Neutral Citation Number: [2022] EWHC 366 (Ch)

Case No: F00YE085

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 25 February 2022

Before :

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

- -

BETWEEN:

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(3) TOM CONYERS D'ARCY

Claimants

and

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

- -

Mrs Nihal Brake and Mr Andrew Brake appeared on their own behalf and that of **Mr Tom D'Arcy**
Andrew Sutcliffe QC and William Day (instructed by **Stewarts Law LLP**) for **The Chedington Court Estate Ltd**

Hearing dates: 12-29 October 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.

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HHJ Paul Matthews :

INTRODUCTION

1. This is my judgment on the trial of a claim, made by claim form issued on 3 April 2019, for (i) delivery up of possession of a property known as West Axnoller Cottage (but which I shall simply call "the cottage"), historically forming part of West Axnoller Farm, near Beaminster in Dorset, (ii) an injunction and various declarations as to the status of the parties in relation to the cottage, (iii) delivery up of certain chattels at the cottage, and (iii) and an inquiry as to damages. The claimants claim to have been unlawfully evicted from the cottage by the defendant on 18 January 2019. The defendant admits taking possession of the cottage on 18 January 2019, but resists the claim to delivery up of possession of the cottage or the chattels. It also denies the claims for damages.

2. I am giving judgment simultaneously in another action between (in effect) the same parties, called *Axnoller Events Ltd v Brake* (where the claimant is a wholly owned subsidiary of the defendant in this case). That case has been colloquially referred to as the "Possession Proceedings", to distinguish it easily from this case, which is called the "Eviction Proceedings". Rather than refer readers of this judgment to the other judgment for certain background and other information, I am going to set out certain material in effect twice, once in each judgment, so as to make each judgment self-contained. In any event, the two cases differ in certain details, and this approach means that each judgment can be tailored to the needs of the particular case.

3. This claim is only one part of wider litigation between the parties. Until recently, the claimants were represented by solicitors and leading and junior counsel. However, in March last year both counsel withdrew from the litigation generally, and in particular from representation in the present claim. The claimants' solicitors continued on the record until June 2021, when they also withdrew. The trial of this claim had originally been listed for May last year, but after an application to adjourn was made to me I vacated that listing and relisted it for last October: see [2021] EWHC 982 (Ch). Because it was envisaged that the claimants would represent themselves, the first claimant Mrs Brake conducting the advocacy on behalf of all, and she has a number of medical conditions, I agreed that this trial (like that in the other case) would be conducted in half days only.

BACKGROUND

4. I set the context for the present claim by providing some background, which refers to some of the other litigation between the parties. I have adapted this from similar statements in earlier judgments of mine. In September 2004, the first claimant (then Mrs D'Arcy, but whom I shall call by her current name, Mrs Brake) acquired West Axnoller Farm ("the Farm"), near Beaminster in Dorset, from local landowners, the Vickery family (who continued to have substantial landholdings locally). This property included a substantial dwelling-house known subsequently as Axnoller House. In 2006 Mrs Brake began to operate a holiday letting business at the Farm, subsequently joined in

partnership in 2008 by her husband, the second claimant ("Mr Brake"). Just outside the southern boundary of the Farm, on the other side of the private lane leading to the Farm, lies another, smaller residential property known as West Axnoller Cottage (the "cottage").

5. Although the cottage had historically formed part of the Farm, in July 2002 a Mr and Mrs White had purchased it from the Vickery family and were living there when Mrs Brake bought the Farm. In 2006 Mrs Brake bought and was registered (again under her former name of D'Arcy) as proprietor of two further small parcels of land from the Vickery family, one on either side of the cottage. Mrs Brake borrowed money from bankers Adam & Co in 2006, secured by a first legal charge on the Farm (but not on the two small parcels either side of the cottage). The financial crisis of 2008 made it impossible to obtain further bank finance to expand the business being carried on at the Farm. Mr and Mrs Brake ("the Brakes) therefore looked for an outside investor.

6. In February 2010 the Brakes entered into a partnership with a limited partnership called Patley Wood Farm LLP ("PWF"), whose principal was Mrs Lorraine Brehme ("Mrs Brehme"). The partnership (known as "Stay in Style") was to carry on the business of providing luxurious weekend and other breaks, and hosting events such as weddings. The Brakes contributed the Farm as partnership property, although still subject to the charge to Adam & Co to secure existing borrowings. With funds contributed by Mrs Brehme, on 8 April 2010 the partnership acquired the cottage, the legal title to which was transferred to the Brakes and Mrs Brehme jointly, who were registered as proprietors. At first the cottage was used as accommodation for a housekeeper and then for a personal assistant (Simon Windus) and his family. After the Windus family left in 2012 it was used (inter alia) for the Brakes and Mrs Brake's son, the third claimant, to stay in when the main house was let.

7. Differences arose between the Brakes on the one hand and PWF on the other, as partners in Stay in Style. In accordance with the partnership agreement, these were referred to arbitration, which ended on 21 June 2013 with an award in favour of PWF, and the dissolution of the partnership. Following a failure to pay orders made against them for costs in the arbitration, the Brakes were adjudicated bankrupt on 12 May 2015. Mr Duncan Swift was appointed trustee in bankruptcy with another person, who later retired and was not replaced. The partnership itself subsequently went into administration (in 2016), and then into liquidation (in 2017). On Mrs Brake's bankruptcy, the two small parcels of land either side of the cottage vested in Mr Swift, as did the benefit of a claim by the Brakes to a proprietary estoppel interest in the cottage as against PWF. But the partnership's beneficial interest in the cottage did not vest in Mr Swift, and he took no steps in relation to it, leaving it to the administrators and then liquidators of the partnership to deal with.

8. Prior to this, in October 2014 Adam & Co, the bank which had lent money to Mrs Brake against the security of the Farm, had appointed receivers under the Law of Property Act 1925. After marketing the property, the LPA receivers sold it in July 2015 to a newly incorporated company, Sarafina Properties Limited ("Sarafina"), said to be a corporate vehicle for the Hon Saffron Foster

("Mrs Foster"), a daughter of Lord Vestey, as well as a friend of Mrs Brake. Sarafina did not purchase the wedding and events business of the partnership. It was not the receivers' to sell. But Sarafina honoured existing bookings, and continued in the same line of business, albeit that, as explained below, for the first six months, Mrs Brake was restrained by injunction from working in it.

9. In February 2017 Sarafina was sold to The Chedington Court Estate Ltd ("Chedington", the defendant), and its name was changed to Axnoller Events Limited ("AEL"). Chedington is an investment vehicle for Dr Geoffrey Guy ("Dr Guy"). I refer to Dr Guy, Chedington and AEL collectively as "the Guy Parties". Mr and Mrs Brake were employed to continue to run the wedding and rental accommodation business as before. Relations between the parties broke down, and on 8 November 2018 notice by letter was given to each of the Brakes of the termination of their employment. This also gave notice to them of the termination of any licence to stay in Axnoller House and required them to remove their possessions by 30 November 2018. The Brakes did not do so, but continued to stay in Axnoller House. These events led both to proceedings in the employment tribunal against Chedington and others by each of the Brakes ("the Employment Claims"), and to proceedings in the High Court by AEL against the Brakes and Mrs Brake's son Tom D'Arcy to recover possession of the Farm ("the Possession Claim"). In fact, Tom D'Arcy was later removed as a defendant.

10. Following this, in January 2019, Mr Swift as trustee in bankruptcy entered into a transaction with the liquidators of the partnership in relation to the cottage, to acquire the liquidators' rights in it. Chedington entered into back to back transactions with Mr Swift in order to acquire those rights. The Brakes allege that Chedington and Mr Swift acted collusively, implementing "unlawful arrangements to create the false appearance that Chedington had acquired title to the cottage". Chedington subsequently took possession of the cottage, the Brakes say unlawfully. They therefore commenced eviction proceedings against Chedington ("the Eviction Claim"). This is my judgment on that claim. So the position on the ground currently is that the Brakes are in occupation of the house, but seek possession of the cottage, whereas the defendant is in occupation of the cottage, and its subsidiary seeks possession of the house.

11. In addition to all this, on 12 February 2019 the Brakes commenced insolvency proceedings (the "Liquidation Application" and the "Bankruptcy Application") against both the liquidators of the partnership and their trustee in bankruptcy. The first purpose of these insolvency proceedings was to unwind the disputed transactions between the liquidators and Mr Swift. The second purpose was (as against the trustee) to establish that the Brakes' pre-existing interests in the cottage and the adjacent parcels had revested in them and Mrs Brake respectively on 12 May 2018 under the Insolvency Act 1986, section 283A, on the basis that they were the Brakes' sole or principal residence at the date of bankruptcy, and Mr Swift had taken no steps to realise them three years later. In April 2019, by consent, Chedington was joined as second respondent to the proceedings against Mr Swift, because it claimed to be a successor in title to him. In June 2019 Mr Jarvis QC, sitting as a deputy

judge, made two orders by consent, one removing Mr Swift from office, and another appointing his successors.

12. In January 2020 Chedington applied to strike out the proceedings against the liquidators and most of those against Mr Swift and itself, on the basis that the Brakes lacked standing to bring them. I heard those applications in early March 2020, and acceded to them. I struck out the whole of the Liquidation Application ([2020] EWHC 538 (Ch)), and most of the Bankruptcy Application ([2020] EWHC 537 (Ch)), for lack of standing. I also struck out an application brought by Mr Swift relating to the cottage, to which I refer further below. An appeal against my decision in the Liquidation Application was dismissed by the Court of Appeal. An appeal against my decision in the Bankruptcy Application was however allowed, so that that application is yet to be tried (see [2020] EWCA Civ 1491, [2021] Bus LR 577, for both appeals). However, as I understand the matter, the Supreme Court subsequently gave permission to Chedington to appeal against the decision of the Court of Appeal, on 6 December 2021, so that that appeal will have to be dealt with before it is known whether the decision of the Court of Appeal stands. I am told the Supreme Court appeal is now fixed for 1 November 2022. But, as at March 2020, the only significant matter left from the Liquidation and Bankruptcy Applications to be tried in May of that year, against the former trustee and Chedington, was the revesting issue under section 283A.

13. It is relevant to note that, on 4 May 2020, the Brakes applied by notice in relation to that section 283A claim for me to recuse myself from trying it. I heard that application on 7 May and gave judgment on 11 May 2020, refusing the application: see [2020] EWHC 1156 (Ch), [2020] BPIR 1254. Permission to appeal against my decision was refused by the Court of Appeal. So the section 283A claim was tried by me, and I gave judgment in July 2020, in favour of Chedington ([2020] EWHC 1810 (Ch), [2020] 4 WLR 113). An application for permission to appeal was refused by the Court of Appeal on 30 October 2020. What this means is that, even if the Brakes had any rights in relation to the cottage (for example, by proprietary estoppel) when they became bankrupt, they never revested in them under section 283A. So they cannot be a basis for the Brakes' claiming possession in this claim.

14. The next claim to be tried was the so-called "Documents Claim". The claim form in this claim was issued on 2 September 2019. The claim form sought a final injunction and damages based on causes of action in breach of confidence, misuse of private information, procuring a breach of contract, and compensation under article 82 of the (EU) General Data Protection Regulation. This claim concerned the Guy Parties' access to and use of what were said to be private and confidential documents and information in an email account which prior to the Brakes' dismissal had been used, not only for the business purposes of the weddings and events business carried on at Axnoller, but also by Mrs Brake for her personal communications. At an early stage the Brakes were granted an interim injunction restraining the defendants until final determination of the claim or further order from disclosing or publishing certain documents within the particular email account.

15. After considering submissions from the parties, I decided to try the claim in stages. I heard argument on a preliminary issue of law and heard evidence and arguments on certain other issues. My decisions on these matters ([2021] EWHC 670 (Ch), [2021] 4 WLR 71, and [2021] EWHC 671 (Ch)), which were in favour of the Guy Parties, meant that the remaining issues did not need to be tried. On 3 September 2021 the Court of Appeal granted permission to appeal from the second judgment (the part trial). That appeal was heard, I understand on 2 and 3 February 2022. The decision has not yet been handed down, so far as I know. No application for permission to appeal was made in relation to the judgment on the preliminary issue.

16. The two next trials, in the Possession Proceedings and the Eviction Proceedings, were listed for trial in April and May 2021. A draft judgment in the Documents Claim had been circulated to the parties on 19 March 2021, and formally handed down (without attendance) on 25 March 2021. Unfortunately, and as I have already said, between those two dates junior counsel who had appeared for the Brakes at the trial of the Documents Claim (and indeed the section 283A trial and the insolvency proceedings) withdrew from that case, and *also* from the forthcoming trials in the Possession and Eviction Proceedings. On 29 March 2021 it was confirmed that the Brakes' leading counsel who had been retained in each of those two trials (two different people) had also withdrawn. This left the Brakes without any retained barrister to carry out the advocacy at the two trials. Their solicitors, however, remained on the record.

