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APPEAL Ref: CH-2021-000028

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS
ON APPEAL FROM THE CROYDON COUNTY COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 26 /10/2021

Before:

EASON RAJAH QC
Sitting as a Judge of the Chancery Division

- -

BETWEEN

MARTIN WALKER
Appellant

v.

THE OFFICIAL RECEIVER
(as trustee in bankruptcy of Martin Walker)
Respondent

- -

Andrew Peebles (instructed by Amphlett Lissimore) for the **Claimant**
Camilla Chorfi (instructed by the Official Receiver) for the **Defendant**

Hearing date: 19 July 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10.30 am on Tuesday 26 October 2021.

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Eason Rajah QC

A) Introduction

1. This is an application for permission to appeal by Mr Walker. He made an application for compensation from the Official Receiver ("the **OR**") under s.304 of the Insolvency Act 1986 ("the **Act**"), and for leave as required by the Act to bring such a claim, on the basis that she had negligently sold certain land to the east of 163 Brookbank Road, London SE13 7DA ("**the Land**") at an undervalue in 2014 ("**the Application**"). The application for leave was heard on 15 December 2020 and 15 January 2021. By an ex-tempore judgment on 15 January 2021, District Judge Bishop refused leave, dismissed the Application, refused permission to appeal and awarded costs to the OR summarily assessed in the sum of £10,000.

2. By an appellants' notice dated 15 February 2021, Mr Walker seeks (1) permission to appeal the order of DJ Bishop (2) a stay in relation to costs award and (3) an extension of time for late filing. By his Grounds of Appeal, Mr Walker seeks fresh reconsideration of the Application in the event permission to appeal is granted.

3. On 16 April 2021 Miles J directed that there should be a hearing before a High Court Judge to hear Mr Walker's application for permission to bring this appeal out of time and, (subject to such permission) for permission to appeal, with the hearing of the appeal (subject to permission) to follow ("**the Appeal**").

B) The Facts

4. The Land was purchased in 1994 for £15,000. It was registered in Mr Walker's sole name, but by a Declaration of Trust dated 20 January 1994 made between Mr Walker and his parents which recited their financial contribution to the purchase, he declared that he held the property on trust for himself and his parents in equal shares ("the Declaration of Trust").

5. Mr Walker was declared bankrupt on 20 January 1997. It was not a straightforward bankruptcy. Public examinations took place on 10 April 1997 and 22 December 1997 before an examiner. During those examinations, he disclosed the Declaration of Trust and his one third beneficial interest in the Land. He estimated the value of the Land as between £15,000 and £20,000. Between August 1997 and February1998 the Insolvency Service corresponded with Mr Walker's parents to satisfy themselves of the parents' two-thirds interest in the property and were sent a copy of the Declaration of Trust and other information as to Mr Walker's parents' financial contribution to the purchase of the Land.

7. A trustee in bankruptcy was appointed on 23 July 1998 and received a release on 17 November 2000. It is not clear what the trustee in bankruptcy knew or understood at the time about the Land and the Declaration of Trust.

8. Following a substantial suspension, Mr Walker was finally discharged on 18 August 2006 . There was no distribution to creditors.

9. In March 2013, an unconnected third party, a Mr Calvin Bell, approached the OR to enquire about the possibility of purchasing the Land.

10. The OR believed that in view of the lapse of time the original bankruptcy file had been destroyed. The OR made enquiries of the Former Trustee, who responded that he had minimal records remaining, and as far as he could determine he had not dealt with the Land. The OR also wrote to solicitors who the OR believed had acted for Mr Walker in relation to the transfer of 163 Brookbank Road nineteen years previously, but, perhaps unsurprisingly, received no response. On the basis of this information, or rather the absence of contrary information, the OR concluded that the Land remained part of Mr Walker's estate on bankruptcy. The OR required Mr Bell to provide two independent, professional valuations of the Land, at his own cost. The reports valued the Land at £15,000 and £23,000 respectively (together "the **Valuations**"). The Valuations described the Land as in an unkempt state, potentially squatted and subject to restrictive covenants and (significantly) that there was no planning permission for residential use. A sale price of £20,000 was agreed and the transfer completed on 16 July 2014 and registered on 5 August 2014. Mr Bell bore the legal costs. This resulted in a payment to creditors of 63.98p in the pound.

11. No notice was given by the OR to Mr Walker or his parents of the approach to purchase the Land and no enquiries made of them about the proposal, the valuations or the proposed sale price.

