Mr Sutcliffe KC, for Chedington, accepted, in the course of his submissions, that he had to establish that the trustee in bankruptcy had a better *common law* right to possession than the Brakes.

58. Trusts of land are now governed by the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA"). Section 1 (2) (a) of TOLATA provides that a trust of land includes a bare trust. Mr Learmonth KC, for the Brakes, placed some reliance on section 6 (1) of that Act which provides:

> "For the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner."

59. I find it difficult to see how, in asserting a right to possession of the cottage for their own personal benefit against the only person entitled to a beneficial interest in it, the Brakes can be said to have been exercising their functions as trustees. Moreover, section 6 (6) provides that those powers "shall not be exercised in contravention of … any rule of law or equity". If there is one golden rule applicable to trustees, it is that they cannot take a personal benefit from the trust property without the informed consent of the beneficiaries. On the contrary, where the trust property includes land, it is the trustees' duty to render the land productive by leasing it: *Byrne v Kendle* [2011] HCA 26, (2011) 243 CLR 253, at [67]; *Brudenell-Bruce v Moore* [2014] EWHC 3679, [2015] WTLR 373 at [88]. Moreover, section 11 (1) (a) of TOLATA requires the trustees, before exercising any of their functions, so far as practicable to consult the beneficiaries of full age and entitled to an interest in possession. The Brakes carried out no such consultation. I do not consider that section 6 advances the Brakes' case.

60. The major difference between the parties was whether as sole beneficial owner the trustee in bankruptcy was entitled to possession against the Brakes in their capacity as trustees. Snell's Equity (34th ed) summarises the position of a bare trustee at paragraph 21-027 as follows:

> "A bare (or simple) trust is one where property is vested in one person on trust for another, but where the trustee owes no active duties arising from his status as trustee. His sole duty is to convey the trust property as the beneficiary directs him. An example is where property is transferred to T "on trust for B absolutely". *In such a case, T's sole duty is to allow B to enjoy the property* and to obey any direction he may give as to how the property should be disposed of." (Emphasis added)

61. Mr Sutcliffe referred us to the decision of Haddon-Cave J in *AAZ v BBZ* [2016] EWHC 3234 (Fam), [2017] 2 FCR 415. The particular question that the judge was considering in that case was whether, for the purpose of redistributing assets under the Matrimonial Causes Act 1973, he should take into account assets which were held by what appeared to be a discretionary trust as counting as assets of the husband. In that case the judge correctly directed himself at [25] that the computation of a party's resources includes not only assets beneficially owned by the party, but assets which he or she is likely to receive from a third party (e.g. a trustee) if he or she asked for them. It was in that context that the judge went on to consider the assets held by the trustee. He held on the facts that the trustee was in fact the husband's nominee. He went on to say, in the passage on which Mr Sutcliffe relies:

> "85. The Law Commission Report on Trusts of Land (No. 181) (1989) defined a bare trust as follows (in paragraph 3.27):
>
> "A bare trust exists where the entire beneficial interest is vested in one person and the legal estate in another. The trustee in such a case has no duties other than to obey the beneficial owner, who is, to all intent, the real owner."
>
> (see also Lewin on Trusts, Chapter 1-028)

> 86. The terms "bare trustee" and "nominee" are often used interchangeably. In essence, a bare trustee and a nominee are "nominal" title holders, holding an asset for another person who is the true beneficial owner for all purposes. A bare trustee is a trustee who is a mere repository of the trust property with no active duties to perform, and with no responsibilities in relation to trust property other than to preserve the property for the beneficiary (and the transferor of the assets). The bare trustee's duties are purely passive, and "bare" or naked of active duties decreed by the settlor. In *IRC v Silverts Ltd* [1951] Ch D 521 at p 530 the Court of Appeal described a bare trustee of shares in a company as being "a mere name or "dummy" for the true owner."