17. The Brakes thereafter made two applications. First, they applied for an order that I recuse myself from hearing the two trials. I refused that application for reasons given in a written judgment: [2021] EWHC 949 (Ch). Secondly, the Brakes applied for an adjournment of the two forthcoming trials. After hearing argument, I acceded to this latter application, and vacated the trials, relisting them for September and October 2021, when Mrs Brake would act in person for herself and her husband. Both cases would be tried in half-days only, so as to meet Mrs Brake's medical needs, according to the advice of her consultant physician: see [2021] EWHC 982 (Ch).

18. In May 2021 Mr Brake entered a mental health crisis moratorium under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020. This placed restrictions on the ability of the Guy Parties to enforce orders made against him, and also against any person who was a joint debtor with him (*ie* Mrs Brake). On 11 June 2021 the Brakes' solicitors came off the record. The Brakes have been acting in person ever since, except in relation to the appeal in the Documents Claim and the Supreme Court appeal in the Bankruptcy Application. On 25 June the Guy Parties applied for an order cancelling the mental health crisis moratorium of Mr Brake, or alternatively for certain unless orders. This was argued remotely by videoconferencing on 12 August 2021. I announced my decision (to refuse the cancellation order but to make some unless orders) on 13 August, and handed down written reasons for my decision on 17 August 2021: [2021] EWHC 2308 (Ch), [2021] 1 WLR 6218.

19. On 31 August 2021 the defendants issued a further application for specific disclosure against the claimant and for third party disclosure against Mrs Lorraine Brehme. I dealt with this on paper on 6 September 2021 (which was my first day back from annual leave). I made no order on the first part of the application, as it appeared that the documents sought had already been supplied, and so it was academic, and I refused the second part of the order, for the reasons given. The trial of the Possession Claim began the next day. It concluded on 24 September 2021. In the following week I heard and determined an application by the defendant for security for its costs. I ordered that the Brakes provide security in the total sum of £100,000, in two tranches: see [2021] EWHC 2640 (Ch). Shortly before the trial began, I also dealt with an application by the Brakes concerning the costs of the trial transcript: see [2021] EWHC 2700 (Ch).

PROCEDURE

20. As I have said, the claim form was issued on 3 April 2019, together with particulars of claim. Amended particulars of claim were filed and served on 6 October 2020. The original defence and counterclaim was served on 8 January 2019, but amended and re-served on 14 February 2019. The particulars of claim were amended on 24 January 2019 and re-amended on 20 January 2020. An amended defence was filed and served on 20 October 2020, amending an earlier defence. Finally, an amended reply to the amended defence was filed and served in November 2020.

21. On 31 March 2021, Marcus Smith J gave directions for the conduct of both forthcoming trials. These included the provision of a joint trial bundle for both trials. He also set out the issues for each trial. I held a pre-trial review on 5 August 2021, in both this claim and the Possession Claim. I heard the evidence in the Possession Claim between 6 and 24 September 2021 and reserved judgment, receiving written closing submissions thereafter.

22. During the Possession Trial, an issue arose about an apparently draft witness statement, dated 26 November 2018, unsigned but in the name of Mrs Brake. This was in the trial bundle, and the claimant wished to cross-examine Mrs Brake upon it. I was obliged to hear evidence from those who were present at a hearing at the County Court at Yeovil on 27 November 2018. These included both counsel then present and Mr Brake, the second defendant. One counsel provided her evidence in the form of emails. The other went into the witness box. After hearing the evidence and considering the submissions, I ruled on 21 September that, if the document had once been privileged, that privilege had been waived, and the claimant was entitled to cross-examine upon it: see *Axnoller Events Ltd v Brake* [2021] EWHC 2539 (Ch). Because the same bundle was used for both trials, my ruling applied to both cases.

23. Because the Brakes' counsel had withdrawn earlier in the year, and later the Brakes' solicitors too (as set out above), the roles of both solicitor and advocate devolved upon Mrs Brake, supported by her husband. Usually, at a court hearing, litigants in person do not know what they are doing, and allow their ignorance and their emotions to interfere with their organisation and presentation of their case. Mrs Brake has proved a notable exception to this

generalisation. First of all, she is extremely clever, with a prodigious memory and recall for events, details and documents. Secondly, she is very fluent (as the transcribers will agree, sometimes too fluent) in expressing her ideas. Thirdly, she is an extraordinarily rapid learner. Having sat behind counsel on earlier occasions, she was able to adapt to the ways of the courtroom with impressive speed. She even made clear, in an intervention during the trial, that she was well aware that, if evidence in witness statements were not challenged in cross-examination, the failure could be held against her (day 14, pages 52-53).

24. However, there were problems. It is clear that she is used to getting her own way, to wear down opposition by constant attrition, and always to have the last word on everything. I had to intervene frequently in her questioning of witnesses. For example, she would make lengthy, tendentious statements to a witness, and then finally ask the witness to agree with the whole. On occasions, she also allowed her emotions sometimes to get in the way. Her mastery of the rule about not leading her own witnesses did leave something to be desired.

25. Nevertheless. it is clear that, despite her various serious medical conditions, and the strictures of her doctors, a great deal of work has gone into her presentation. In addition, Mrs Brake has informed the court that she had assistance from specialist chancery counsel with her written closing submissions. (I have to say that, notwithstanding Mrs Brake's undoubted intelligence and ability, it was already clear to me from the quality of the submissions that she had been assisted by a lawyer.) Taking all these matters together, I am satisfied that the claimants' case was properly put forward, and that the defendant's case was properly tested.

THE ISSUES

26. The issues for trial in the Eviction Proceedings, as set out in Appendix 4 to the order of Marcus Smith J dated 31 March 2021, are as follows:

> "This list of issues does not identify every pleaded issue between the parties, but only those relevant to the substantive relief sought by the Claimants in these proceedings, namely:
>
> (1) Declarations that the Defendant (Chedington)
>
> (a) was not entitled to enter West Axnoller Cottage (the Cottage**)** on 18 January 2019 and exclude the Claimants and
>
> (b) is a trespasser in the Cottage.
>
> (2) Delivery up of possession of the Cottage, including all keys and other means of access, and an injunction restraining Chedington from entering and/or remaining in possession of the Cottage.
>
> (3) Damages in respect of the matters at (1) above.

(4) Delivery up of chattels in the Cottage (the Chattels).

(5) Damages or an inquiry for damages for conversion and/or deterioration in and damage to the Chattels.

In particular, this list does not deal with the issues arising from an alleged assault on 18 January 2019. Those allegations are not relevant to any of the relief sought, the Claimants having by amendment withdrawn their damages claim for personal injury.

A. PRELIMINARY MATTERS

1. Do the First and Second Claimants (the Brakes) bring this action in their capacity as trustees for the Brake Family Trust as well as in a personal capacity?

2. What is the relevant *res judicata* or other effect on these proceedings of the judgment of 12 July 2020 ([2020] EWHC 1810 (Ch) (the s283A Trial Judgment))? In particular:

(1) Who holds the proprietary interests in the Cottage existing at the date of the Brakes' bankruptcy?

(2) Are any of the Claimants' allegations issue estopped and/or advanced in abuse of process?

B. THE COTTAGE

3. Were the Claimants in possession and/or occupation of the Cottage on 18 January 2019?

4. If so, were the Claimants entitled to be in possession and/or occupation of the Cottage on 18 January 2019? In particular, were the Claimants so entitled by reason of:

(1) The Brakes' registered titles to the Cottage?

(2) The Brakes' rights under a partnership agreement dated 19 February 2010 (in particular, the licence in clause 8.4)?

(3) Section 12 of the Trusts of Land and Appointment of Trustees Act 1996?

(4) An unvindicated proprietary estoppel claim (under claim number HC12F04831) that the Brakes are the beneficial owners of the Cottage arising from an alleged agreement between the Brakes and Lorraine Brehme (Mrs Brehme) on 7 October 2011?

(5) An implied licence from the Brakes' trustee in bankruptcy, the partnership's liquidators and/or Mrs Brehme (and, if so, what were its terms)?

(6) The fact of the Claimants' possession and/or occupation of the Cottage?

5. Was Chedington entitled to enter the Cottage on 18 January 2019 and exclude the Claimants? In particular, as to the licence granted by the Brakes' trustee in bankruptcy to Chedington on 15 January 2019 (the Licence):

(1) Was it a sham?

(2) Was it beyond the powers of Duncan Swift (Mr Swift) as trustee in bankruptcy?

(3) If not:

(a) What are its terms?

(b) What is its effect? In particular, did it permit Chedington lawfully to enter the Cottage and exclude the Claimants on 18 January 2019?

6. Does Chedington remain entitled to remain in and/or exclude the Claimants from the Cottage? In particular:

(1) Has Chedington conformed to the terms of the Licence?

(2) Has the Licence been frustrated or is it otherwise ineffective by, or following, the removal of Mr Swift from office as the Brakes' trustee in bankruptcy?

(3) Has Licence been impliedly continued after 15 January 2021 by the Brakes' new trustees in bankruptcy?

(4) If the Licence ended on 15 January 2021, have the Brakes' new trustees in bankruptcy granted Chedington an implied licence or a tenancy at will?

(5) Is Chedington entitled to remain in and/or exclude the Claimants from the Cottage by virtue of the fact of its possession and/or occupation of the Cottage?

7. What is the relevance of sections 1 and/or 3 of the Protection of Eviction Act 1977?

C. THE CHATTELS

8. To whom do the Chattels belong?

9. Has Chedington converted any Chattels?

10. If so, are the Claimants entitled to sue in conversion and in respect of which Chattels?

11. Have the Chattels been damaged and/or have they deteriorated?

12. If so, are the Claimants entitled sue and in what cause of action?

13. Have the Claimants failed mitigated any losses in respect of the Chattels? In particular, have the Claimants failed to mitigate their loss by:

(1) Not providing a schedule of any Chattels owned by them?

(2) Not agreeing to their solicitor attending the Cottage to supervise the collation and removal of any Chattels belonging to them?

D. RELIEF

Dl. The Cottage

14. Are the Claimants entitled to the declarations that Chedington (a) was not entitled to enter the Cottage on 18 January 2019 and exclude the Claimants and (b) is a trespasser in the Cottage?

15. Are the Claimants entitled to delivery up of possession of the Cottage, including all keys and other means of access?

16. Are the Claimants entitled to an injunction against Chedington and, if so, in what terms?

17. Are the Claimants entitled to damages in respect of Chedington's entry into the Cottage and exclusion of the Claimants from 18 January 2019?

18. If so, in what amount? In particular, are the Claimants entitled to damages for (a) distress and inconvenience (b) legal costs?

19. Are the Claimants entitled to punitive and/or exemplary damages? If so, in what amount?

D2. The Chattels

20. Are the Claimants entitled to delivery up of the Chattels?

21. Are the Claimants entitled to damages and/or an inquiry for damages for conversion and/or deterioration in and damage to the Chattels?

22. If so, in what amount?

D3. Interest

23. Are the Claimants entitled to any interest on damages under section 35A of the Senior Courts Act 1981 and, if so, for what period and at what rate?"

WITNESSES

27. The following witnesses were tendered on behalf of the Brakes: Nihal ("Alo") Brake, Andrew Brake, and Paul Maple. A lady called Deborah Moxhay had made a witness statement but declined to attend at trial. At the Brakes' request I admitted her statement as hearsay, on the basis that her absence went to weight rather than admissibility: Civil Evidence Act 1995, s 2(5). The following witnesses were tendered on behalf of the defendant: Dr Geoffrey Guy (director and shareholder of Chedington), Duncan Swift (former trustee in bankruptcy of the Brakes), Ian Lyons (security officer at the cottage), Colin Maddock (estate manager), Sherryl Dagnoni (housekeeper at Axnoller), Mrs Brehme, and Tracey Symons (former events planner). Mrs Brake cross-examined all of them.

28. I give here my views of the witnesses. In doing so I emphasise that I do so on the basis of the evidence given in person in front of me on this occasion. Some of these witnesses have previously given evidence to me in earlier proceedings between the same parties, but by videolink, or in the trial of the Possession Proceedings. In reaching my views, I disregard all that, and focus on what I heard and saw at this trial, which was in person.