12. Five years later, in 2019, Mr Bell sold the Land for £175,000.

C) The Application

13. Mr Walker made two principal complaints in his witness statement in support of the Application. Firstly he asserted that the Land was in fact worth £325,000 as at October 2014. He exhibited a retrospective valuation from a Mr Bradley to that effect,

dated 17 December 2018. He also relied upon a historic valuation by a Mr Smith dated 25 July 2003 which had valued the site at that date as between £110,000 and £130,000. He said that the Valuations failed adequately to take into account that there had previously been planning permission benefiting the Land which had lapsed in 2007 and thus failed properly to assess the true development value. Secondly Mr Walker said that the OR ought to have contacted him or his parents when Mr Bell approached her and had she done so she would have been appraised of the previous planning permission and the fact that Mr Bell's offers represented a significant undervalue.

6. Mr Walker's application for leave to bring the Application was heard on 15 December 2020, with an ex-tempore judgment being delivered on 15 January 2021. At the December hearing the Appellant's case was put on the mistaken basis that he had owned the Land legally and beneficially and that the legal and beneficial interest in the Land had vested in the OR. He contended that she had been negligent in the exercise of her statutory duties as trustee of his estate in selling at an undervalue. The hearing therefore focussed on the duty of care owed by the OR and whether it had been breached, as well as the question of loss to the estate.

7. Between the two hearings the OR obtained from storage, and examined, papers related to this bankruptcy. This turned out to be the original bankruptcy file and it contained details of the trust of the land, including the Declaration of Trust, the bankrupt's evidence about it during his examinations and the Insolvency Service correspondence with Mr Walker's parents where they confirmed their interest in the Land.

8. Disclosure was made by the OR in Liesl Cooke's second witness statement of 7 January 2021 and both sides addressed the disclosure in closing submissions and supplemental submissions. Both sides treated this disclosure as further evidence on the issue of negligence. Judgment was handed down just over a week later on 15 January 2021.

D) The District Judge's judgment

14. The relevant parts of section 304 Insolvency Act provides:

> *304 Liability of trustee.*
>
> *(1)Where on an application under this section the court is satisfied—*
>
> *(a)…*
>
> *(b)that a bankrupt's estate has suffered any loss in consequence of any misfeasance or breach of fiduciary or other duty by a trustee of the estate in the carrying out of his functions,*
>
> *the court may order the trustee, for the benefit of the estate, to repay, restore or account for money or other property (together with interest at such rate as the court thinks just) or, as the case may require, to pay such sum by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.*

This is without prejudice to any liability arising apart from this section.

(2) An application under this section may be made by … the bankrupt himself.

But the leave of the court is required for the making of an application if it is to be made by the bankrupt ...

9. In her judgment, the District Judge noted the two central factors she should consider when deciding to give leave were as follows. Firstly, had the Applicant shown a reasonably meritorious cause of action? Secondly, if permission were given, was it likely to result in a benefit to the estate. Although these were the main presumptions she noted that it was permissible for the court to consider other issues such as the costs, the likelihood of success and so on.

10. Having so directed herself, she then considered the merits of Mr Walker's prospective claim against the OR on the basis that the issue was whether the OR had breached the duty of care in relation to the price she had obtained for the Land. She considered the valuations relied upon by Mr Walker, noted that they suggested a much higher value for the Land than Mr Bell actually obtained for it and noted also that she had no evidence of the increase in value of property between Mr. Bell's acquisition of it and its sale – but she acknowledged that there was a vast difference between the price he had paid in 2014 and the price he received in 2019. She noted that there were faults with the valuations obtained by the OR, and that they had not made the full enquiries one might have expected. She also took the view that the OR should have had sight of the documents in storage at the time of the sale, should have realised that the Land had had planning permission and should have considered whether the Valuations were therefore flawed – see paragraph 40 of her judgment. She also should have realised that the Land was subject to the Declaration of Trust and it would have then been appropriate for her to contact Mrs Walker's surviving parent – see paragraph 42 of the judgment.

11. However, the District Judge decided that the question she had to ask herself was whether the OR, judged by the standards of a reasonable and skilful insolvency practitioner and not a valuer, had taken reasonable steps to obtain a proper price in the circumstances and had exercised her statutory discretion properly and competently. She considered it fatal to Mr Walker's application that there was no evidence before her as to whether the OR had acted to the standards of the reasonably skilful and careful insolvency practitioner. She concluded that she was satisfied that the OR took reasonable steps, using her discretion, to obtain a proper price for the assets that the circumstances permitted.