62. Haddon-Cave J's description of a bare trustee was not in fact necessary to his decision in that case, as his self-direction at [25] made clear. The passage in Lewin to which he referred in fact expresses a more nuanced view. I pause also to note that in the *Silverts* case this court in fact decided that even though the settlor could have removed the trustees at will, they were not bare trustees in the sense of being a "mere name" or dummy"; and that, in any event:

> "… a question of the rights of members vis-à-vis the corporation (such as that of voting control under its regulations) is to be determined by reference, and by reference only, to the share register beyond which it is not (save possibly in the case of mere "nominee" shareholders) permissible to look; and not that, in the case of a trust, the powers and discretions of exercising votes in regard to shares must be treated as reposing in the trustees without regard to the terms of the trust or the right of beneficiaries to direct such exercise."

63. I do not consider that it is possible to say that on the facts of this case, the Brakes are "mere nominees" for the trustee in bankruptcy, even though he is entitled to the whole beneficial interest. He did not instal the Brakes as trustees (or nominate them): he merely acquired the beneficial interest partly by operation of law and partly by contract from the liquidator.

64. The question in *Ingram v HMRC* [1997] 4 All ER 395 was whether it was possible for Lady Ingram to grant a valid lease to her solicitor (Mr Macfayden) as nominee. In a dissenting judgment (subsequently approved by the House of Lords at [2000] 1 AC 293, 305) Millett LJ said at 424:

> "It is important not to understate Mr Macfadyen's position. He was not independent of Lady Ingram, but neither was he a mere cypher. His duty was "to deal with the land as Lady Ingram might direct". He was bound to convey the land to her or to whom she might direct. But he was not bound to comply with other directions which she might give (see *Re Brockbank (decd), Ward v Bates* [1948] Ch 206 and *Re Whichelow (decd), Bradshaw v Orpen* [1954] 1 WLR 5 at 8). He could not have been compelled to grant the lease, though if he had refused to

> do so Lady Ingram could simply have found someone willing to do her bidding and require Mr Macfadyen to convey the land to him. It is not, in my opinion, correct to identify Mr Macfadyen's mind with Lady Ingram's for the purposes of the two-party rule.
>
> I reject the idea that no rational system of law could sensibly allow a party to assume an obligation to a party whose only function was to hold the benefit of the obligation for the benefit of the person subject to it. This might be so in a unified system like Scottish law, but in a divided system like ours it is possible for the parties to create obligations which are enforceable at law while being subject to equitable defences. Such obligations will not be enforced, but they are not nullities. Where the only objection is one of circuity of action they are capable of ripening into enforceable obligations when third parties become interested."

65. This is a very important passage for a number of reasons. First, Millett LJ held that a bare trustee is not a mere cypher. Second, he distinguished between obligations enforceable at law and equitable defences to them. That is the consequence of what is still a "divided system". Third, he recognised that *the court* "will not enforce" such obligations because of the objection of circuity of action.

66. Mr Sutcliffe also relied on section 12 of TOLATA which, he said, entitled Mr Swift to take possession and grant the licence to Chedington. Section 12 relevantly provides:

> "(1) A beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land is entitled by reason of his interest to occupy the land at any time if at that time—
>
> (a) the purposes of the trust include making the land available for his occupation (or for the occupation of beneficiaries of a class of which he is a member or of beneficiaries in general), or
>
> (b) the land is held by the trustees so as to be so available.
>
> (2) Subsection (1) does not confer on a beneficiary a right to occupy land if it is either unavailable or unsuitable for occupation by him.
>
> (3) This section is subject to section 13."

67. I consider that there are a number of flaws in this argument. The beneficiary on whom Mr Sutcliffe relies is Mr Swift. First, section 12 is not concerned with possession, but with occupation. The mere fact that someone is entitled to occupy property does not necessarily mean that he is entitled to possession of it. One obvious example is that of a lodger who may be entitled to occupy rooms in a house, but who does not obtain possession even of those rooms. Second, section 12 only applies to a beneficiary who

is beneficially entitled to an interest in possession. Section 22 (2) of TOLATA provides that:

> "In this Act references to a beneficiary who is beneficially entitled do not include a beneficiary who has an interest in property subject to the trust only by reason of being a trustee or personal representative."