29. Mrs Brake was a fast and fluent witness, very good at detail when the answers favoured her, although, I am afraid, evasive and discursive when they did not. She attempted to dominate and to control the whole process. Where she was supported by documents, she was positively triumphant in tone. Where she was not, she was much more subdued. Her answers were often disjointed, as she started a sentence, stopped, and started again, or changed direction in mid-flow. As a result, her spoken answers were difficult to follow, and I often had to rely on her accompanying body language in order to understand them. This means that the transcript is an even more incomplete record than usual of what happened in court.

30. It is clear that Mrs Brake believes that she is completely in the right, and that therefore the underlying facts must be such as to support her case. In answering 'difficult' questions, she prevaricated, filibustered, split hairs, and offered "technical" explanations. The defendant's closing submissions at [10], fn 15, refer to some of the many occasions on which I was obliged to intervene. Many of her statements, when challenged and referred to documents, were found to be either exaggerated or mistaken. More than that, I am driven to the conclusion that some of her answers were deliberately false. As a result, I am unwilling to accept her evidence where not either obvious or corroborated by an independent source.

31. Mr Brake was an intelligent and often perceptive witness, but much slower than his wife, both in speaking and in reading. He had very little useful evidence to give about financial and transactional aspects of the dispute, as he left all of that to Mrs Brake. Generally speaking (though not always) he deferred to what the documents said. He was also – and understandably – very protective of his wife. I had no doubts about the sincerity of his positive evidence, but he clearly sought to evade questions whose answers were unfavourable to his side, and, if he could not evade them, sought to answer

them in a way which (as he thought) minimised their impact. I also consider that on occasions he was (honestly) mistaken. I treat his evidence with caution.

32. Tom D'Arcy was a straightforward and unsophisticated witness, who however plainly resented the loss of his relative freedom at the Cottage and was sometimes argumentative as a result. I regard his evidence as truthful from his point of view, though clearly partial.

33. Paul Maple was a pleasant but rather carefree, and also peripheral, witness who generally sought to assist the Brakes' case. (Mr Brake's sister is his partner.) His evidence was not very important, but some of it was simply implausible, and I did not accept it. Moreover, I cannot put any weight on his re-examination, which was largely the product of leading questions.

34. Dr Guy was a businesslike, down to earth, precise and detailed witness. He readily accepted correction when shown to be wrong (which was not often). In my judgment he was a transparently honest witness doing his best to help the court, for example readily giving answers to questions against his own interest. Cross-examination made no impression on him. I accept his evidence, and prefer it to any of the Brakes' witnesses where there is a direct conflict.

35. Duncan Swift was a calm and understated, but highly professional, witness, despite Mrs Brake's somewhat aggressive questioning of him. He was knowledgeable on all the events in which he had been involved, answering complex questions without hesitation, whether or not they favoured his interest, and accepting correction where appropriate. He was anxious to be as accurate as possible. I regard him as a straightforward and palpably honest witness. Where his evidence and that of Mrs Brake conflict, I prefer his evidence to hers.

36. Ian Lyons was a very fluent witness, despite being unsophisticated in his speech. His manner and his evidence were both straightforward. He came across as a highly professional private security officer. He was very clear on what he thought he could and could not do, and also why. He accepted correction without difficulty. I accept his evidence, which, in relation to the state of the cottage when Chedington took possession, was not challenged. Where his evidence and that of Mr or Mrs Brake differ, I prefer his.

37. Colin Maddock was a rather wary witness, slow to answer and cautious in what he said. He was sometimes muddled, but he readily accepted correction. On the whole I considered him a credible witness doing his best to assist the court, although making some mistakes along the way.

38. Sherryl Dagnoni was a no-nonsense and businesslike witness, doing her best to assist the court in a transparently honest way. She readily accepted correction when shown to be wrong. I accept her evidence without reservation. Where it conflicts with that of Mr or Mrs Brake, I prefer the evidence of Ms Dagnoni.

39. Mrs Brehme was a fluent but careful witness. She was very businesslike, did not waste time, and gave straightforward answers to questions. She is not a

party to this claim, but I bear in mind that she lost a considerable amount of money in the partnership with Mr and Mrs Brake, and evidently blames Mrs Brake for this. Nevertheless, I have no doubt that she was trying to assist the court, and I accept her evidence. Where her evidence conflicts with that of Mr or Mrs Brake, I prefer that of Mrs Brehme.

40. Tracey Symons was a straightforward and honest witness. I accept her evidence, as far as it went.

41. I did not hear from Deborah Moxhay in person. The witness statement she had made was of limited relevance to the main issues that I have to decide. It stops in October 2018. In any event it is hearsay, and weakened by her refusal to attend court to give oral evidence, aggravated by her statement that she had felt pressured to make the statement by the Brakes. In the circumstances, I can give it very little weight.

VIDEO EVIDENCE

42. A number of video recordings were played during the hearing, concerned with the events on 18 January 2019. These recordings had been made either by the Brakes, using their mobile telephones, or by the security guards engaged by the defendant, using body cameras. Those depicted or heard in the recordings included Mr and Mrs Brake and Tom D'Arcy, Mr Maddock and Mr Lyons. The authenticity of these recordings was not challenged before me. There was no argument about their status. But I should say that, subject to what I say next, I treat them as strong evidence of the events shown and words heard in them. The weaknesses of such evidence include that (1) there is only a narrow field of vision, and the wider context is missing; (2) the viewer cannot see the person holding or wearing the camera, or what that person is doing, *eg* gesturing or holding something; (3) the viewer does not know what happened immediately before or after the recording was made; (4) the quality of the recording is dependent on the light available, whether the background is quiet or noisy, and whether the camera is held steady or moved around suddenly and violently, *eg* as in a scuffle.

FACTS FOUND

43. On the basis of the evidence in this case, I find the following facts. As I have said, the Brakes entered into a partnership with PWF, a vehicle for Mrs Lorraine Brehme. The Brakes contributed West Axnoller Farm (subject to the charge in favour of Adam & Co) to that partnership. The partnership agreement of 19 February 2010 provided in part as follows:

> "1. INTERPRETATION
>
> 1.1. The definitions and rules of interpretation in this clause apply in this agreement.
>
> Admission Date: [ ] February 2010, being the date of LLP's admission to the Partnership.

Founding Partners: Mr Brake and Mrs Brake.

Managing Partner: Mrs Brake, who was appointed as managing partner in accordance with clause 14.

Partnership Property: the Premises and all other assets (all rights in them) which are used by the Partnership for the purposes of the Business and listed in Part I of Schedule 5 except for those assets listed in Part II.

Premises: the freehold or leasehold premises to be occupied by the Partnership, 0 [sic], and such other premises as the Partners may decide in accordance with clause 15.6(i).

[…]

2. DURATION

The Partnership is a continuation of the partnership established by the Founding Partners before the Admission Date and shall be carried on under the terms of this agreement from the Admission Date until it is terminated in accordance with its terms.

[…]

5. PARTNERSHIP PROPERTY

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

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

6. PROFITS AND LOSSES

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

[…]

8. DRAWINGS

8.1. On the last day of each month, or the next Business Day where that date is not a Business Day, the Founding Partners shall be paid the aggregate sum of £8,333. … In addition, at the option of the Founding Partners, this amount may be paid in whole or part by payment in kind. …

8.2. If any Partner withdraws funds in excess of his entitlement to profit share under clause 6.1 for an Accounting Period, that Partner shall repay

> the excess drawings to the Partnership immediately on the approval of the Accounts for that Accounting Period in accordance with clause 9. …
>
> 8.3. Subject to the requirements of clause 8.1, no sum may be drawn under this clause unless there is money and/or facilities to cover the drawings to which all of the Partners are entitled at date, in excess of sums which the Partners unanimously agree are required for the current expenses of the Partnership.
>
> 8.4. The Partners hereby agree that the Founding Partners are entitled to reside in the Premises as Licensees rent-free.
>
> 8.5. West Axnoller Cottage forms part of the Premises. The Partners agree that as and when the Founding Partners so decide at any time after the second anniversary of the Admission Date, West Axnoller Cottage will be valued by an independent valuer and an aggregate amount equal to 25% of the value will be credited in that Accounting Period to the Current Accounts of the Founding Partners …
>
> […]."

44. In fact, notwithstanding the terms of clause 8.5, the cottage had not actually been acquired by the partnership at the date of the agreement. It was only on 8 April 2010 that the partnership acquired the cottage, the legal title to which was transferred to the Brakes and Mrs Brehme jointly, who were registered as proprietors at HM Land Registry. At that stage there were two keys to the cottage, and the Brakes had both. By virtue of clause 8.4, coupled with clause 8.5, it was envisaged that the Brakes would reside in the cottage once acquired. In fact, they did not initially make use of it, because they were also able to reside in the main house, which was grander and more luxurious. Instead, the cottage was occupied by a housekeeper, Hazel Apps, who was given one of the two keys, but she stayed only for a very short time. It was subsequently occupied by Simon Windus and his family (who had a key) from early 2011 until June 2012, when Mrs Windus became ill, and they moved out. Once again the Brakes had both keys. (At some point in the subsequent history, one key was lost, and so the Brakes relied on a single key through to January 2019. This key was placed in a variety of hiding places, so that the Brakes and Tom D'Arcy could use it.)

45. There was then renovation work at the cottage. Thereafter the Brakes used the cottage when the main house was required for the purposes of a wedding or other event. This was usually at the weekend. They had sufficient furniture, clothes and equipment (*eg* for the kitchen) in the cottage to mean that moving from house to cottage or *vice versa* was relatively easy and straightforward. It usually involved the transfer of food, clothes immediately needed, and other personal things (*eg* toiletries). Mrs Brake however did pick out specific clothes from the house to take to the cottage, so that she dressed appropriately at weddings that she managed. In occupying the cottage in this way, both physically staying there from time to time and keeping some of their possessions there when they were not, the Brakes were there by virtue of the partnership between them and PWF.

46. After the dissolution of the partnership, and its subsequent descent into insolvency, the cottage remained in the legal ownership of the Brakes and Mrs Brehme, though of course on trust for the benefit of the partnership and (more particularly) its creditors. The Brakes were made bankrupt in May 2015, and thereafter, with limited interruptions, they stayed at the cottage rather than the house until at least October 2016. I should say at this point that Mr Swift's witness statement of 12 March 2021 (at paragraph 7) was to the effect that, whilst he was trustee in bankruptcy he did not grant any licence or other consent to the Brakes to occupy the cottage. This evidence was unchallenged at the trial, and I accept it.

47. In the meantime, West Axnoller Farm, including the house, was sold by the receivers appointed by Mrs Brake's mortgagees (Adam & Co) to Sarafina, which was said to be a corporate vehicle for Mrs Brake's friend, the Hon Saffron Foster. But this sale did not include the cottage, which had never been charged to the bank. Despite the dissolution of the partnership, and its later entering administration (2016) and then liquidation (2017), the Brakes continued to use the cottage as before, that is, as a place to stay when the main house was being used for a wedding or other event.

48. In February 2017, Chedington bought Sarafina, and subsequently changed its name to Axnoller Events Ltd ("AEL"). Again, the cottage lay outside the purchase, because Sarafina/AEL never owned the cottage. But in fact Sarafina/AEL paid nearly all the living expenses associated with the cottage, 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. Dr Guy, the moving spirit behind Chedington, was interested in acquiring the cottage, and its purchase was expressly contemplated by clause 7 of the Sarafina Share Purchase Agreement. He asked Mrs Brake to negotiate with the liquidators of the partnership to purchase it, allocating a maximum of £350,000 of the total purchase price for that purpose. Mrs Brake claimed to the liquidator that the cottage was a *bankruptcy* asset (because she said she and her husband had a proprietary estoppel claim against the partnership), but to the trustee in bankruptcy that it was a *partnership* asset. She accepted in cross examination that that was "leverage to get the best deal possible." The lower the price paid, the more of the £350,000 she would be able to keep for herself.

49. Nevertheless, during the whole time from the acquisition by Chedington of Sarafina until 18 January 2019, the only persons with a key to the cottage were the Brakes. In purely practical terms they controlled access to the cottage. Only they stayed there overnight, and to begin with, at least, the *contents* of the cottage (furniture, clothes and other personal effects) belonged to them. The evidence satisfies me, however, that all perishable food was taken back to the house from the cottage, and sometimes even non-perishable staples were not to be found in the cottage. There was therefore not a constantly fully stocked kitchen at the cottage. The point is that the Brakes stayed overnight at the cottage, not when they *wanted* to, but only when they absolutely *had* to.