12. On the second limb she concluded that having regard to the costs which would be incurred in taking the matter to trial she could not conclude that it was reasonably likely for there to be a benefit to the estate.

13. It can be seen that the District Judge had serious reservations as to whether the Land had been sold at its market value, but concluded that the OR, not being a valuer, had acted reasonably in selling at that price and was not in breach of her duty of care. She

was also not satisfied that it was reasonably likely that there would be a benefit from the estate.

E) Grounds of Appeal

15. Paragraph 2 of the Grounds of Appeal assert that the decision is wrong because "the District Judge misdirected herself and/or took into account matters which ought not to have been taken into account and/or failed to take into account matters which ought to have been taken into account as more particularly set out below".

16. The Appellant accepts that the District Judge correctly directed herself as to the principal but non-exhaustive factors to take into account (as described in paragraph 9 above) - see *Brown v Beat* [2002] BPIR 421 ChD and *McGuire v Rose* [2013] EWCA Civ 429. However the Grounds of Appeal explore over 9 paragraphs the ways in which the Appellant says that the District Judge thereafter went wrong in a number of ways. In summary it is alleged:
    1. The District Judge lost sight of the fact that she was simply considering whether the claim had sufficient merit to be allowed to proceed and instead made findings on the evidence before her;
    2. The District Judge misunderstood the duty of care alleged by the Applicant as a duty of care to act with the care and skill of a valuer;
    3. The District Judge mistakenly concluded that there would be minimal benefit to the estate from proceedings;
    4. The District Judge having concluded that the OR ought to have known about the previous planning permission, and ought to have considered whether the Valuations should be revisted, had found that the OR was negligent and therefore breach of duty had been established;
    5. The District Judge having concluded that that the OR should have known about the Declaration of Trust and the interest of Mr Walker's parents failed adequately to deal with the Appellant's principal submission that notice of the sale should have been given to her and had that been done would have prevented a sale at an undervalue.

17. There is considerable force in some of these points. I find it hard to reconcile the apparent views of the District Judge in paragraph 40 of her judgment that there was a failure to act reasonably on the part of the OR in failing to discover that there was lapsed planning permission on the Land and her views in paragraph 43 that the OR ought to have considered the documents in storage before selling the property with her subsequent conclusion that there was no breach of duty on the part of the OR in taking reasonable steps to obtain a proper price and therefore no meritorious claim. The District Judge had apparently concluded that had the OR been aware of the lapsed planning permission the OR ought to have considered challenging the Valuations and, had she inspected the file, it would have been appropriate for her to have contacted Mr Walker's surviving parent. That is the thrust of Mr Walker's case. Had that happened he says that it would have become clear that the proposed purchase price from Mr Bell was a significant undervalue. For reasons set out below it is not necessary to consider these points further.

F) The correct legal analysis

18. Early in the hearing of the Appeal I put to each counsel that the correct legal analysis of the rights and interests of each of the interested parties in the Land after Mr Walker's bankruptcy is as follows.

19. The Land was held by Mr Walker as trustee. On his bankruptcy only his one third beneficial interest in the land vested in the trustee in bankruptcy for the time being. The legal title remained vested in him as trustee. This the effect of section 283 Insolvency Act 1986.

20. The OR was therefore clothed with no authority to sell the Land as she purported to do by her TR1 in July 2014. All that was vested in the OR was Mr Walker's one third beneficial interest in the Land and without an order for sale under s. 14 Trusts of Land Appointment of Trustees Act 1996 she had no power to sell the Land. Having intermeddled with trust property without authority she is liable to her account for the consequences of her dealings as a trustee de son tort. On an application of trust principles, she is therefore liable (in principle, and subject to the limited defences available to trustees and trustees in bankruptcy in such a position) to reconstitute the trust fund by replacing the Land or its value to put the trust back into the position it would be if the Land had not been sold.

21. Further while Mr Walker might need permission under section 304 Insolvency Act 1986 to bring a claim in respect of loss to his estate as a bankrupt, that claim relates only to the one third beneficial interest which was vested in his bankruptcy estate. His parents need no permission to bring proceedings against the OR in respect of their two thirds interest in the Land which have never vested in Mr Walker's bankruptcy estate.