68. Mr Swift is entitled to his interest as a trustee. On the face of it, therefore, section 12 does not apply to him. Third, in my judgment the purposes of the trust do not include "making the land available for *his* [i.e. Mr Swift's] occupation". I agree with Mr Learmonth that section 12 looks at the beneficiaries from time to time during the lifetime of the trust. Fourth, Mr Swift has never occupied the Cottage. I do not consider that his authorising Chedington to take *possession* amounts to *occupation* by Mr Swift. Possession may be a precursor to occupation, but it is not the same. Equally, possession may be the precursor to an advantageous sale for the benefit of creditors, but occupation is not necessary. Fifth, Chedington's *occupation* (as opposed to its possession) was in its own right; it was not vicarious or representative occupation on behalf of Mr Swift. Sixth, I do not consider that a beneficiary's right of occupation under section 12 (in a case in which the trust purposes include making the land available for his occupation) gives that beneficiary the right to confer possession on a stranger to the trust whose occupation the trust has never envisaged. Seventh, such authority as there is on the question points to the same conclusion, although the question has not been addressed on facts comparable to those in this case: *French v Barcham* [2008] EWHC 1505 (Ch), [2009] 1 WLR 1124 at [18] (where it was common ground that the trustee in bankruptcy had no right of occupation, which Blackburne J accepted as correct); *Davis v Jackson* [2017] EWHC 698 (Ch), [2017] 1 WLR 4005 at [47] (where admittedly one of the beneficiaries was in occupation). In the latter case Snowden J said at [47]:

> "And a claim by the trustee would inevitably be defeated by section 12(2) which provides that a beneficiary does not have a right to occupy land if it is "unsuitable for occupation by him". It is difficult to envisage any circumstance in which it would be "suitable" for a trustee in bankruptcy to take up occupation of a domestic house with the bankrupt and/or their co-habitee."

69. I find it difficult to envisage a case in which a trustee in bankruptcy would be performing his statutory function by personally occupying property which had belonged to the bankrupt. In my judgment, this argument fails.

70. The Brakes' argument under this head recognises that if the trustee in bankruptcy had gone to court, the court could have ordered the Brakes to give up possession of the cottage. Indeed, since they accept that the trust was a bare trust, and the bankruptcy took place over one year before the entry by or on behalf of the trustee, the court would have been very likely to have made such an order: see section 335A (3) of the Insolvency Act 1986. As Lewin on Trusts (20th ed) states at 35-07:

> "In the case of a bare or simple trust of land, the beneficiary has always been able to compel the trustees to put him into possession."

71. But that, they say, is a question of remedies granted by the court administering principles of equity. It is not a matter of absolute right at common law such as to enable the trustee, either himself, or through the agency of Chedington, to exercise a self-help remedy without the intervention of a court of equity. In the present case, the trustee in bankruptcy has not even asked the Brakes to transfer legal title to him.

72. In *A-G v Lord Gore* (1740) Barn Ch 145 (mentioned by Lewin in a footnote to the cited passage) the beneficiary was in possession of the land, and the question was whether the trustees could recover possession. This was not, however, an action in ejectment, but an information heard in the Court of Chancery. Lord Hardwick LC posed and answered the following question:

> "…what Ground is there for a Court of Equity to take the Possession of an Estate from *Cestui que Trust*, and to deliver such Possession to Trustees, unless there was some gross Mismanagement in the *Cestui que Trust*? This Court never takes the Possession from *Cestui que Trust*, unless there is some strong Reason for doing it…"

73. This, therefore, was a case in which the court exercised its equitable jurisdiction. It was not a case about the common law. Mr Sutcliffe, however, submitted that the right of a beneficiary had hardened since Lord Hardwicke's time. He relied on the decision of this court in *Hodgson v Marks* [1971] 1 Ch 892, and the decision of Mr John Baldwin QC, sitting as a deputy judge of the Chancery Division, in *Hawk Recovery Ltd v Hall* [2016] EWHC 3260 (Ch), [2017] 4 WLR 40.