50. After Mr and Mrs Brake were dismissed from their employment on 8 November 2018, they stayed overnight exclusively at the house. Mrs Brake's

son Tom D'Arcy did stay overnight at the cottage on several occasions during this time, but eventually that ceased too. His evidence (which I accept) was that he did not sleep at the cottage after his computer was moved to the house with the assistance of Paul Maple (transcript day 6, pages 49-50). That happened on or around 20 December 2018. Nevertheless, the Brakes left furniture, clothes and other effects belonging to them at the cottage, and continued to hold the only key. Thereafter, Mr Brake visited the cottage sometimes during the day. Tom D'Arcy may also have done so: see the texts on 17 January 2019 passing between Tom and Mrs Brake. 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. As a footnote, I remind myself in passing that, in their closing submissions in the Possession proceedings, the Brakes at several points (*eg* [90], [94], [95]) claim that *the house* (and not the cottage) was their "principal *and sole* residence" (emphasis supplied). Indeed, at [73] they say that I so found in the section 283A proceedings and that they accept my finding. But, apart from anything else, that was a finding as at April 2015. It cannot govern the position as at January 2019.

The interim injunction

51. On 3 December 2018, Chedington caused a letter to be sent to the Brakes by a law firm called Equine Law. This intimated a claim under the Animals Act 1971, section 7C (inserted by section 3 of the Control of Horses Act 2015) to detain the Brakes' horses, which were said to be in their possession, and gave notice that the claimants should remove them within the 96-hour period stipulated by the Act itself. The letter went on to point out, in accordance with section 7C, that, if the horses were not removed within that period, they would become the defendant's property and the defendant would be entitled to dispose of them. The Act itself specifically refers to disposing of a horse

> "by selling it, arranging for it to be destroyed or in any other way".

52. This interstitial reference to the destruction of horses prompted an immediate application without notice by the Brakes in the Possession Claim, issued on 19 November 2018 by AEL, for an interim injunction against AEL. This was granted by Deputy District Judge Cornford on 5 December 2018. The order required AEL, until a return date hearing on 10 December 2018, not to "detain, interfere with or remove" the Brakes' horses from the stables at the Farm, or to "prevent them from accessing their horses" there. It also required AEL not to "interfere with the [Brakes'] continued occupation of the Axnoller House (contained within title number DT 327772) … " That title number of course refers to the Farm and not to the cottage. Accordingly, the order did not apply to the cottage. On 10 December 2018, that order was continued until trial or further order by District Judge Davies.

Events leading up to taking possession

53. On 18 January 2018 Chedington took possession of the cottage. I will deal with this in detail below. But this taking of possession by Chedington

followed a transaction between three parties: the liquidators of the partnership (who held the beneficial but not the legal interest in the cottage), the trustee in bankruptcy Mr Swift (who claimed the benefit of all such rights as the Brakes claimed to have at the time of their bankruptcy), and Chedington. This transaction was subsequently challenged by the Brakes in the insolvency proceedings referred to earlier (see [11] above). That challenge has not yet been determined.

54. The tripartite transaction came about in this way. Once the Brakes had been dismissed, both Dr Guy and the Brakes separately sought to acquire the partnership's interest in the cottage. Dr Guy met the liquidators on 3 December 2018 and made clear his interest in making an offer for the cottage. On the same day Mrs Brake informed the liquidators that the Brakes' position was that they were quite happy

> "to come to a sensible agreement concerning the cottage and to purchase ourselves, albeit we still stand firmly by our case the cottage is not a partnership asset and therefore can only be dealt with, with our agreement without recourse to time-consuming, and hugely expensive legal action … something we all want to avoid."

55. She repeated their interest in a purchase on 12 December, when she told the liquidators that her son was living in the cottage, asked them to quote a price and also asked what it would take for her to buy the cottage. The liquidator noted that Mrs Brake

> "claimed that she would reinstate the High Court proceedings if I did not sell the cottage to her (but then added that this was not to be taken as a direct threat)."

I assume that the reference to "the High Court proceedings" was a reference to the specific performance/proprietary estoppel claim made by the Brakes against PWF, for the transfer of the cottage to them, which had by then been stayed for some years. But for present purposes it does not in fact matter which litigation it was.

56. In a separate email on the same day, Mrs Brake wrote to her trustee in bankruptcy, Mr Swift, to assert that, because it was more than three years since she and her husband were made bankrupt,

> "in accordance with section 283A of The Insolvency Act 1986 our interest in West Axnoller cottage has reverted to Andy and I. You will recall that there was a piece of garden which I had bought separately and which you argued had to be sold with the cottage as it was part of its garden and access. You will no doubt be familiar with the definition of a dwelling house under the Act which includes any yard, garden or garage belonging to the dwelling house. Please would you confirm that the interest I have in the cottage's garden and access is revested in me."

(In fact, in the section 283A trial, I held that neither the interest of the Brakes in the cottage itself nor the interest of Mrs Brake in the adjacent parcels had

revested in them under that section. Permission to appeal from that decision was later refused by the Court of Appeal.)

57. On 18 December 2018 both Dr Guy and the Brakes were invited, by separate but identical letters to bid for the partnership interest. In part, these letters included the following:

> "The criteria for the bidding process are detailed below:
>
> **Guide price**: £570,000. Your offer to take account of the points made below:
>
> 1. The Joint Liquidators of the Partnership are selling only such legal and/or beneficial right, title and interest as they have in West Axnoller Cottage.
>
> […]
>
> 3. Such right, title and interest will be transferred by way of assignment of the Liquidators beneficial interest, if any, although the Liquidators will, when ownership has finally been determined and if still in office, execute such further documents as may be appropriate to transfer such legal ownership as they may have to the buyer.
>
> 4. The Joint Liquidators shall be under no obligation whatsoever to take any steps to resolve the dispute over ownership, to rectify the title plan, to remove or vary any restrictive covenants affecting the title and/or to secure vacant possession.
>
> […]".

58. On the same day Chedington purchased from Mr Swift, as the Brakes' trustee in bankruptcy, (i) the two small parcels of land on either side of the cottage for the sum of £50,000, (ii) a claim in respect of 8 show-jumping horses, said to be the subject of a voidable disposition, for £12,000, and (iii) a claim to certain furniture known as the D'Arcy Furniture Collection, also said to be the subject of a voidable disposition, for £40,000. The contract for the land included the following provisions:

> "6. VACANT POSSESSION
>
> The Property is not sold with vacant possession but sold subject to any occupational interests that may exist at the date of this contract.
>
> 7. TITLE GUARANTEE
>
> The Trustees will transfer the Property with no title guarantee and no covenants for title, whether express or implied.
>
> […]
>
> 8. MATTERS AFFECTING THE PROPERTY

> 8.1. The Trustee will sell the Property subject to all incumbrances … "

59. On 20 December 2018 Chedington by its solicitors Moore Blatch bid £500,000 for the partnership interest in the cottage. The next day the Brakes in their capacity as trustees of the Brake Family Settlement by their solicitors Michelmores bid £476,000. In cross-examination, Mrs Brake said (day 2, page 72) that they bid because they feared eviction from the house, and "the cottage was the only place that we could go".

60. Yet the Brakes at that time had over £2 million in cash at the bank. They could easily have rented or bought a far bigger, grander and more comfortable home than the cottage, with its small rooms, plumbing problems and title issues. Moreover, it also had no accommodation for their horses, which Mr Brake had said in his witness statement of 16 March 2021 was essential for anywhere he lived. (I accept that their friend Susan Maslin's stables were not far away, but that is not the same thing.) On the evidence, I am satisfied that both Mr and Mrs Brake hated having to stay in the cottage for weddings. And, in any event, they bid in the name of the Brake Family Settlement, which did not have the funds to acquire the cottage, and of which Mr and Mrs Brake were trustees, *but not beneficiaries*: see *Brake v Lowes* [2020 EWHC 538 (Ch). As a result, I am afraid that I simply do not accept this explanation. I find that the motive for bidding for the cottage was instead to give the Brakes more leverage in their dispute with Dr Guy.

61. On 2 January 2019 the liquidators accepted the Chedington offer, and notified Dr Guy by email. At the same time they informed Mrs Brake that her bid had been unsuccessful. She asked whether Dr Guy was the successful bidder and was told that he was. But, although she asked, she was not told the size of the successful bid. In an email to the liquidators next day, she explained that she thought the partnership would still have to be involved in the High Court proceedings.

62. The following day, 4 January 2019, Mrs Brake sent a further email, attaching some of the pleadings from the litigation, as well as two judgments which had been given in it. In part, her email said this:

> "if you read the Judgement of Iain Purvis QC it clearly states that prior to the determination of the case, that it would be foolish for any party to attempt to sell their beneficial interest in the property. This is what you purport to have done. Does Geoffrey know about this Judgement? And the Master Marsh one?
>
> I have attached the Judgement for you to read. … Also do have a look at the Amended Particulars of Claim. You cannot really say that it no longer has anything to do with you. Clearly it does. You are (or soon will be) in receipt of funds to which you are not yet entitled and you cannot distribute them until the High Court Claim is determined. It would be most injudicious of you to do so. Perhaps what you say that Geoffrey knows all this and he has bought it with full knowledge of these facts. I am not sure that he is live to all of the facts.

> I do hope that you will give this some thought and rather than continue with the deal which is bound for failure allow the litigation in respect of the cottage to be heard first before you take any further action."

63. I read this letter as an attempt to derail the Chedington offer. This is confirmed by an email sent on 7 January 2019 by Michelmores on behalf of the Brakes to the liquidators' solicitors, threatening legal action against the liquidators if any assignment of the beneficial interest to Chedington took place. In part this email says:

> "Please note that in the event transfer (of whatever form) takes place, Mr and Mrs Brake intend to pursue your client for conversion. It is clear that until the dispute as to title has been resolved, your client is unable to transfer any interest in the Cottage. If he attempts to do so when the partnership has no transferable interest, and such a purported transfer results is [sic] loss caused to Mr and Mrs Brake or their connections, your client will be liable for such losses as the liquidator of a general partnership.
>
> In light of the issue in relation to title to the Cottage my clients request that your client does not attempt to transfer any interest the Partnership may have (which our clients do not admit) and instead awaits the outcome of the court proceedings.
>
> If your client does not agree to the above request, our clients intend to join him in the general partnership into the court proceedings relating to the title dispute."

64. As it happens, however, the Chedington offer in its original form was derailed for other reasons. On the same day as Mrs Brake's original email, 4 January 2019, Simon Lowes, one of the liquidators, spoke to Dr Guy, who told him that Chedington wanted to buy the whole legal and beneficial ownership in the cottage. Since the legal title was outstanding in the Brakes and Mrs Brehme, and the Brakes would obviously not agree to transfer the legal title, Dr Guy proposed that an application should be made to the court by the liquidators (though funded by Chedington) to obtain an order which would effectively enable the transfer of the legal title to Chedington as well as the beneficial interest from the liquidators. As Dr Guy put it in his confirmatory email after the telephone conversation,

> "We are concerned that if our name is not on the title and the Brakes occupy the cottage then it may be a devil of a job to evict them with their names still on the title. … What is urgent and very important is that we can exchange, have a licence to occupy and put our security people in. If not and the Brakes get in ahead of this they will see no reason to leave (as for the last three years) nor to complete a purchase. If we do not purchase then I doubt you will see any money from the Brakes for years."

65. Simon Lowes was unwilling to agree to sell whatever interest the partnership had in the cottage on the basis that the liquidators then took proceedings (even if paid for by Chedington) to obtain the legal title. Mr Lowes did not give

evidence before me, but the evidence of other witnesses was that Mr Lowes was not the kind of person who wished to be involved in confrontation, and simply did not wish to take on Mrs Brake in litigation. Mr Swift, however, appears to have been of a different stamp, and agreed with Dr Guy for a revised scheme to be put forward to Mr Lowes. This is sometimes referred to in the documents as "Plan B". This was that Chedington would put Mr Swift in funds, and then *he* would buy such interest as the partnership had in the cottage from the liquidators, and sell it on conditionally to Chedington, together with any residual rights which he had in relation to the cottage (in particular, the benefit of any claim in respect of the cottage which the Brakes had, but which had vested in him at the time of their bankruptcy). *Mr Swift* would then apply to the court to obtain the legal title to the cottage, funded and indemnified by Chedington.

66. In the meantime, however, on 8 January 2019, Chedington's solicitors Moore Blatch made a formal written offer, subject to contract, to the liquidators' solicitors, BDB Pitmans LLP. This appears to have been a final attempt to persuade the liquidators to make the application to the court to obtain the legal title. This offer involved an exchange of contracts as soon as feasible (that day, if possible), the grant of an immediate licence to Chedington to occupy the cottage, and an application by the liquidators for a court order enabling him to sign the transfer of the whole registered estate in the cottage to Chedington.