22. Both counsel agreed with this analysis. Although the parties provided the District Judge with further written submissions after the disclosure of the original bankruptcy file, itself made after the hearing before the District Judge and about a week before her judgment, those written submissions unfortunately failed to recognise how the documents on that file had changed the analysis.

23. At the conclusion of the hearing I gave the parties permission to file and serve sequentially further written submissions in connection with the consequences of the Declaration of Trust on the Application. Mr Walker's submissions were due on 20 August 2021. On 23 August 2021 I was informed as a matter of courtesy that for professional reasons Mr Peebles had withdrawn from representing Mr Walker. Nevertheless submissions were filed by Mr Walker on 30 August 2021 and I gave an extension to the time for the Official Receiver to file her submissions which were filed on 20 September 2021.

G) Further Submissions

24. In his further submissions Mr Walker accepts the analysis above. He contends that as the correct analysis was not put to the District Judge her judgment failed to take into

account relevant matters and the Appeal should succeed. On a reconsideration by this court he argues that his claim against the OR is actually stronger; there being a clear breach of trust in selling without the authority to do so. Had there been no breach, then Mr Walker's mother would have been consulted and he contends that it is inevitable that the previous planning permission and the undervalue in the Valuations would have come to light. He accepts that the Application relates only to the one third beneficial interest in the Land which vested in the OR. While this restricts his claim to a third of any undervalue he says that it is still sufficient in circumstances.

25. As regards the remaining two-thirds beneficial interest in the Land that had been vested in the Land he says that he is now entitled to this interest by succession on the deaths of his parents. He notes that there may now be a limitation issue in respect of any claim in respect of that two-thirds interest. Mr Walker now seeks in his further submissions to add a claim to the Application on behalf of his parents which he says vests in him after their respective death. He says the addition of this claim after the expiry of the limitation period is permissible under CPR 17.4. He has supplied draft Particulars of Claim in case these proceedings should continue as if Part 7 proceedings and in that draft pleading (described as draft Amended Particulars of Claim) he has sought to show the changes to the original claim which would be required to add the new causes of action in relation to his parents' two third interest.

26. The OR's submissions are focussed on strenuously resisting the proposed amendment of the Application to bring what she maintains is a time barred claim in respect of Mr Walker's parents' two-thirds interest. In her further submissions the OR accepts that neither the legal title to the Land nor the beneficial interests of Mr Walker's parents vested in her at the time of the sale, that by selling the Land the OR has become a trustee de son tort and is liable to account to the beneficiaries. She maintains that the OR is entitled to rely on s. 61 Trustee Act 1925, under which the court may relieve the OR if she has "*acted honestly and reasonably, and ought fairly to be excused*". She also maintains that the OR has a statutory defence under s 304(3) which confers protection to a trustee who with reasonable grounds for believing he is entitled to do so, innocently disposes of property belonging to a third party, and does not act negligently in doing so.

H) Permission to appeal out of time

27. The District Judge's order under appeal was made on 15 January 2021. Pursuant to CPR 52.12, Mr Walker had 21 days from that date to file an appeal notice. His Appeal Notice was in fact filed on 15 February 2021. Included in the Appeal Notice is an application for permission to bring the appeal out of time. The OR adopts a neutral position on the application for permission to bring the appeal out of time.

28. An appeal court can vary the time limit for filing an appeal notice even if the application is made after the time for compliance has expired (CPR 52.15 and 3.1(2)(a)). Such applications are equated with applications for relief from sanctions and the *Denton* principles apply. In summary a judge should address the application in three stages. The first stage is to assess the seriousness of the procedural breach. The second is to consider the reason for the default. The final stage is to determine,

having regard to all the circumstances of the case, how to deal justly with the application.

29. A 10 day delay in filing an appeal notice is not trivial, but it has not delayed the hearing of this appeal in any material way or increased costs or otherwise caused any hardship or injustice to the OR. At the time the Appeal Notice was filed on 15 February 2021 the parties had not yet even received the transcript of the judgment.

30. The reason for the delay is set out in the Appeal Notice. Mr Walker's solicitors attempted to file the Appeal Notice, Grounds of Appeal by hand delivery by courier on 2 February 2021 – within the 21 day appeal period. On 3 February 2021 Mr Walker's solicitors were informed by the Civil Appeal's Officer that the documents had made their way to the Court of Appeal but would be passed to High court Appeals. On 15 February 2021 the Notice was returned unissued on the basis that it ought to have been filed using e-filing. The Appeal Notice appears to have then been redrafted to include an application for permission to bring the appeal out of time and efiled that day. Plainly Mr Walker's solicitors must take responsibility for failing to realise that the Appeal Notice needed to be efiled, but it is clear that they attempted to file the Appeal Notice within time, and it is the mechanical processes of doing so which have caused the Appeal Notice to be filed late.