74. In *Hodgson v Marks* Mrs Hodgson was the sole beneficial owner of the property, and lived there together with her lodger Mr Evans who held the legal title. The issue was whether Mrs Hodgson was in actual occupation of the property. If she was, then her equitable interest ranked as an overriding interest under the Land Registration Act 1925. The consequence of that was that her overriding interest had priority over a charge granted by Mr Marks who had bought the property from Mr Evans without Mrs Hodgson's consent. At 930 Russell LJ quoted the following part of the judgment of the trial judge:

> "So I will now come to the facts which bear on whether Mrs. Hodgson was, independently of the context of section 70 (1) (g) of the Land Registration Act 1925 , in actual occupation in this case. Before Mrs. Hodgson's transfer of the house to Mr. Evans and its registration in his name, it is undisputed and indisputable that Mrs. Hodgson was in actual occupation of it. After the registration, she continued to live there to all appearances and as a physical fact in exactly the same way as before; and so did Mr. Evans. They lived and ate and slept in the house exactly as before. The financial arrangements of payment by Mr. Evans to Mrs. Hodgson for board and lodging and by Mrs. Hodgson to Mr. Evans for investment for her and for the payment of bills continued unchanged. Mrs. Hodgson continued too as the rateable occupier. There was no change in the physical appearance of occupation nor was there any other change at all, except that Mrs. Hodgson transferred the house to

> Mr. Evans upon oral trust for herself and that Mr. Evans was registered as proprietor. Except that Mr. Evans held the legal estate on trust for Mrs. Hodgson, the transfer and registration made no difference as between Mrs. Hodgson and Mr. Evans. She was absolutely beneficially entitled and could at any time call for a transfer of the legal estate and then be registered as proprietor. Mr. Evans as bare trustee of the legal estate for Mrs. Hodgson was not entitled to occupy the house, but she as absolute beneficial owner was so entitled. After, as before Mr. Evans' registration, Mr. Evans' presence in the house was exclusively as lodger and Mrs. Hodgson's presence was in virtue of being absolute owner, legally and beneficially before the registration, and beneficially afterwards. She could terminate Mr. Evans' presence in the house after the registration just as she could before. As between Mrs. Hodgson and Mr. Evans, her occupation and her dominion over the house was the same after the registration as before.
>
> So at all material times, Mrs. Hodgson was in fact in physical occupation of the premises and, more, had the right to occupy them. It seems to me that in general (if this matter can be considered at all independently of context) such physical occupation, even apart from such right to occupy, would constitute what would be meant by actual occupation generally."

75. Russell LJ added: "With those findings I entirely agree." There are, I think, a number of difficulties in Mr Sutcliffe's reliance on that passage. First, Russell LJ's agreement was with the judge's "findings" which are normally taken to mean findings of fact. Second, the only issue was whether Mrs Hodgson was in actual occupation. That is itself a question of fact. Third, as far as I can tell from the report, Mrs Hodgson's right of occupation as against Mr Evans was argued neither at trial nor on appeal. Fourth, the trial judge did not say that Mrs Hodgson would have been able to exclude Mr Evans from the property without a court order. That is not surprising because the point did not arise. Fifth, that was a case in which both legal and beneficial owners were in occupation; and Mr Evans' presence in the house was as Mrs Hodgson's lodger. Where a person is the lodger of another, it is at least in general the position that possession remains in the latter and the lodger does not have possession. So the probability is that on the facts found Mrs Hodgson was not only in actual occupation of the house but also in possession of it. But be that as it may, that was not a case in which the beneficial owner was neither in occupation nor in possession.

76. Unlike *A-G v Gore*, *Hawk Recovery Ltd v Hall* was a case in which the trustees (rather than the beneficiary) were in possession. But they had been ordered to execute a document transferring legal title to the beneficial owner, which they had refused to do. The beneficial owner thereupon applied to the court for an order for possession. Mr Baldwin said at [55]:

> "A beneficial owner of land seeking possession of land has, in ordinary circumstances (such as this case), a better right to possession of the land than a bare legal owner who has been

> ordered by the court to transfer that legal title to the beneficial owner but refuses to comply, even when the bare legal owner is in actual possession of the land at the time the matter is adjudicated. Such seems to me to be in accord with common sense and the authorities and statutory provisions to which my attention was drawn. The contrary position is inconsistent with the duties of trustees and with the paramount importance of maintaining the authority of the court."