67. It was followed up by a second letter from Moore Blatch to BDB Pitmans LLP, later the same day, which enclosed a copy of the order of Chief Master Marsh dated 6 January 2016. This order recited that the parties (who were the three partners in the partnership) had agreed that the cottage "must be sold as part of the winding up of the affairs of the partnership known as 'Stay in Style'." It went on to provide that the application for an order for possession and sale was "adjourned with permission to either party to restore". But it also provided that "On the appointment of an administrator or a receiver, the Application for an order for possession and sale may be restored for a hearing before the master on application by the said administrator or receiver." The letter went on to say:

> "it therefore seems most appropriate for your Client, the Liquidator, to make the application with my Client's support."

68. At 18:41 on 8 January 2019 Mrs Brake emailed Simon Lowes and asked whether the deal with Dr Guy had been completed. At 19:09 on the same day Simon Lowes confirmed that it had not, "and I am available to chat first thing tomorrow if that helps?" Simon Lowes and Mrs Brake did indeed speak on 9 January 2019. Simon Lowes' attendance note records that:

> "She claimed that she would 'reluctantly' drag me into litigation if we proceed to sell to Dr Guy. In short, she is advised that a Liquidator can be held liable for damages/costs when he/she assigns/sells an asset where there is knowledge of the dispute. I refuted this on the basis of such right, title and interest but she does not accept this. Her Solicitor will now be communicating with us.

> She claimed that we would be far better placed to sell to her because this litigation would then go away. She added that Dr Guy could not attack us in this scenario and neither could L Brehme (because she is arguing that the cottage belongs to the partnership).
>
> She advised me that she would consider mediation. The conversation then moved to how much she would settle for (to drop the cottage claim and allow us to deliver up a TR1). She agreed to consider this and revert to me asap. I see this as an opportunity to avoid expensive litigation!"

"Plan B"

69. On 10 January 2019 BDP Pitmans LLP on behalf of the liquidator wrote to Moore Blatch LLP on behalf of Chedington to say that Chedington's counter-offer (of 8 January 2019), involving an application to court by the liquidator, was unacceptable and therefore rejected. However, by that date, it appears that Simon Lowes was prepared in principle to proceed with the revised scheme (Plan B). The offer had been put forward by an email from Mr Swift to Mr Lowes at 15:16 on 10 January 2019, and accepted (subject to contract) by an email from Mr Lowes to Mr Swift dated the same day at 17:00. The intention appears to have been to complete the transaction on 11 January 2019.

70. 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. The draft facilitation agreement was put forward to Dr Guy and his lawyers by email also on 10 January 2019.

71. The agreement was expressed to be made between Dr and Mrs Guy on the one hand and Moore Stephens (South) R&I LLP, a corporate body of which Mr Swift was a member. It relevantly provides as follows:

> "FACILITATION SUPPORT OF THE TRUSTEE IN BANKRUPTCY ('the TiB') OF MR AY & MRS NMK BRAKE ('the Debtors')
>
> […]
>
> 3. Further to our meeting 10 January 2019, you have requested that using funds advanced by The Chedington Court Estate Limited ('the Company') the TiB purchases rights and title of the property known as West Axnoller Cottage ('WAC', title no DT 302107); then obtain clean registered title by way of office-holder application to Court to enable full clean title to WAC, which is then to be sold and delivered to the Company or one of its associated companies. …

4. We intend that our Restructuring & Insolvency Partner, Duncan Swift, who is the TiB of the Debtors' estates, will perform this work with the assistance of Mark Littleton-Gray, Restructuring & Insolvency Manager. …

[…]

7. The facilitation price for this assignment is as detailed at Appendix II. It comprises two parts, one part being our fees for undertaking the services referred to above, the other part being the benefits to the Debtors' bankruptcy estates.

8. The Company is also to advance funding on an interest-free basis to us to enable the TiB to undertake the purchase, sale and court application transactions in the assignment.

[…]

APPENDIX II

FACILITATION SUPPORT OF THE CHEDINGTON COURT ESTATE LIMITED ('CCEL') BY THE TRUSTEE IN BANKRUPTCY ('the TiB') OF MR AY & MRS NMK BRAKE ('the Debtors')

[…]

Facilitation price

- The TiB must demonstrate a suitable benefit to creditors in order to proceed as set out above, so a facilitation price will be paid by CCEL to the TiB in the following sums:
  - £30,000 plus VAT (£36,000) at the point of instruction;
  - £3000 plus VAT per month (£3,600) until completion of the transfer enabling full registration for CCEL, or for 12 successive months, or on 30 days notice given by CCEL, whichever is the sooner. …
- The facilitation price is an agreement between CCEL and MSSRI and the monies paid will be applied as follows –
  - One third will be made available to the creditors of the bankruptcies of the Debtors
  - Two thirds will be paid to the TiB to allow the TiB to spend the necessary time on these matters as it progresses, without that being a cost to the bankruptcy estates and therefore, the creditors in the two bankruptcy estates.

[…]".

72. The agreement between Mr Lowes and Mr Swift was not in fact executed on 11 January 2019 as originally envisaged. Instead it was postponed twice, first to 14 January 2019 and then to 15 January 2019, on which date it was executed. By clause 2.1, and subject to the terms of the agreement, the partnership (acting by its liquidators)

> "hereby sells and assigns and [Mr Swift] hereby buys such right, title and interest (if any) as [the partnership] has and can transfer in the beneficial and/or equitable interest in the property known as West Axnoller Cottage … "

By clause 3, the purchase price was £500,000.

The "back-to-back" agreement

73. On the same day, the so-called 'back-to-back' agreement was entered into between Mr Swift and Chedington. This defined the "Property" as

> "the freehold property known as West Axnoller Cottage, Beaminster, (DT8 3SH) registered at HM Land Registry with title absolute under title number DT 302107."

It defined the "Purchase Price" as £500,000. It also defined the "Conditions Precedent" as

> "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."

74. The agreement went on to provide as follows:

> "2. SALE AND PURCHASE
>
> 2.1. Subject always to the satisfaction of the Conditions Precedent, [Mr Swift] will sell and [Chedington] will by 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 … ”

The Licence

75. A further document was executed on 15 January 2019 by Mr Swift. This was described as a “Licence” granted in relation to the cottage by Mr Swift to Chedington. It recited the assignment by the liquidator of the partnership’s interest in the cottage to Mr Swift, and the contract between Mr Swift and Chedington. It defined the “Permitted Use” as “as a residential property”, the “Licence Fee” as “the amount of ONE POUND (£1.00) per week”, and the “Licence Period” as “the period from and including the 15th day of January 2019 until the date on which this licence is terminated in accordance with clause 4”.

76. The document went on to provide in part as follows:

> “2 LICENCE TO OCCUPY
>
> 2.1. Subject to clause 3 and clause 4, and only insofar as [Mr Swift] has the ability to do so, [Mr Swift] permits [Chedington] to occupy the Property for the Permitted Use for the Licence Period in common with [Mr Swift] and all others authorised by [him].
>
> 2.2. [Chedington] acknowledges that:
>
> […]
>
> 2.2.3. [Mr Swift] retains control, possession and management of the Property and [Chedington] has no right to exclude [Mr Swift] from the [property];
>
> 2.2.4. The licence to occupy granted by this agreement is personal to [Chedington] and is not assignable and the rights given in clause 2 may only be exercised by [Chedington] and its employees].

> 3. LICENSEE'S OBLIGATIONS
>
> [Chedington] agrees and undertakes:
>
> […]
>
> 3.3. Not to use the Property other than for the Permitted Use.
>
> […]
>
> 4. TERMINATION
>
> The licence to occupy granted by this agreement shall end on the earliest of:
>
> 4.1. The 15th day of January 2021.
>
> 4.2. [Mr Swift] giving notice to [Chedington] at any time of breach of any of [Chedington's] obligations contained in clause 3.
>
> 4.3. On not less than four (4) weeks notice given by [Mr Swift] to [Chedington] or by [Chedington] to [Mr Swift].
>
> […]."

77. In his witness statement of 12 March 2021 (at paragraph 8) Mr Swift denied that the licence was a sham. This evidence was not challenged at trial. Indeed, the cross-examination of Mr Swift proceeded on the footing that it was *not* a sham, and I so find.

The hearing at the County Court on 17 January 2019

78. Having obtained this licence, Chedington prepared to take possession of the cottage. A 'team' was assembled for this purpose, including Mr Maddock, locksmiths (from a company called SES Security Services Ltd) and security men (from Atlas UK Security Services Ltd). The operation was originally scheduled to take place on 17 January 2019, but there was a hearing before DDJ Hebblethwaite at Yeovil County Court on that date in the Possession Claim, and in the end the Chedington 'team' was stood down until the next day.

79. At the court on 17 January 2019, AEL was represented by David Reade QC, and the Brakes were represented by Christopher Jones of counsel. Tom D'Arcy represented himself. A number of matters were dealt with, ultimately (and after long negotiations) by agreement. The first was that Tom D'Arcy was removed from the proceedings. The second was that the Brakes undertook to the court to permit weddings to be conducted at the house in accordance with schedule to be provided by AEL, and not to interfere with their conduct, with an exception for the removal by the Brakes of "such delicate or valuable chattels as they would normally remove for a wedding weekend, and any other of their chattels upon giving 21 days notice". The undertaking contained a timetable for "wedding weekends". AEL gave certain cross undertakings,

relating to wedding bookings, the chattels in the house, and in substance repeating the terms of the orders of 5 December 2018 and 10 December 2018. (There was apparently some uncertainty as to the continuation of those orders.) Thirdly, directions were given for the future conduct of the claim.

80. During the course of his addressing the court, there was an exchange between Mr Reade QC and the judge (transcript page 38, at volume G1/77):

> "MR READE: … We were willing to give undertakings that we give 14 days' notice of the weddings to be held and that we would not interfere with the [Brakes'] non-exclusive access to the arena, which is where the horses are trained, for the purposes of exercising the [Brakes'] horses, and, on the occasion of a wedding being held at Axnoller House, if we are the owner of the cottage, we would permit the [Brakes] to occupy the cottage during the wedding. Then we give the undertakings that were in the previous order.
>
> JUDGE HEBBLETHWAITE: Is that the cottage that – I thought in the papers the cottage was said to be owned by the [Brakes].
>
> MR READE: [AEL has] been in the process of buying it and it is referred to in the paperwork.
>
> JUDGE HEBBLETHWAITE: All right.
>
> MR READE: 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.
>
> JUDGE HEBBLETHWAITE: I have got you."

So the judge was aware that AEL was in the process of buying the cottage. However, the judge was not informed of the conditional contract with Mr Swift or his licence of 15 January 2019.

81. The only reference to the cottage in the order of DDJ Hebblethwaite is contained in the timetable for the "wedding weekends" (in the order called "Relevant Weekend"). It provided in part as follows:

> "b. By 5 PM on a Friday of a Relevant Weekend the [Brakes] will leave Axnoller House for Axnoller Cottage, or such other property as they choose …
>
> c. By 10 AM on the following Monday … the [Brakes] may return to Axnoller House".

There was no provision in the order to deal with the possibility that the cottage might not be available to the Brakes and, in particular, no provision as to what would happen if AEL or Chedington were to acquire it (a possibility which had been stated to the judge) or simply took possession of it (a possibility which had not).

82. However, unknown to the judge or to the Brakes, Dr Guy (who was present at the court) was communicating by text with the 'team' waiting to be given instructions to take possession of the cottage. For example, at some time before lunch Mr Maddock asked whether they can move in, and was told "No not yet. Hold." Shortly afterwards Dr Guy sent a further text saying "Still arguing so hold. Do not go near the cottage." In the afternoon Mr Maddock asked "Are we securing the cottage?!" Dr Guy told Mr Maddock not to move in, but to stand by. In the next text he instructed Mr Maddock and the locksmiths to "gain entry and change the locks today after 1700 please". Subsequently, when Mr Maddock texted "Going in now", Dr Guy immediately responded "Hold on", and then "Please confirm you have held". Shortly after that Dr Guy texted "Stand down for today. See you in the morning."

Chedington takes possession

83. On 17 January 2019, before going to court, Mr Brake had placed two boulders at the bottom of the cottage drive where it joins the lane leading off the estate to the public highway. On their return from court Mrs Brake noticed that they had been moved. Between then and 08:31 in the morning of 18 January 2019 Mrs Brake sent a text to Mr Maddock requiring the return of the stones "forthwith, or we will have no option but to report you to the police". She also sent one to her husband to tell him to put a gate at the bottom of the drive to the cottage. That morning the Chedington 'team' reassembled. The question was raised at the trial as to whether Dr Guy or his wife were present when it did so. One of the security men suggested that they may have been, but it is clear from the context that this was based on having noted the presence of a motor vehicle which either belonged to the Guys or resembled one that belonged to them rather than because Dr and Mrs Guy were themselves seen. On the other hand, Dr Guy categorically denied that they had been present. On the evidence before me I find that they were not.