31. In the circumstances of this case and having regard to the significance of the breach and the reasons for it, it would be a wholly disproportionate reaction to the breach to refuse to extend the time for bringing the Appeal. I will accordingly vary the time for filing an Appeal Notice to 15 February 2021.

I) Appealing discretion

32. A decision whether to grant leave under section 304 Insolvency Act to pursue a claim against a trustee of a bankrupt's estate is an exercise of the court's discretion.

33. The principles upon which an appeal court approaches an appeal against the exercise of a judicial discretion are well known and were recently summarised and reviewed by Saini J in *Azam v University Hospital Birmingham NHS Trust* [2020] EWHC 3384 (QB):

"*50. An appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the follows errors:*

1. *(i) a misdirection in law;*
2. *(ii) some procedural unfairness or irregularity;*
3. *(iii) that the Judge took into account irrelevant matters;*
4. *(iv) that the Judge failed to take account of relevant matters; or*
5. *(v) that the Judge made a decision which was "plainly wrong".*

51. Error type (v) requires some elaboration. This means a decision which has exceeded the generous ambit within which reasonable disagreement is possible. "

52. So, even if the appeal court would have preferred a different answer, unless the judge's decision was plainly wrong, it will be left undisturbed. Using terms such as "perversity" or "irrationality" are merely likely to cause confusion. What is clear is that the hurdle for an appellant is a high one whenever a challenge is made to the outcome of a discretionary balancing exercise. The appellate court's role is to police a very wide perimeter and it will be rare that a judge who has exercised a discretion having regard to relevant considerations will have come to a conclusion outside that perimeter. I would add that an appellate court is unlikely to be assisted in such challenges by a simple re-argument of the points made to the judge below. It needs to be underlined that an appellate court in an appeal such as the present is exercising a CPR 52.21(1) "review" power. It is also well-established that the weight to be given to specific factors is a matter for the trial judge and absent some wholly unjustifiable attribution of weight, an appellate court must defer to the trial judge."

J) Appeal and permission to appeal

34. In the circumstances both sides are agreed that the correct issues were not identified before the hearing below and the Application was argued before the District Judge on a mistaken basis. One can only sympathise with the District Judge, but the consequence is that her exercise of discretion was based on a fundamentally flawed premise.

35. The District Judge considered the Application on the mistaken footing that the legal title to the Land had vested in the OR and that the OR had the power as trustee in bankruptcy to sell the Land. In fact the Land did not vest in her and she did not have power to sell it and overreach the beneficial interests in the land without a court order. The District Judge approached the Application on the basis that she was considering a potential claim that the OR had been negligent in selling the Land for £20,000 on the information and valuations she then had. In fact the OR had no power to sell the Land at all, and by purporting to do so the OR became a trustee de son tort and, in principle, liable to reconstitute the trust with the value of the Land. Negligence might be relevant to the defences available to the OR, but Mr Walker does not need to establish it as part of his cause of action.

36. The District Judge's exercise of discretion is therefore flawed. The District Judge misdirected herself in law in that the District Judge did not address the correct legal questions raised by the Application. For the same reason she failed to take into account relevant matters.

37. Ms Chorfi argued that Mr Walker did not advance the correct legal analysis as a ground of appeal in his Appeal Notice and he should not be permitted to advance a ground of appeal which was not advanced in his Notice of Appeal. I do not agree for the following reasons.

