

Neutral Citation No: [2022] EWHC 3257 (Ch)

Claim No: 166 AND 167 OF 2015

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

2 Redcliff St  
Bristol

**Before HIS HONOUR JUDGE PAUL MATTHEWS  
(Sitting as a High Court Judge)**

**IN THE MATTER OF NIHAL MOHAMMED KAMAL BRAKE  
IN THE MATTER OF ANDREW YOUNG BRAKE  
AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**BETWEEN**

**(1) PATLEY WOOD FARM LLP  
(2) LORRAINE BREHME  
(3) THE CHEDINGTON COURT ESTATE LIMITED**

**Claimants/Respondents**

**AND**

**(1) KRISTINA KICKS  
(2) BLAIR CARNEGIE NIMMO  
(as joint Trustees in Bankruptcy of the estates of Nihal  
Mohammed Kamal Brake and Andrew Young Brake)**

**Respondents/Applicants**

**MR WILLIAM DAY appeared on behalf of the Claimants/Respondents  
MR TIM CALLAND and MS ROWENA PAGE appeared on behalf of  
Respondents/Applicants**

**JUDGMENT  
16<sup>th</sup> DECEMBER 2022  
(AS APPROVED)**

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JUDGE PAUL MATTHEWS:

1. This is an application by the Trustees in Bankruptcy of Mr and Mrs Brake on form IAA dated 9 December 2022 for (a) the abridgement of time for this application to be made, (b) directions under s303 of the Insolvency Act that the submission of the draft submissions appended would not be a breach of my order of 17 November 2022, but alternatively, (c) a variation of my order to permit the Trustees to submit those submissions to the Court of Appeal, (d) such other directions as the Court thinks fit, and (e) a declaration that the costs of preparing the submissions be recoverable from the third respondent (“Chedington”) under the undertakings given in the order.

2. The abridgement question I have already dealt with (positively), and the costs question is not for today, and will be adjourned off, but the rest is live. The application is made under two sections of the Insolvency Act 1986, first of all, s 375, under which the court may review, rescind, or vary any order made in insolvency proceedings, or, alternatively, under s 303 whereby the court may give directions to the Trustees in Bankruptcy.

3. So far as concerns the jurisdiction under s303, I think that the problem for the Applicants is that I have already made an order directing the Trustees to do certain things. If they do not like that order, then either they should appeal that order or they should apply under s375, *if* they can meet the jurisdictional criteria for it. What they should not do is make a separate application under s303 for relief which is different from what which was ordered in the original direction.

4. So far as concerns the jurisdiction under s375, it is clear from the authorities to which I have been referred, in particular the cases of *Egleton v IRC* [2003] EWHC 1054 (Ch), *Ross v HMRC* [2012] EWHC 3355 (Ch) and *Harvey v Dunbar Assets plc* [2015] Bus LR 1383, and also the decision of Laddie J in *Papanicola v Humphreys* [2005] EWHC 335 (Ch), [25], that essentially this is an exceptional jurisdiction. It is not an alternative to an appeal, and in most cases where you disagree with the directions you should appeal, not try to rescind it. In effect, for the jurisdiction to become available, there has to be some material change in the circumstances which would justify the court re-appraising the situation.

5. The background to this application is set out in my earlier judgments in the wide-ranging Brake litigation, but most recently in the judgment which I gave, or the reasons for the decision which I handed down, in the earlier application between these parties on 25 November 2022, *Patley Wood Farm LLP v Kicks* [2022] EWHC 2973 (Ch). The decision for which that is the explanation, or the reasons, led to the order that I made that the Trustees in Bankruptcy should apply to join the Court of Appeal proceedings in relation to the appeal

from my decision in the eviction proceedings concerning the Cottage, and also, having been joined to those proceedings, should apply for a possession order of the cottage as against the Brakes.

6. The argument for the Trustees in Bankruptcy in general terms is that simply applying to be joined and asking for a possession order would breach the Trustees in Bankruptcy's "duty of candour to the court", as it was put by Mr Calland in his submissions to me. (I come back to this "duty" later.) This is because they claim to have doubts about whether Mr Duncan Swift, the former Trustee in Bankruptcy, had the power to enter into the transactions that he did with the Liquidator of the partnership, Stay in Style, on the one hand, and Chedington on the other. The proposed written submissions to the Court of Appeal which they have effectively asked this court to bless, and which I have read, set out these doubts at some length and in some technical detail. The argument, or the submission, of the Trustees in Bankruptcy, is that they do not wish the Court of Appeal to grant any relief which it is otherwise prepared to grant on a mistaken basis.

7. As to that, the Respondents have pointed out a number of things. First of all, Mr Duncan Swift did in fact consider this very issue at the time of the transaction and was satisfied in his own mind that this was proper. Now, that is not conclusive, but it is an indication at least of good faith, and it is also an indication that there is something to be said for the transaction. Secondly, the Respondents point out that the submissions made to the Court of Appeal are that that court should only grant the relief sought if it were satisfied that the Trustees own the beneficial interest. And that, of course, is not something which the Court of Appeal is going to decide. Indeed, Mr Calland accepted as much in his own skeleton argument to the court (at paragraphs 9-10).