77. Since the court had intervened it was administering both law and equity. In considering the claim of the beneficial owner to an order for possession the court was, as it was entitled and indeed bound to do, giving effect to equitable rights. It was not a case of self-help without the intervention of the court.

78. I reluctantly agree with Mr Learmonth that Mr Sutcliffe's argument mixes the common law and equity in a way that is not legitimate when considering action taken by way of a self-help remedy without the intervention of the court. The trustee in bankruptcy's rights against the Brakes are rights recognised by a court of equity but not by a court of common law. The position at common law, is in my judgment clear. Perhaps the clearest expression is in the judgment of Lord Kenyon CJ in *Roe d Reade v Reade* (1799) 8 Term Rep 118, 122:

> "… if it appear in a special verdict, on a special case, that the legal estate is outstanding in another person, the party not clothed with that legal estate cannot recover in a Court of Law; and in this respect I cannot distinguish between the case of an ejectment brought by a trustee against his *cestui que trust*, and an ejectment brought by any other person."

79. Likewise in *Doe d Butler v Kensington* (1846) QB 429, 449 Lord Denman CJ said:

> "The principles on which the question here raised is to be decided are clear; that, in a Court of Law, and in the action of ejection, the legal title to the possession, if it conflict with the equitable, must prevail: we cannot prevent a subsisting term from being set up, even by the trustee against *the cestui que trust*."

80. Accordingly, as Meagher, Gummow and Lehane point out in Equity: Doctrine and Remedies (5th ed) para [1-275] (a):

> "… a lease from a *cestui que trust* could not be set up against the trustee in any case *without the aid of a court of equity*." (Emphasis added)

81. Since the Judicature Acts, the court could be any court administering the rules of equity. In those circumstances, I am driven to agree with Mr Learmonth that by taking matters into their own hands, without submitting the competing claims to the adjudication of the court, the trustee in bankruptcy and Chedington are not entitled to rely on any principles of equity to undermine the Brakes' common law claim. The judge's error was to treat the state of affairs as at 18 January 2019 as if those claims

had been before the court. They were not. A relatively recent illustration of the different consequences of taking possession under a court order and taking possession without one is *Billson v Residential Apartments Ltd* [1992] AC 214 (to which Mr Learmonth briefly alluded) where both Nicholls LJ in this court and Lord Templeman in the House of Lords were strongly condemnatory of the exercise of a self-help remedy in recovering possession.

82. Accordingly, I consider that we should allow the appeal at least to the extent of granting the declaration claimed in the claim form, namely that that the exclusion of the Brakes from the cottage was unlawful at common law and that Chedington had no right or title at common law to justify any interference with the Brakes' exclusive possession of the cottage without a court order.

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

The Protection from Eviction Act 1977

84. The second ground of appeal relies on the Protection from Eviction Act 1977, although it was common ground that if the Brakes succeeded on the first ground this one did not arise. Section 3 of that Act relevantly provides:

> "(1) Where any premises have been let as a dwelling under a tenancy which is neither a statutorily protected tenancy nor an excluded tenancy and—
>
> (a) the tenancy (in this section referred to as the former tenancy) has come to an end, but
>
> (b) the occupier continues to reside in the premises or part of them, it shall not be lawful for the owner to enforce against the occupier, otherwise than by proceedings in the court, his right to recover possession of the premises.
>
> (2) In this section "the occupier", in relation to any premises, means any person lawfully residing in the premises or part of them at the termination of the former tenancy.
>
> …
>
> (2B) Subsections (1) and (2) above apply in relation to any premises occupied as a dwelling under a licence, other than an excluded licence, as they apply in relation to premises let as a dwelling under a tenancy, and in those subsections the expressions "let" and "tenancy" shall be construed accordingly."

85. Section 3A relevantly provides:

> "(1) Any reference in this Act to an excluded tenancy or an excluded licence is a reference to a tenancy or licence which is

> excluded by virtue of any of the following provisions of this section."
>
> […]
>
> (7) A tenancy or licence is excluded if—
>
> (a) …;
>
> or
>
> (b) it is granted otherwise than for money or money's worth."

86. Section 8 (1) provides that in Part I of the Act (which includes section 3) "the owner" in relation to any premises "means the person who, as against the occupier, is entitled to possession thereof".