1. The Application has proceeded on mistaken lines because there was not the full disclosure of the bankruptcy file until the eleventh hour. I am told that Mr Walker had been pressing for that disclosure since 2017 and had made a subject access request which was purportedly complied with in 2018. The legal analysis underlying the Application will have been based on the documentation which was then available to Mr Walker's legal advisors. It was the disclosure of the original bankruptcy file after the hearing before the District Judge and shortly before she gave her judgment, containing as it did the Declaration of Trust and supporting documents, which permitted the correct legal analysis. That documentation was in the possession of the OR. According to Liesl Cook's second witness statement there had been a note on the Insolvency Service's Case Management System that a file relating to this bankruptcy had been returned to external storage on 3 March 2020. The OR did not see fit to check that file until after the hearing in December 2020 and when she did it revealed a considerable amount of information which should have been disclosed before. There appears to have been an assumption by the OR that the file contained hard copies of documents the OR already had electronically – that assumption, the basis of which is explained in very vague terms in the witness statement, has proved to be false. As between Mr Walker and the OR, responsibility for that late disclosure lies with the OR. It does not lie in her mouth to criticise his lawyers for not having identified the correct legal analysis earlier. Had the bankruptcy file been disclosed in 2017 or 2018 it may well have been.
2. Ms Chorfi points out that Mr Walker should have known himself that there had been a Declaration of Trust. That is true, but in circumstances where Mr Walker has apparently succeeded to his parents' interests under that Declaration of Trust it is not a reasonable criticism that a layman should have realised that the Declaration of Trust may continue to have relevance and should have been mentioned to his lawyers. Even after the Declaration of Trust was disclosed by the OR, none of the lawyers on either side recognised the correct legal analysis until the Appeal hearing.
3. To accede to Ms Chorfi's submission would mean determining this Appeal on a hypothetical basis that it is a negligence claim for 100% of the alleged undervalue for which the Land was sold. When in reality, if the appeal is successful, the claim which will continue is a claim for intermeddling and for reconstitution of the trust in respect of a one third share of the Land. That claim would then proceed on the correct legal basis and no one will ever know if permission would have been granted on the merits of the Application on the correct legal basis. Bearing in mind the purpose of section 304 is to act as a filter against vexatious claims, the Court should ensure that it considers the merits of the claim which it is proposed will actually go forward.
4. I according give Mr Walker leave to rely on the correct legal analysis in this Appeal.

38. I will therefore grant permission to appeal, allow the appeal and reconsider the Application afresh.

K) Reconsideration

39. The approach of a Court to an application for leave under section 304 was considered in the judgment of Laws LJ in *McGuire v Rose* [2013] EWCA Civ 249 in a passage which merits setting out in full;

"21. The proper test which Miss Start said should be applied to applications for permission under section 304 is that set out by Hart J in Brown v Beat, and cited by Lewison J at paragraph 18 of his judgment:

"The factors which the court must bear in mind in deciding whether or not to grant permission are, first, whether or not a reasonably meritorious cause of action has been shown and, secondly, whether giving permission for its prosecution is reasonably likely to result in a benefit to the estate."

22. Miss Start says that that was the test, and the judge should have applied nothing else. In fact he wrongly brought in additional factors, and particularly in his paragraph 49 when, having referred to the absence of a surplus, he added his reference to Mr McGuire's inability to conduct litigation properly (see above). That, she said, went outside the proper test and was an error of principle.

23. We do not agree. Hart J cannot be taken as having laid down any particular test. It would not be appropriate for the court to lay down exclusive criteria by reference to which an application by the bankrupt under section 304(2) had, in all cases, to be judged. He was doing no more than identifying two central factors which have to be taken into account (and obviously so). That is quite apparent from the context of his judgment. In the immediately preceding paragraph to that in which the words cited appear he referred to the policy behind the leave requirement in section 304(2), namely to apply a filter because of the risk of vexatious applications. The risk of vexation in the proceedings is therefore obviously another matter which can, and in our view should, be taken into account, though a favourable answer to Hart J's two questions may well be sufficient in many cases to demonstrate that the particular course of action proposed by the bankrupt is worthwhile and not driven by vexation. Furthermore, at page 427 Hart J returned to the point and described a different test, or perhaps an umbrella test under which his two more specific questions should be asked. At page 427B he said:

"An application for leave under a Grepe v Loam order or under section 304(2) stands on a somewhat different footing from the normal case of a final decision on a trial inter partes. It is not final in the sense that nothing in practice can prevent an application being renewed. It is also different in that the criteria being applied by the court in deciding whether or not to grant leave are those that I have mentioned, namely is there material produced on the application such as would justify a reasonable litigant pursuing the particular litigations proposed?"

As a sort of umbrella test that must be unobjectionable. It coincides with the description of the test proposed by Blackburn J in Re Hellyer (a Bankrupt) [1998] BPIR 695 at 696C in considering whether or not to allow an application which would otherwise have been barred by a Grepe v Loam order (the precursor of civil restraint orders). We cannot see anything wrong with that as a requirement. Hart J himself referred to the Hellyer test at page 424, and added:

"That criterion of reasonableness has, of course, to be stretched to include the factors which I have mentioned, that is to say, the likelihood of success, and the risks as to costs of the estate in the event of failure."