8. Thirdly, the original bankruptcy application and the liquidation application, in which these issues were raised by the Brakes challenging these transactions, were struck out by me in 2020. The Court of Appeal ([2021] Bus LR 557) then affirmed my decision on the liquidation application and on part of the bankruptcy application (the part that dealt with the Brakes as trustees of the Brake Family Settlement). But they reversed my decision on the part of the bankruptcy application dealing with the Brakes as bankrupts. And that meant there still had to be a trial on that point. However, Chedington then appealed to the Supreme Court. The position now, as everybody in the litigation knows, is that the Supreme Court has heard the argument on that appeal, but has yet to hand down its judgment.

9. So, there is still no decision on that point. In my judgment at first instance in the eviction proceedings, *Brake v The Chedington Court Estate Ltd* [2022] EWHC 366 (Ch), I

said (at paragraph 196) that the court in this litigation had to proceed on the basis that the transactions were and remained of full force and effect. I pointed out that, for example, Mr Swift was not a party to the eviction proceedings. In my view, it was not right to entertain any challenge therefore in those proceedings. I therefore refused to allow the Brakes to bring into the eviction proceedings various points which properly belonged in the insolvency proceedings.

10. Now there was no appeal brought against that part of my decision, and the Court of Appeal, certainly so far as I can see, did not comment on it, let alone disturb it. And, as Mr Day has rightly pointed out, if the Trustees in Bankruptcy or anyone else were joined to the proceedings now, then it is clear that they too would be bound by that part of my decision. Mr Day referred to a statement by Lord Toulson in the Privy Council in the case of *Den Danske Bank v Surinam Shipping Limited* [2014] UKPC 10, [18], to make that good.

11. It is clear, and I think common ground on this application, that the Court of Appeal is simply not going to entertain arguments about whether or not the transactions entered into by Mr Swift with the Liquidator on the one hand and Chedington on the other were within his powers or not, and therefore whether or not the transactions were valid or invalid. Those are matters which will be dealt with, if at all, in the insolvency proceedings.

12. Accordingly, in my judgment, the Court of Appeal will be proceeding on the basis that the Trustees in Bankruptcy currently have the beneficial ownership of the Cottage, unless and until a trial of the remaining part of the bankruptcy application (or some other proceedings hereafter) shows otherwise. I was referred to, and was interested to note, the positive written submission to the Court of Appeal pursuant to its order of 10 October 2022 (at paragraph 2.5) by counsel instructed on behalf of *the Brakes*, to the effect that the Brakes averred that the current applicants, the Trustees in Bankruptcy, actually *did* have the beneficial ownership of the Cottage.

13. Secondly, I consider that the Trustees in Bankruptcy should not be seeking to raise this before the Court of Appeal now. That is a corollary of, or it follows on from, the first point that I made. But I emphasise that there is, in my judgment, nothing wrong and nothing in my order to prohibit the applicants from simply reminding the Court of Appeal of the existence of the insolvency proceedings, and pointing out that (obviously) the beneficial ownership of the Trustees in Bankruptcy is subject to whatever happens in those proceedings. But, in my judgment, the Trustees in Bankruptcy should not be going into the question at all and certainly not in the detail which the present draft submissions propose. The Court of Appeal will not be deciding the point and the Trustees should not be arguing it.

14. Other points were made, but it seems to me that these are determinative of this application. As to s 375, I am not at all satisfied that there is anything material here that has happened since I made my order. The only points which have been raised are really points which already are waiting to be resolved by the insolvency proceedings. If the insolvency proceedings in the Supreme Court are resolved by that court holding that the Brakes have no standing to raise the issue, then the Brakes' application falls away and there is no other claim or challenge to Mr Swift's having validly acquired the property as part of the bankrupt estate.

15. If, on the other hand, the Supreme Court takes the view that the Brakes do have standing then there will have to be a trial of that issue. But unless and until that trial takes place, and finds in the Brakes' favour, it seems to me that we proceed on the basis, as I said at first instance in the eviction proceedings, that there is nothing wrong with the claim to beneficial ownership by the Trustees in Bankruptcy.

16. I do add, however, that I find it difficult to see why the Trustees in Bankruptcy have only just now decided to put this matter forward. I regret to say that it does remind me of the comments that I made in my earlier judgment that the Trustees in Bankruptcy just seem to be looking for an excuse not to get involved. I do accept what Mr Calland says, that he has come into the case, taken a professional view and given certain advice and so on. That is as may be, but, in this context, I think that it is merely the instrument implementing the attitude which the Trustees appear already to have taken.

17. Lastly, there is the question of the Trustees in Bankruptcy's "duty of candour to the court". I really am not sure where this comes from. I have not been taken to any authorities to say that there is such a duty. Certainly the Trustees in Bankruptcy have a duty not to mislead the court. And officers of the court are held to a higher ethical standard than ordinary litigants. That is well known, and has been well established since the 19<sup>th</sup> Century, but this is not a case where that kind of thing applies. It is not an *ex parte* application: the Brakes would be able to make such representations as they wish, if so advised, as to why Mr Swift had no beneficial title..

18. It is not for the Trustees in Bankruptcy to assist the bankrupts by, effectively, putting forward arguments which might be employed by the Brakes when all of those arguments are going to be raised and decided, if at all, in the insolvency proceedings. The Trustees in Bankruptcy have been saying all along that they are trying to be neutral. I have difficulty in seeing how their proposed submissions are even neutral as between the applicants and the Brakes, but there we are. For the reasons I have given I dismiss this application, so far as it is effective today.

19. I should just add as a footnote that I received an email from Mrs Brake directly to my email inbox this morning, and I think it was copied to the other parties. She is not, of course, a party to this application but I have read it *de bene esse*. I record that I do not consider that anything in it affects the conclusions to which I have come.

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