87. Whether a person occupies property as his residence (or as his home) has been the subject of a large number of decided cases, principally concerning either the Rent Acts or the Housing Acts. There is a close parallel between those Acts and the Protection from Eviction Act 1977. It is clear from those cases that a continuous physical presence is not required in order for property to be occupied by someone as his residence or home. In such cases what is required is some outward manifestation of physical presence (typically a caretaker or furniture) and an intention on the part of the putative occupier to resume residence within a reasonable time. It is also possible for someone to have more than one residence or home. But in the case of what has traditionally been called a "two-homes" man, the courts have been cautious.

88. In *Beck v Scholz* [1953] 1 QB 570 a tenancy of a flat in London had been originally granted to Ms Muller. On her marriage to Mr Scholz they bought a house in Luton and lived there. Mrs Scholz left furniture in the London flat at and she and her husband visited the flat from time to time. In due course a Mr and Mrs Schweitzer came to the flat as licensees of the tenant. They paid no rent, but kept the flat in good condition and ready for the occasional visits of Mr and Mrs Scholz; they were described as caretakers. In the year before the date of the action, Mrs Scholz had slept in the flat four or five times, and Mr Scholtz had slept there between two and ten times. Reversing the county court judge, this court held that Mrs Scholz did not occupy the flat as her residence. Sir Raymond Evershed MR said at 575:

> "I cannot see that it would be in accordance with the main principle and purpose of the rent restriction legislation to hold that a man may have statutory protection for any premises to which he may occasionally find it convenient to resort, and in which he may keep furniture and instal a caretaker, when in no true sense of the term are those premises his "home," for example, where they are merely used as a matter of convenience for occasional visits."

89. He added:

> "The word "home" itself is not easy of exact definition. But the question posed, and to be answered by ordinary common-sense

> standards, is whether the particular premises are in the personal occupation of the tenant as the tenant's "home," or, if the tenant has more than one home, as one of his homes. Occupation merely as a convenience for such occasional visits as I have suggested would not, I think, according to the common sense of the matter, be occupation as a "home"."

90. He added at 576:

> "But as Jenkins LJ observed, the mere use of the phrase animus possedendi requires the further explanation animus possedendi as what? – as a convenience, as a resort, or as a home?"

91. In *Regalian Securities Ltd v Scheuer* (1981-1982) 5 HLR 48 this court distinguished between use as a home on the one hand and "a convenient resort" on the other. Only the former amounted to occupation as a residence.

92. In *Hampstead Way Investments Ltd v Lewis-Weare* [1985] 1 WLR 164 In 1970 Mr Lewis-Weare was the statutory tenant of a flat. He married, and his wife and stepchildren came to live with him there. In 1978 they purchased and moved into a house nearby. Mr Lewis-Weare, however, retained one room in the flat for the sole purpose of sleeping there five times a week on his return from work at a night-club in the early hours of the morning, so as not to disturb his family. He paid the rent and all the outgoings apart from the gas bill which was paid by his adult step-son who occupied the remainder of the flat. Mr Lewis-Weare kept his clothes in his room and had his mail addressed to the flat but never had any meals there. The House of Lords held that he did not occupy the flat as his residence. Lord Brandon said at 171:

> "If one treats the question as one of fact and degree, as the authorities require that a court should do, it is, in my opinion, impossible to conclude that that limited use of the flat made by the tenant was sufficient to make the flat his second home. The flat was in truth the home, not of the tenant, who slept there on five nights a week and kept his clothes there, but that of the adult stepson, who carried out all an ordinary person's living activities there. On that ground, I would hold that the tenant was not occupying the flat as his residence within the meaning section 3(2) of the Rent Act 1968, as incorporated into section 2(3) of the Rent Act 1977, and that his tenancy of the flat was not, therefore, protected by the latter Act."