All this points to a test which is wider than the two criteria relied on by Miss Start.

24. Furthermore, in Parkinson Engineering Services PLC v Swan & another [2010] BPIR 437 Lloyd LJ expressly said that the two requirements were not exhaustive, albeit in the context of section 212 of the Insolvency Act:

"The judge started by considering whether or not it would be appropriate to allow proceedings under section 212. It seems to me that this was the correct starting point. He had seen (as we did) the decision of Hart J in Brown v Beat [2002] BPIR 421, where the judge, considering the corresponding provision as regards bankruptcy, identified two criteria: whether or not a reasonably meritorious cause of action has been shown, and whether giving permission for its prosecution is reasonably likely to result in a benefit to the estate. Those are not exhaustive but they are certainly relevant and likely to be among the most important factors. They are relevant here, together with the question of delay."

25. All this shows that Lewison J was right to take into account Hart J's two criteria, together with such further other factors as seemed to be relevant. It follows, therefore, that there is no error or principle here, and indeed, in this area, no error of any kind in the judgment."

Has a reasonably meritorious cause of action been shown?

40. The OR accepts that she had no power to sell the Land, that in doing so she became a trustee de son tort and she is liable to account to the beneficiaries. This acknowledges that Mr Walker's cause of action on liability is established subject to two statutory provisions the OR relies upon in her defence.

41. The first is section 61 Trustee Act 1925 which provides:

"If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same."

42. The second is section 303(3) Insolvency Act 1986 which provides:

"*(3)Where—*
(a) the trustee seizes or disposes of any property which is not comprised in the bankrupt's estate, and

(b) at the time of the seizure or disposal the trustee believes, and has reasonable grounds for believing, that he is entitled (whether in pursuance of an order of the court or otherwise) to seize or dispose of that property,

the trustee is not liable to any person (whether under this section or otherwise) in respect of any loss or damage resulting from the seizure or disposal except in so far as that loss or damage is caused by the negligence of the trustee; and he has a lien on the property, or the proceeds of its sale, for such of the expenses of the bankruptcy as were incurred in connection with the seizure or disposal."

43. I note that section 60 confers a discretion upon the court to relieve the trustee from liability whereas section 304(3) does not. One requires the trustee to have acted "*honestly and reasonably*" and for the court to be satisfied that he "*ought fairly to be excused*". The other requires the trustee to have had reasonable grounds for believing he was entitled to dispose of the property and that he did so without negligence.

44. In circumstances where these proceedings may continue it is not appropriate for me to ventilate my views on the issues any more than absolutely necessary to explain my decision. I will simply say this. On the face of it something has gone wrong here. The OR had in her possession the original bankruptcy file. She failed to appreciate that she had that file. That file contained documents which showed that the correct legal analysis was that the Land was not vested in the OR, the OR had no power to sell, two-thirds of the Land was vested in third parties and an order for sale would be required for a sale of the Land. The reasons why the OR did not inspect that file before sale have not been fully explained in the second witness statement of Liesl Cook and Mr Walker has not had a chance to challenge those reasons. At this stage I cannot conclude that the OR will show that she has acted honestly and reasonably and ought fairly to be excused or that she had reasonable grounds for believing that she was entitled to dispose of the property or that she did so without negligence.

45. If the OR is liable to account to the beneficiaries it will be on the basis that she must reconstitute the trust fund which has been depleted by her wrongful sale of the Land in excess of her power and authority. It would be an answer to this claim, so far as it related to Mr Walker's one third share, to show that the Land was sold at or above its true value. There is clearly a case that it was not. The Valuations did not take into account the fact that the Land had planning permission albeit planning permission which had lapsed and there is expert evidence which says that the existence of such planning permission should have had a significant impact on the values placed on the Land. The OR has not provided any satisfactory explanation for the increase of value in the Land from £20000 for which it was sold in 2014 to £175000 for which it was sold in 2019. Mr Walker also relies on the valuations of Mr Bradley and Mr Smith as suggesting the Land had an even higher value although I treat that contention with caution as it would mean that Mr Bell failed to achieve its fair market value when he sold the Land.