84. At 11:20 Ms Dagnoni (who lived in the bungalow almost opposite the cottage) sent a text to Mr Maddock: "Coast is clear". This referred to the fact that Mrs Brake had left the estate in her car in order to go to the gym. The Chedington 'team' arrived at the cottage at 11:22. They looked through the windows to see if they could see anyone inside, but could see no one. Mr Maddock knew that the Brakes often kept the key hidden in a suitable hiding place near the entrance to the cottage. He looked to see if he could find the key, in particular in a Wellington boot near the door, but was unsuccessful. Mr Brake was out riding a horse on the estate at that time. He noticed the arrival of the 'team' at the cottage, and rode over to the cottage to find out what was going on. He arrived there at 11:23. The locksmiths were busy drilling out the lock. He asked Mr Maddock what he was doing, to which Mr Maddock responded, "Taking ownership of the cottage".

85. Mr Maddock attempted to give Mr Brake a copy of a letter dated 15 January 2019 and addressed to "To whom it may concern" from Mr Swift, explaining what he considered to be the legal position, but Mr Brake refused to take the letter, and the security men taped a copy to the front door where it could be read.. In substance, this letter reads as follows:

> "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."

86. Mr Brake, still on horseback, continued to remonstrate with the 'team', and to object vigorously to what they were doing but, very sensibly, did not attempt physically to interfere. So far as it matters, I am satisfied that the Brakes did not consent to what Chedington was doing, indeed that they objected, and that Chedington was aware of that objection (and the lack of consent). At 11:28 the locksmiths had drilled out the lock and gained access to the cottage. By that time, however, Mr Brake had returned his horse to the stable, and was returning to the cottage on foot.

87. After access had been gained to the cottage, Mr Lyons went in first. 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. In an adjacent storage room there were a number of boxes, which Mr Lyons did not examine, though he reported their existence to Mr Maddock. Although there were duvets on the beds they had no covers on them, and neither were there any sheets. (Tracey Symons' evidence was that there were duvet covers, but this was based on her viewing of a video recording of the bedroom after Chedington had taken possession, and in my judgment she was simply mistaken.)

88. A further point is that Mr Lyons said that, later on that day, it became apparent that the boiler in the cottage was not working, and it required an engineer to fix it, with portable heaters used in the meantime. In this regard, however, on

one of the video recordings made at the time of the entry into the cottage Mr Lyons can be heard saying "Ooh, the heating's on in here," and one of the locksmiths adds "Lovely". There are a few more phrases uttered, but they were too indistinct for me to make them out. I see no reason to disbelieve Mr Lyons' evidence that the engineer was called out to deal with the boiler. There are therefore two possibilities. Either the heating *was* on, and the boiler failed subsequently. Or the heating was *not* on, and the men in the team were comparing the external and internal temperatures, which were obviously significantly different. I can understand that the heating might have been on in the evening, when Tom might use the cottage with his friends. It is difficult to believe that the heating would have been left on all morning when no one was in the cottage, and there was no expectation that any of the Brakes would visit it that day. On the balance of probabilities, therefore, I find that the heating was not on.

89. A further point which took some time at trial concerns the question of how recently the Brakes had visited or used the cottage. As I have said, Mr and Mrs Brake had not stayed overnight since the end of October 2018, and Tom D'Arcy not since 20 December 2018, though Mr Brake (and perhaps Tom) had visited during the day since then. At trial, the Brakes relied on a photograph taken by Mr Brake on 18 January 2019, through the kitchen window. This showed some food packets on the counter in the foreground and a mug in the background. The Brakes said that this showed recent use of the cottage by them. When Mrs Brake produced the metadata for this photograph, it was found to have been taken at 14:48 on 18 January 2019. However, it was inconsistent with videos of the same scene made *earlier* on the same day, which did *not* contain the food packets or the mug. In other words, the situation had changed since the security men had taken possession. 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.

90. After stabling his horse, as I say, Mr Brake had returned to the cottage. He stood outside, and used his mobile phone to make video recordings of the scene. He asked if he would be given a set of keys for new lock, but was told that the answer was No. He was also told by the security men that the cottage was private property and that he was trespassing. In turn, he told the security men that they should look at the title deeds, where they would find the Brakes' names. He repeated this advice on subsequent occasions.

91. Mrs Brake drove up to the cottage at about 13:30. She too remonstrated with the security men, telling them that the police were on their way. She too was told that she was trespassing. At one point she picked up a large rock and advanced with it towards the glass door of the cottage, as if she were about to throw it at the door. In fact, she did not. But it was certainly an intimidatory gesture. Subsequently, two police officers came to the cottage. Mr Lyons showed the two police officers the documents that he was relying on and

explained what they were doing. The police officers were satisfied with the explanation, and declined to intervene. Mr Lyons asked the police if they would ask the Brakes to leave. Mrs Brake's car was also blocking the driveway. The Brakes did in fact move the vehicle and leave the premises for the time being. Mrs Brake admitted in cross examination (day 3, page 33) that the police had advised the Brakes to stay away from the cottage in order to defuse the situation, but she was not prepared to take their advice.

92. I referred earlier to the discovery by Mr Lyons of a number of boxes of documents in the storage room upstairs. Mr Lyons reported this to Mr Maddock, who in turn reported it to Dr Guy. Dr Guy contacted Mr Swift, who in his capacity as the Brakes' trustee in bankruptcy arranged for agents to collect those boxes. At about 16:00 that afternoon, the boxes were so collected and taken away. There were 34 of them. I find that neither Dr Guy, Mr Maddock nor the security men read any of the documents inside the boxes before they were taken away. Whether all or, if not, which of the remaining movable contents of the cottage belonged to the Brakes and/or Tom D'Arcy is a question I shall have to return to.

The confrontation that evening

93. At about 22:17 that evening, Mr Brake returned with Tom D'Arcy, and explained that Tom wished to sleep at the cottage. The security men declined to allow him to do so. He asked whether he could retrieve some personal property from his bedroom on the ground floor, and was permitted to do this, being accompanied by one of the security men. Mr Brake remained outside. At about 22:27, and despite the police advice earlier, Mr and Mrs Brake presented themselves at the cottage, where Mrs Brake explained that she needed to retrieve some "vital medication" and "essential medicine" which she had to take every day. The security men declined to allow her to enter, but on more than one occasion offered to retrieve it for her, if she would explain where it was. She refused to do this, and insisted that she be allowed personally to enter the cottage to obtain it. The security men continued to refuse to admit her.

94. There was then an unfortunate confrontation with the security men, in which Mrs Brake sustained some injuries, for which she subsequently presented at the local hospital. I have viewed and reviewed the video footage of this incident, which is unclear in parts, although the words used during the confrontation are regrettably all too clear. The language used by the security men was measured and, especially in the circumstances, restrained. That used by Mr and Mrs Brake, I am sorry to say, was not. It was shouty, aggressive, insulting and peppered with expletives. They also accused the security men of being drunk, "as drunk as can be". I dare say the Brakes were frustrated and angry that they could not get their own way. For the avoidance of doubt, and, based on the material that I have seen and heard, I find that the security men were not drunk.

95. On the material that I have seen and heard, including the video and sound recordings, I have no doubt that Mrs Brake attempted to push her way into the cottage when it was clear that the security men, on behalf of Chedington, had refused to permit this, and had already clearly communicated that refusal to

her. Accordingly Mrs Brake knew that Chedington did not allow her to enter the cottage, but she persisted in trying to do so. She can clearly be heard, for example, shouting, "Get out of my way. Get out of my way now!" And, when the security man says, "You are not gaining entry, madam," she replies, "Oh yes I am." On another occasion, she can be heard shouting "I am going to kick you in the balls", and then "I am going to kick you in the fucking balls okay". In cross examination (day 3, page 41), she admitted that she was trying to force her way into the cottage.

96. Mrs Brake had jammed a leg under the open door, which prevented its being closed, and did not move it on being asked to do so. She claimed it was stuck there. The security men certainly resisted Mrs and Mr Brake's attempts to enter the cottage. The particulars of claim in their original form sought damages for personal injury said to be suffered by Mrs Brake on this occasion. That part of the claim was abandoned when the particulars were amended in October 2020. I am not therefore required to decide whether, and if so what, personal injury was sustained by Mrs Brake, and if so whether Chedington would be liable for it. In fairness to Mr Lyons, I should record that he was not challenged on his written evidence that he did not strike Mrs Brake.

97. It is also right to record that Mrs Brake had been the recipient of a kidney transplant many years previously, and had survived cancer more recently. Accordingly I readily accept her evidence that she had medication to take on a daily basis, for example, immunosuppressant drugs. However, I do not accept that her supplies of that medication were kept at the cottage, in circumstances where (i) by this date Mrs Brake had stayed overnight in the house, and not the cottage, for several months, (ii) she had not mentioned her medication or the need to retrieve it when she attended at the cottage at about 1330, (iii) Mr Brake had not mentioned her medication or the need to retrieve it when he attended at the cottage a few minutes earlier, assisting Tom to retrieve his personal property, (iv) there is no evidence of Mrs Brake visiting the cottage previously in order to retrieve medication; (v) she did not ask her son to retrieve her medication for her when he went down to the cottage and found his own personal property there; (vi) she was unwilling to allow the security men to retrieve her medication for her, and (vii) it is simply not credible to suppose that Mrs Brake would have kept her medication *in the cottage* when she was living and sleeping entirely *at the house*. In cross-examination (day 3, pages 29-32), indeed, Mrs Brake admitted that she already had medication and did not need any that night. She just wanted to get back into the cottage. Accordingly, I find that the story about needing to retrieve her medication then and there was untrue, and was a transparent device for her to obtain entry to the cottage.

98. There is in addition video footage showing each of Mr and Mrs Brake, at some point in time that is unclear, giving various workmen a copy of the interim injunction dated 5 December 2018 (and continued on 10 December 2018) preventing AEL from interfering with occupation of the house or with the horses in the stables. Of course, the order of 5 December 2018 did not apply to the cottage. The Brakes appear to have been relying on it in relation to works being done on the Farm near the horses.

99. Mr Brake gave evidence that, after his dismissal, he was "starting to move stuff" from the house to the cottage. I find that what he moved were items, not from the house, but from the garden or grounds of the house, to a strip of land near (but not forming part of) the curtilage of the cottage. I find that he moved *no* furniture from the house to the cottage during this period, apart from a mirror belonging to Mrs Brake, although he admitted in cross-examination that he *had* moved furniture *from the holiday cottages to the house*. This, he said, was because it would not fit in the cottage. I do not accept this explanation. There would have been room for at least some of it, especially since the Brakes were not living in the cottage at the time.

Further applications

100. I understand from paragraph 27 of the transcript of District Judge Walsh's judgment of 20 March 2019 in the Possession Claim, that on 22 January 2019 Mr Swift, the trustee in bankruptcy, applied for an injunction to exclude the Brakes from the cottage. So far as I can see, there are very few papers concerned with this application in the bundle and I do not know what, if anything, happened to it.

101. On 4 February 2019 the Brakes applied for an order releasing them from the undertakings which they had given to the court on 17 January 2019. This was heard at the County Court at Yeovil on 20 March 2019 by District Judge Walsh. The judge accepted that the court could not vary an undertaking given by litigant, but it could on application release the litigant from that undertaking. He further agreed that:

> "53. … the events of 18 January 2019 were both a significant and a material change of circumstances, and, therefore, satisfy the test in *Birch v Birch* [[2017] 1 WLR 2959, SC]. The exclusion of the [Brakes] from the cottage is and was significant and material.
>
> […]
>
> 56. For the reasons I have already given, or by reason of the material I have already read out and referred to, it is clear that the spirit and intention of the undertakings that were offered and accepted on 17 January 2019 was that the status quo would continue with the [Brakes] utilising [the cottage] which was for all practical intents and purposes being treated by them as a property that they were entitled to occupy at the time when those undertakings were given. As I have already said, Dr Guy plainly knew on 17 January 2019 that he intended to, if necessary, expressly exclude them from the cottage on the following day. The court was not misled expressly, I have already indicated that, but modern litigation and the whole tenor of the Civil Procedure Rules themselves demand a cards on the table approach.
>
> 57. Having reflected on this at some length I am absolutely clear that Dr Guy should have revealed his contingency plans to the court. That is not to criticise counsel. Counsel was acting on instructions and very carefully used turns of phrase which did not mislead the court and certainly were

> not a breach of his professional obligations but that is different. Dr Guy should have revealed his contingency plans when a consensual resolution of, or short-term resolution of, the occupation of the property was being considered.
>
> […]
>
> 59. Under the revised proposed undertaking that has been offered the status quo would be largely restored…"

102. The reference in paragraph 59 of the judgment to a revised undertaking is a reference to a form of undertaking offered by the Brakes which the judge then accepted in substitution for the original undertaking by the Brakes. Although this form of undertaking repeated the substance of the earlier one, it was subject to an important proviso, which read as follows:

> "Subject to the Claimant securing and making the property known as Axnoller Cottage unconditionally available for the exclusive occupation of the Defendants on any given "relevant weekend" and giving the Defendants 48-hours' notice then the DEFENDANTS UNDERTAKE… "

Essentially, therefore, the Brakes were not obliged to vacate the house so that weddings could be permitted unless AEL first made the cottage unconditionally available for their exclusive occupation.