93. In the present case, one of the critical issues for the judge was whether, at the date of the eviction (18 January 2019) Mr and Mrs Brake were "[continuing] to reside" in the cottage. He found as a fact that the cottage was neither their home nor part of their home. It was an annexe where they stored things and where Mrs Brake's son went occasionally to play computer games. Even their intention for the future was limited to occasional stays when there was a wedding which, as the judge said, was reluctant or "only when they absolutely had to." As far as the Brakes' intentions were concerned, the judge found that they did not intend to stay in the cottage again until there was another wedding, some months away. But since their employment had been terminated in November 2018, and they had been ordered to leave Axnoller House,

with the result that they would have no further part to play in future weddings, it is difficult to see how even that limited intention could have been given effect.

94. Whether property is or is not someone's home or residence is a "jury question" as it was described in *Beck*; or a "question of fact and degree" as it was described in *Hampstead Investments*. We were shown a number of additional pieces of evidence which were before the judge (but which the judge did not explicitly mention in his judgment) which support the judge's overall conclusion. There are formidable difficulties in asking an appeal court to reverse an experienced judge's findings of fact reached after careful consideration of all the evidence for all the reasons that I summarised in *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48. In my judgment, the Brakes have not surmounted those difficulties. I consider that the judge was entitled to find that at the date of the eviction the Brakes did not continue to occupy the cottage as their residence.

95. On the morning of the appeal (and not foreshadowed by any skeleton argument or amendment to the grounds of appeal) Mr Learmonth sought to raise a new point. That point was that under the terms of the partnership deed the Brakes were given licence to occupy "the Premises" as defined in the deed. The Premises, as defined, included both the cottage and Axnoller House. Since section 3 applies where the occupier continues to reside "in the premises or part of them", and the Brakes continued to reside at Axnoller House, section 3 was contravened.

96. Mr Sutcliffe objected to this new point being taken at such short notice; and in my judgment his objection was a good one. He did his best to answer it on its merits, but without any time to research the applicable law. We were not referred to any authorities on the question, so what I say is tentative only.

97. It is, however, doubtful whether even if we permitted the point to be taken it is a good one. Section 3 (1) applies where any premises have been "let as a dwelling". This is the much the same phrase as was used in the context of the Rent Act, where the Act applied to a dwelling house "let as a separate dwelling". In *Horford v Lambert* [1976] Ch 39 this court rejected the argument that in the context of the Rent Act the singular included the plural. Scarman LJ said:

> "But I agree with the county court judge in thinking that Parliament when it enacted section 1 (1) used the singular deliberately, and in this instance did not intend the singular to include the plural. The policy of the Rent Acts was and is to protect the tenant in his home, whether the threat be to extort a premium for the grant or renewal of his tenancy, to increase his rent, or to evict him. … I, therefore, think that the context requires that the words of the subsection "let as a dwelling" be confined to the singular: they mean what they literally say."

98. He concluded:

> "A house (or part of a house) must be let as a dwelling, that is to say, as a single dwelling, for the tenancy to be protected for the purposes of the Act."

99. Axnoller House and the cottage were two separate dwellings; and on that basis, reliance on the definition of "Premises" in the partnership deed appears to be misplaced. As I have said, however, the point was not fully argued; so I must not be taken to have decided it either way.

100. It is not, therefore, necessary to consider the other interesting points that arose in connection with this claim; and I prefer not to do so.

Result

101. I would allow the appeal, but only to the extent of declaring that that the exclusion of the Brakes from the cottage was unlawful at common law and that Chedington had no right or title at common law to justify any interference with the Brakes' exclusive possession of the cottage without a court order.

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

Lady Justice Asplin:

103. Having had the opportunity to consider the judgments of Lewison and Arnold LJJ in draft, I agree with them both. I consider that the appeal should be allowed to extent indicated by Lewison LJ for the reasons he gives.

Lord Justice Arnold:

104. I agree that the appeal should be allowed to extent indicated by Lewison LJ for the reasons he gives. In deference to the able argument of Mr Colclough on behalf of the Brakes and Mr D'Arcy on the residence issue, I would add a few words on that question.