46. Although I do not believe it adds anything to a claim on trust principles, I note that there is force in Mr Walker's contention that had the OR appreciated the true position there would have been no intermeddling. The OR would have been bound to notify Mrs Walker of her intention to apply for an order for sale and invite her consent, and to join her to the application if she did not consent. It is one of Mr Walker's principal complaints that there was no communication at all to him or his parents, and that had there been the previous planning permission, and the alleged undervalue would have become apparent. If the OR had acted within her powers there would have been such

communication and an opportunity for Mrs Walker to place the information before the court in the context of the proposed order for sale.

47. I therefore conclude that Mr Walker has a reasonably meritorious claim in respect of his one third interest.

Is the Application reasonably likely to produce a benefit for the estate if successful?

48. The OR suggests that Mr Walker's claim is at best for "*a very modest*" £38,000. This is on the basis of an assumed value for the Land in 2014 of £175,000 and giving credit for the £20,000 received for its sale which was paid into his bankruptcy estate (two thirds of which should have been paid to Mr Walker's parents). I note that there would also be claims for compensation for loss flowing from the failure to realise that sum in 2014, such as interest.

49. A recovery of £38,000 would be a significant benefit to the estate. I am told it should discharge the unpaid creditors and produce a surplus. This Court may be used to seeing much larger claims but it remains the case that for all but a very small minority of society £38,000 is a significant sum. A just legal system requires that Mr Walker is able to invoke the court machinery to recover that sum, and it is incumbent on the courts and the parties to manage the claim in a manner which ensures that his claim is dealt with cost effectively and proportionately. Under the ordinary principles that apply to costs of proceedings such as this, if Mr Walker is successful he should recover his legal costs from the OR, in addition to any compensation.

50. I therefore conclude that the Application is reasonably likely, if successful, to produce a benefit for the estate.

Other relevant factors – the claim of the estates of Mr Walker's parents

51. One other relevant factor is the possibility that there may be a claim which is brought in respect of Mr Walker's parents two-thirds share. If such a claim were to be brought and to proceed to trial, that would enhance the global value of the claim. If the OR was to face such a claim anyway, there would not be much further cost or time required by permitting Mr Walker's claim to continue alongside it. However, a claim on behalf of Mr Walker's parents is no more than an unresolved possibility at the moment.

52. Mr Walker seeks in his further submissions to add a claim on behalf of his parents which he says vests in him after their respective death. He says the addition of this claim after the expiry of the limitation period is permissible under CPR 17.4. I do not refuse that application but I decline to deal with it. This is an important application in the context of this case because it potentially increases the liability of the OR three fold. The application is made informally in post hearing submissions. The OR has filed written submissions but the application has not been fully argued and I am not satisfied that it can be properly dealt with on written submissions. It raises complicated issues. For example:

1. The application is premised on Mr Walker now having title to bring a claim in respect of his parents' interests. His submissions say that he is now entitled to this interest by succession on the deaths of his parents. His father died before the sale of the Land and his submissions say that his father's interest passed to his mother. She has since died and her interest, his submissions say, has passed to him. There is nothing in evidence on this issue and, in any event, this is not adequate evidence of a title to sue. It is not clear whether the father died testate of intestate, whether any grant of probate or administration was obtained and if so by whom, or whether any interest in the Land was formally vested in the mother or remains in his estate. The same points can be made in respect of the mother's estate and the alleged succession of Mr Walker.
2. The claims so far as they relate to Mr Walker's parents' interests in the Land are arguably time barred. Mr Walker seeks to circumvent this by adding the claim to the Application under CPR 17.4. That presupposes that CPR 17.4 can be used to add a claim to the Application and that it is appropriate to do so. The Application is a claim for relief under section 304 Insolvency Act and brought in accordance with the Insolvency Rules. It is far from clear to me that a claim can be added to it (whether under CPR 17.4 or not) where relief under section 304 is not sought. No relief can be given under section 304 in respect of the parents' interest in the Land because it did not vest in the Trustee in bankruptcy. Ordinarily their rights would be vindicated by separate originating process issued under the CPR.

53. If Mr Walker wishes to pursue an application to add a claim in respect of his parents' interests he should make a formal application supported by evidence so that it can be responded to by the OR and given proper consideration by the Court.

L) Conclusion

54. Mr Walker has permission to bring his appeal out of time and is given leave to appeal. The appeal is allowed and the order made below, including as to costs, is set aside. Mr Walker has leave to continue the Application in respect of his one third interest in the Land which vested in the OR as Trustee in Bankruptcy.