103. On 12 February 2019 the Brakes commenced insolvency proceedings against both the liquidators of the partnership and their trustee in bankruptcy. I have already dealt with those proceedings so far as relevant in paragraphs 11 and 12 above, and will not repeat that discussion here.

104. Lastly, it will be recalled that paragraph 3.1 of the conditional contract between Mr Swift and Chedington required Mr Swift to make an application to the court (financed by Chedington) in order to obtain an order that the legal title be vested in him. This application was duly issued in late January 2019, and became known as the "Cottage Application". But Mr Swift was removed from office by a consent order made in June 2019, before the application had been dealt with, and his successors as trustees in bankruptcy did not at that time wish to adopt the contract or continue with the application. Accordingly, the Brakes made a further application to strike out the Cottage Application. In fact, I struck it out on 3 March 2020, not on its merits, but essentially for want of prosecution: see [2020] EWHC 538 (Ch).

105. I referred above to the incidents on the evening of 18 January 2019, when first Tom D'Arcy, and later Mrs Brake, attempted to retrieve personal property from the cottage. Tom D'Arcy was permitted to enter, accompanied by a security man, and he retrieved the items that he had sought from his bedroom. On that occasion, he was told that

> "we are not here to touch, we are just here to take possession of the property not the contents or anything like that, okay."

As I have described already, however, Mrs Brake herself was not permitted to enter. Although the security men offered to go and find the medication that she said she wanted, she declined the offer, on the grounds that she did not want them "rifling through" her things.

106. The next occasion on which the Brakes sought to retrieve personal items from the cottage was on 12 March 2019, when their solicitors wrote to Chedington's then solicitors asking for access for this purpose. On 18 March 2019, Chedington's solicitors replied, saying that their client was willing to return any possessions that the Brakes might have in West Axnoller Cottage that did not form part of the bankruptcy. They asked for a list of the items sought, which their client would review. Chedington would then make items not subject to the bankruptcy available for the Brakes to collect. On the same day the Brakes' solicitors replied to this, saying that the chattels in the cottage did not belong to the bankruptcy estate and that Mr Swift had never suggested otherwise.

107. They wrote again on 22 March 2019, saying they had received no response to the earlier letter. The same day, Chedington's solicitors replied, saying that they would allow a removal company (but not the Brakes) to attend at the cottage to remove items claimed by the Brakes, and asking for suggested dates of attendance. They also said that Chedington would provide a list the following week of items at the cottage claimed by Chedington. I cannot see that any such list was ever provided during the following week.

108. However, on 7 May 2019, Chedington's solicitors wrote to the Brakes' solicitors, saying that Mr Brake and Tom D'Arcy had attended at the cottage on 5 May and demanded entry. The letter continued as follows:

> "[Chedington] is content for a solicitor of your firm to attend West Axnoller Cottage to oversee the collation and packing of the Brakes' chattels and their removal. If your client could provide a schedule of the items which they assert to be theirs and your firm could identify a suitable date for one of its solicitors to attend the cottage then [Chedington] will arrange a date on which a removal can take place. We are aware that receipts for certain items stored at the cottage being purchased by [SPL] and [AEL] including items of statuary and other garden fittings which are currently in the garden of the cottage. A schedule from your clients should allow a straightforward distinction being able to be drawn between their property and that of [AEL] or [Chedington]. We look forward to your response on this."

109. There was no substantive response to this proposal. The Brakes' solicitors wrote again on 12 August 2019, asking for confirmation of "a date upon which our clients can retrieve their impounded property". On 22 August 2019, Chedington's solicitors replied:

> "Our client's proposal is as follows:
>
> > a. An inventory (with photographs) of the furniture and other items in the Cottage has been produced;

> b. The above inventory can be provided to your clients so that they can state what is theirs;
>
> c. Items belonging to your clients will be delivered to a location of your clients' choosing (within reason) (but for the avoidance of doubt this cannot be West Axnoller House which your clients are unlawfully occupying);
>
> d. Clearly it is a possibility that ownership of items will be disputed and if that is the case then their ownership will remain to be resolved in the Eviction Proceedings.
>
> Please confirm by return whether you agree with the above approach…".

110. On 10 September 2019, the Brakes' solicitors wrote to say that the "inventory (with photographs) of the furniture and other items in the cottage which has been produced" did not form part of Chedington's disclosure and they sought its provision by return.

111. In fact, Chedington did not supply an inventory of what it said were the contents of the cottage to the Brakes until 21 January 2021, when it claimed (inaccurately) that the Brakes had not responded to its solicitors' earlier letter of 22 August 2019. This long gap may or may not be connected with the stay of the proceedings in December 2019 and the focus on other proceedings between the parties. Nevertheless the letter requested the Brakes to

> "a. Identify what if any of the chattels in the inventory are claimed to belong to (i) the Brakes in their personal capacities; (ii) the Brake Family Trust; or (iii) Loxley & Brake; and
>
> b. Provide any evidence (such as invoices) to support any claims made by your clients in respect to chattels in the Cottage."

112. The Brakes' solicitors wrote on 4 February 2021, to allege that the inventory was incomplete. They also said that Chedington had "no possessions whatsoever at the Cottage or within the grounds and that the entirety of the contents belong to our clients (or their connections)".

113. Chedington wrote again on 2 March 2021, enclosing a table listing chattels from the inventory, and asking that the Brakes note on it whether they claimed ownership and if so in what capacity, indicating the supporting evidence and the date of acquisition. It also asked for details of any alleged damage to chattels, with supporting evidence. There was no substantive response to this further request. It appears that the first time that any specific chattels said to be missing from the inventory were actually identified was during Mrs Brake's own evidence at trial (day 4, pages 42-44).

THE CLAIMANTS' CASE

114. I summarise the way that the Brakes put their case at trial as follows. They say they occupied the cottage as a residence pursuant to the licence granted to

them by clause 8.4 of the Stay in Style partnership agreement. As at 18 January 2019 they were in possession and occupation of the cottage. It was unlawful to evict them from the cottage other than by court proceedings, in accordance with section 3 of the Protection from Eviction Act 1977. The eviction by Chedington contravened section 3, and accordingly Chedington is liable in the tort of trespass. As to the quantum of damage, the Brakes say that this is "a particularly egregious case". They ask for aggravated damages of £10,000 and exemplary damages of £7,500.

115. The Brakes also seek a possession order in respect of the cottage. They say that they are two of the three legal joint owners of the cottage, and have at least a possessory title to the cottage, whereas Chedington has no legal or beneficial interest in the property. They say that the licence granted to Chedington by Mr Swift (i) was a sham, (ii) had no effect because Mr Swift had no sufficient interest to grant occupation or possession rights, (iii) on its face did not confer any such rights, (iv) did not grant exclusive rights of occupation, (v) granted only rights subject to the Brakes' superior rights, and (vi) ceased to exist because Mr Swift is no longer trustee in bankruptcy and his successors have not adopted it. It also expired in January 2021 (in accordance with clause 4.1 of the licence). The Brakes also say that that licence was of no legal effect for the reasons asserted in the insolvency proceedings. Moreover, and in any event, the licence was granted by the *beneficiary* of a trust of land, and not by the *trustees*. The conditions precedent to the sale agreement with Mr Swift have not been satisfied. They say that to justify what it did Chedington must show a better title than the Brakes had on 18 January 2019, and this it cannot do.

116. In addition, the Brakes seek an order for delivery up of chattels which they say belong to them, and make a claim in conversion in respect of both those chattels. They say that it is not disputed that there are chattels in the cottage, that they do not belong to Chedington, but belong instead to them or to their company Loxley & Brake Ltd, and have not been returned. They say that on the balance of probabilities the only sensible inference from the evidence is that some or all of the chattels do belong to the Brakes, whether as trustees or in their own beneficial capacity, and that this is sufficient to establish liability. They say the question of quantum should be reserved to an inquiry, because, until they regain possession of the cottage, they are unable to work out or plead the extent of the damage caused.

THE DEFENDANTS' CASE

117. Chedington says the Brakes' claim is not (and cannot be) for trespass, but instead for the recovery of land (technically called "ejectment" until the Common Law Procedure Act 1852, and still commonly so known for convenience), because the Brakes were not in possession of the land at the time of instituting the claim. They were out of possession, and therefore their claim is to seek to recover that possession. They say that claims for trespass to land and for the recovery of possession of land are mutually exclusive. They also say that (i) section 3 of the Protection from Eviction Act 1977 does not apply because (a) the Brakes had no extant licence at the time of the events complained of, and (b) even if there had been one it would have been an

"excluded licence" under section 3A of the 1977 Act, and (ii) in any event section 3 does not create a separate cause of action.

118. As for the claim for the recovery of land, Chedington says that the Brakes cannot succeed in showing as at 18 January 2019 either (i) that they had the right to possession under the partnership agreement, or (ii) that they had the relevant intention to possess. As to (i) Chedington relies on four separate reasons: (a) the construction of the partnership agreement, (b) the dissolution of the partnership, (c) the effects of the administration and liquidation, and the disputed tri-partite transactions, and (d) a licence cannot entitle the licensee to recover land. As to (ii), Chedington says that the Brakes are trespassers in the cottage. They therefore bear a heavy burden of proof that they intended to possess it on their own behalf and intending to exclude the world at large, which on the facts (Chedington says) the Brakes cannot discharge.

119. As to the licence granted by Mr Swift, Chedington says that it is clear that no trespassory action can lie against the licensee of a person with a better right to possession than the claimant, and (by implication) that Mr Swift had such a better right to possession. It further says that none of the Brakes' objections to the licence holds up.

120. Chedington says that the Brakes are making claims both in trespass to goods and conversion. It says that the Brakes have no evidence as to which chattels in the cottage belong to (i) them beneficially, (ii) them as trustees of the Brake Family Trust, (iii) Loxley & Brake Ltd, (iv) Mr Swift as their trustee in bankruptcy, or (v) the partnership in liquidation. It consequentially says that the Brakes have not discharged the burden of proof on them that they have any claim to the chattels concerned. Secondly, it says that the claim in conversion must fail. This is because, although the Brakes have been denied access to the cottage itself, Chedington has not interfered with the contents. Indeed it has made proposals to return such of the contents to the Brakes as they can show are theirs. However, the Brakes have not done so. Thirdly, it says that, because the Brakes are not in actual possession of the chattels, they have no standing to make a claim for trespass to goods. There is no basis for ordering an inquiry as to damages, because the Brakes have adduced no evidence of damage.

DISCUSSION

Claim for possession

Nature of the claim

121. I deal first with the nature of the Brakes' claim to recover possession of the cottage. In my judgment, the authorities are clear that the action for *trespass* to land is brought by a claimant *in possession of the land*, whose possession has been infringed by the defendant's trespass onto it, whereas the action in what was formerly technically called *ejectment*, and now simply the action to recover possession of land (together with damages to compensate for losses suffered), is brought by the claimant who was in possession but who is now *out of possession*. You cannot recover possession of land still in your possession. In *Secretary of State for the Environment, Food and Rural Affairs*

v Meier [2009] 1 WLR 2780, the Supreme Court held that the court could not make an anticipatory order for the recovery of land of which the claimant had not yet been dispossessed, merely because he reasonably feared that he would be so dispossessed in the near future.