105. Mr Colclough pointed out that the issue as to residence only emerged in Chedington's submissions in reply at trial. For that reason, the judge was not referred to any of the authorities on this question. Mr Colclough argued that, no doubt for that reason, it was not clear what test the judge had applied. The problem with this argument is that the judge found as a fact that the Brakes and Mr D'Arcy were not residing in the cottage on 18 January 2019. Unless it can be shown that the judge misdirected himself in law, that finding cannot be attacked if it was one which was open to the judge on the evidence. Although Mr Colclough sought to argue that the judge had misdirected himself in law, the authorities discussed by Lewison LJ in paragraphs 84-88 of his judgment (which, I note, were not cited by either side in their skeleton arguments, but were drawn to the parties' attention by Lewison LJ in advance of the hearing) demonstrate that he did not do so.

106. Mr Colclough also argued that the judge's finding was not open to him on the evidence. Mr Colclough's starting point here was the judge's statement when addressing the issue of residence for the purposes of the Protection of Eviction Act 1977 at [189]:

> "Section 3 requires that the occupiers of the property must 'reside in' the property. I have no doubt that a person may reside in more than one property simultaneously. But I have found as a fact that the Brakes and Tom D'Arcy *had ceased to* 'reside' at the cottage *before* 18 January 2019. In my judgment, therefore, section 3 does not apply for that reason also. [emphases added]"

107. Mr Colclough submitted that it was clear from this that the judge had accepted that the Brakes and Mr D'Arcy had previously resided in the cottage. Next, Mr Colclough submitted that the only previous passage in the judgment addressing this factual question was [50], which was exclusively concerned with the position following the Brakes' dismissal from their employment on 8 November 2018. Moreover, the same time period was the focus of Chedington's skeleton argument on this appeal seeking to uphold the judge's finding.

108. It followed, Mr Colclough argued, that what the judge had found was that the Brakes and Mr D'Arcy (i) had resided in the cottage until 8 November 2018, but (ii) had ceased to reside in the cottage between 8 November 2018 and 18 January 2019. But nowhere had the judge made any finding as to what had happened during that period which supported conclusion (ii). On the contrary, he had found that the Brakes had remained in possession of the cottage until 18 January 2019; that Mr D'Arcy had continued to stay overnight occasionally until around 20 December 2019; that the Brakes and Mr D'Arcy had left furniture, clothing and personal effects in the cottage until 18 January 2019; and that Mr Brake "may have" visited the cottage on 17 January 2019.

109. Furthermore, Mr Colclough argued, the judge had ignored in this context what had transpired in the County Court at Yeovil on 17 January 2019, as found by the judge at [79]-[80]. During a hearing that day, counsel for AEL told the judge that "if we are owner of the cottage, we would permit the [Brakes] to occupy the cottage during the wedding[s]". As a result, the Brakes gave undertakings to the court that they would permit weddings to be conducted at Axnoller House and would "leave Axnoller House for [the cottage], or such other property as they choose" on weekends when weddings were taking place.

110. Attractively though this argument was advanced by Mr Colclough, I was not in the end persuaded by it. The fundamental problem with it is that it involves a dissection of the judge's judgment which is not justified. Although it is true that the judge focussed in [50] on the period after 8 November 2018, this is because that was the point in the chronology he had reached in making his findings of fact. By that point he had already made a series of findings concerning the Brakes' use of the cottage and how it had changed over time. For example, he had made a finding in the immediately preceding paragraph, [49], that "during the whole time from the acquisition by Chedington of Sarafina until 18 January 2019 … the Brakes stayed overnight at the cottage, not when they *wanted* to, but only when they absolutely *had* to." Thus I do not think that it is accurate to say that the judge found that the Brakes and Mr D'Arcy had resided in the cottage until 8 November 2018. Rather, as I read the judgment, he found that they had ceased to reside in the cottage in about October 2016.

111. More generally, the argument ignores the fact that, as Lewison LJ has explained, there was ample evidence before the judge to support the finding he made. As for what transpired at the hearing on 17 January 2019, while this does not reflect well on Chedington for the reasons the judge explained, it does not undermine the judge's finding. It merely confirms that the Brakes were prepared to continue to use the cottage as a convenient resort if and when they had to when weddings were taking place in Axnoller House and therefore they could not stay there (until such time as AEL succeeded in obtaining possession of Axnoller House, which it eventually did following another trial before the judge held back-to-back with the one giving rise to this appeal.)