122. Lord Neuberger put it this way:

> "61. As Sir George Jessel explained [in *Gledhill v Hunter* (1880) 14 Ch D 492, 496], an action for ejectment and its successor, recovery of land, was normally issued 'to recover possession from a tenant' or former tenant. An action against a trespasser, who did not actually dispossess the person entitled to possession, was based on *trespass quare clausum fregit*, physical intrusion onto the land. Nonetheless, where a trespasser exclusively occupies land, so as to oust the person entitled to possession, the cause of action must be for recovery of possession. (Hence, if such an action is not brought within twelve years the ousting trespasser will often have acquired title by 'adverse possession'.) Accordingly, in cases where a trespasser is actually in possession of land, an action for recovery of land, *ie* for possession, is appropriate, as Lord Denning implicitly accepted in *McPhail* [*v Persons Unknown*] [1973] Ch 447, 457-8."

123. The focus of the two actions is thus different. In trespass the claimant complains of injury to his possession, so the focus is on *possession*, not *title.* In ejectment, the claimant seeks to recover possession, which he must do by showing that he has a better title than the defendant now in possession (see *eg Ocean Estates Ltd v Pinder* [1969] 2 AC 19, 25A). So, the focus is on *title*, not *possession*. Here the word 'title' refers to the transaction or transactions by which he or she obtained his rights, *eg* purchase from X, or gift or inheritance from Y, going back to a point in time (usually beyond the limitation period) when the title cannot be impugned. This is the 'good root of title': see the Law of Property Act 1925, section 44. Accordingly, the 'title' of a party may, and usually does, include reference to the rights of predecessors (in title). The only *original* title nowadays is that obtained by adverse possession (commonly, though inaccurately, called "squatting").

124. In the present case there is no doubt that the Brakes are no longer in occupation or possession of the cottage. They say they were unlawfully dispossessed by Chedington, and wish to be put back into such occupation or possession. Therefore, their claim lies in ejectment, and not in trespass. The difference is that, as I have said, they must succeed by showing a better title to the land than the present occupant, Chedington. A better title, in this context, may not be much. If one squatter, in adverse possession to the paper title owner, before acquiring a perfect title by limitation is ousted by another squatter, and neither of them has any formal rights over and above adverse possession, the first squatter nevertheless has a better title than the latter, though a worse title relative to the paper title owner (see *eg Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894, 898A-B). He would therefore succeed in recovering possession against the second squatter, but fail if the paper title owner got back into possession, or granted sufficient rights to the second squatter to resist the first squatter's claim. This is the doctrine of relative title.

125. As it happens, in the present case the Brakes *do* have a paper title. They are two of the three registered proprietors of the cottage, Mrs Brehme being the third. But they acquired that title as (two of the three) trustees for the partnership "Stay in Style", and not for themselves as beneficial co-owners. This means that, on their bankruptcy, the Brakes' legal title did not vest in their trustee in bankruptcy, for each of two separate reasons. First, the Insolvency Act 1986, section 283(3)(a), excepts such trust property from the bankrupt's estate, which is what *does* vest in the trustee in bankruptcy. Second, given that Mrs Brehme was not bankrupt, any such vesting would have severed the legal joint tenancy, which cannot happen after 1925: see the Law of Property Act 1925, section 36(2). This in turn means that the interesting discussion in Chedington's closing submissions as to the effect of the decision of the Court of Appeal in *Helman v Free Grammar School of John Lyons* [2014] 1 WLR 2451, [28]-[29], has no application here.

126. The Brakes claimed a beneficial interest in the cottage, either by virtue of an alleged agreement with the partnership to acquire the cottage, or alternatively by virtue of a proprietary estoppel against the partnership. But although proceedings were commenced in 2012 to vindicate these rights, those proceedings were stayed, and have never been reactivated. Moreover, on the Brakes' bankruptcies in 2015, the benefit of all such claims vested in their trustee in bankruptcy, Mr Swift, for the benefit of their creditors. The consequence is that they do not now belong to the Brakes, and that the Brakes cannot rely on them. So, although they remain co-owners of the legal estate, they have no beneficial interest.

The partnership licence

127. The Brakes claim to be entitled to possession of the cottage by virtue of a licence granted to them under the partnership agreement with PWF. This is said to arise from clause 8 of the partnership agreement, which is headed "Drawings" and was set out earlier in this judgment. There is no doubt that clause 8.4 does state that the Brakes "are entitled to reside in the Premises as Licensees rent free". The question is what this means in law. The phrase "the Premises" is defined to mean "the freehold or leasehold premises to be occupied by the Partnership … and such other premises as the Partners may decide in accordance with clause 15.6(i)." At the time of the agreement, the main house had been contributed as partnership property, but the cottage had not yet been acquired. The Brakes had been living in the house, and continued to do so.

128. Assuming that, once the cottage was acquired and conveyed to Mr and Mrs Brake and Mrs Brehme, the partners made an appropriate decision under clause 15.6(i), nonetheless the effect of clause 8.4 is not at all straightforward. The law is clear that a landowner cannot give himself or herself a licence to go onto his or her own land, and neither can he or she give such a licence to himself or herself jointly with another person. I agree with the Brakes that this point was not pleaded by Chedington. But it is a matter of *law* which arises on the facts which *were* pleaded and proved. In *Harrison-Broadly v Smith* [1964] 1 WLR 456, the landowner had purportedly granted a licence to herself and the defendant jointly to farm the land. The question was whether the defendant

had been granted a licence for agricultural purposes which was treated by the relevant legislation as an agricultural tenancy. The Court of Appeal held that he had not.

129. Harman LJ said (at 464-65):

> "I cannot give myself a licence, and I think I cannot give myself a licence jointly with somebody else, for I already have a right to go on the land, and it is tautologous to talk of myself as allowing myself to go on my own property. It seems to me that the section cannot operate in circumstances of this kind. In other words, the person to whom the licence is granted must be somebody other than the grantor of the licence."

Pearson LJ and Davies LJ said the same thing in different words (at 468 and 470 respectively).

130. The position in the present case is factually slightly different. Here the three joint owners of the legal estate in the cottage are said to have granted a licence to two of them to occupy it. But I do not think that this factual distinction makes any difference in law. A licence is not an estate or interest in the land, but simply that permission which prevents the act of entering or remaining on the land from being a trespass: see the fuller discussion in *Axnoller Events Ltd v Brake* [2022] EWHC 365 (Ch), [222] ff (handed down at the same time as this judgment). Each of the three co-owners already had the right to occupy the land concerned, and it would not be a trespass for them to do so. Thus, it does not matter whether the purported licence was to one or two or all three of them. It was not a licence in law.

131. The Brakes refer to the recent decision of the Court of Appeal in *Procter v Procter* [2021] EWCA Civ 167. That was a case about a *tenancy* granted by trustees to a partnership, where there was an incomplete overlap between the two sides: three trustees to five partners, all of the trustees being also partners. The Court of Appeal held that sections 72 and 82 of the Law of Property Act 1925 (dealing with conveyances to oneself and covenants with oneself and others respectively) solved all the common law problems of the overlapping interests. As a result the tenancy was valid. There was only limited discussion about licences, and none at all to suggest that A could grant a licence to A or to A and B jointly. Sections 72 and 82 of the 1925 Act are not concerned with licences. *Harrison-Broadley v Smith* was not cited, no doubt because it was irrelevant. In like fashion, *Procter v Procter* is irrelevant to my decision.

132. That is not to say that clause 8.4 is of no effect. *Prima facie*, any use by a partner of partnership property for personal purposes would be a breach of duty and require the partner to account to the other partners for the benefit conferred (see the Partnership Act 1890, s 29(1)). But that general proposition is subject to express provision in the partnership agreement (see section 19 of the 1890 Act). In my judgment, clause 8.4 is such express provision. That is why it is to be found in clause 8, concerning drawings. It will be seen that clause 8.1 gives the Brakes the option of taking their drawings in kind rather than in cash. Clause 8.4 simply makes clear that their personal occupation of partnership premises is not to be counted against their drawings. It is not the

grant of a licence at all. It is the relaxing (to a limited extent) of a rule about breach of fiduciary duty.

133. The consequence is that there never was a licence granted to the Brakes by the partnership. Clause 8.4 does not assist them to establish a right to occupy or possess the cottage separate from (i) their rights as joint owners of the legal estate, and (ii) any beneficial rights they may have had, whether as partners or otherwise (but I deal below with these).

134. Chedington says that, in the case of property which continued to belong to the partnership, an appropriate term would be implied into the agreement to enable the licence to be determined: *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173, HL. And it might be said that, the business of the partnership being no longer being carried on, clause 8.4 was no longer needed. Accordingly, any licence that there might have been (if legally permissible) by virtue of clause 8.4 would have come to an end when the partnership went into administration, or at least when it went into liquidation. But none of this was pleaded, and the law of implied terms was not explored in argument. So I put this on one side.

135. However, even if I were wrong, and clause 8.4 *had* had the effect of granting such a licence in law to the Brakes, as a matter of construction it could not have been intended to have effect once the land concerned ceased to belong to the partnership. In the case of the house, this happened in July 2015, when the Farm was sold to Sarafina by the receivers appointed by Mrs Brake's bankers. So any "licence" granted by the partnership would have come to an end in relation to the house at that point. In the case of the cottage, any possible licence must have come to an end, at the latest, when any partnership interest in the cottage that there might still be was sold to a third party, because it would then no longer be possible for the partnership to make any use of it. So at the time of the dispossession, the Brakes would not have had any such licence.

136. Thirdly, and even if the foregoing were wrong, the fact remains that what the Brakes claim to have is a *licence*, which is not an interest in land at all (*Ashburn Anstalt v Arnold* [1989] Ch 1, 13C-22D), and certainly not one giving a superior title to them for the purposes of recovering possession from a third party who has taken possession. A number of authorities were cited to me in support of this proposition.

137. In *Hill v Tupper* (1863) 2 H&C 121, a company which owned a canal and land adjacent demised part of the adjacent land to the plaintiff and also purported to grant to the plaintiff the exclusive right to hire out boats for pleasure purposes on the canal. The defendant was an innkeeper whose premises abutted on the canal bank. He also had pleasure boats which were used by his family and also sometimes by customers on the canal. The plaintiff sued to prevent the defendant from doing so.

138. At the trial (at Nisi Prius) the jury gave a verdict for the plaintiff, with damages of a farthing (one quarter of an old penny, about one tenth of a

modern decimal penny). A rule was obtained on behalf of the defendant to enter judgment for the defendant on two grounds. The second of these was

> "that, if the grant were good, the action would not live by the plaintiff against the defendant for the alleged infringement of the right".

Against that, the plaintiff argued that, his

> "right having been infringed, an action lies with the infringement. … The circumstance that the [canal company] can sue in trespass is no reason for holding that the plaintiff has not also his right of action. The two causes of action are distinct, and the damage sustained is different."

139. The Court of Exchequer made the rule absolute (that is, overturned the jury's verdict) and entered a verdict for the defendant on the second ground. Pollock CB said (at 127):

> "This grant merely operates as a licence or covenant on the part of the grantors, and is binding on them as between themselves and the grantee, but gives him no right of action in his own name for any infringement of the supposed exclusive right."

And Martin B said (at 128):

> "This grant is perfectly valid as between the plaintiff and the canal company, but in order to support this action, the plaintiff must establish that such an estate or interest vested in him that the act of the defendant amounted to an eviction. … The only consequence is that, as between the plaintiff and the canal company, he has a perfect right to enjoy the advantage of the covenant or contract; and, if he has been disturbed in the enjoyment of it, he must obtain the permission of the canal company to sue in their name."

Bramwell B also agreed.

140. In my judgment, this decision is clear authority for the proposition that a contractual licence is good as between the grantor and the grantee as a contract, but does not confer any right on the grantee to take legal action in respect of any action by any third party which, if carried out by the grantor, would amount to an infringement of the contractual rights granted.

141. In *Clore v Theatrical Properties Ltd* [1936] 3 All ER 483, a deed had been made in 1899 under which one Bruce (described in the deed as "lessor"), who had a long lease of the Prince of Wales Theatre in London, granted to one Leigh (described in the deed as "lessee") the exclusive use of all the refreshment rooms of the theatre for the purpose of supplying refreshments to visitors to the theatre. Bruce's rights under the deed were assigned to the plaintiff and Leigh's rights were assigned to the defendants, notwithstanding a provision in the deed that the benefit should not be assigned or sublet except with the consent of the "lessor". The action was brought by the plaintiff to prevent the defendants from exercising any of the rights conferred upon the

"lessee" by the deed. Clauson J granted the injunction which the plaintiff sought, and the defendants appealed to the Court of Appeal, unsuccessfully.

142. The Court of Appeal held that the deed of 1899 created a licence and not a lease, notwithstanding the words used. Lord Wright MR said (at 490):

> " … this is not a document which creates an estate in land, merely one which is a personal contract between the parties named therein and is only enforceable among parties between whom there is privity of contract. For example, the assignees of Bruce, the lessee, would be entitled to enforce this contract but only against the actual contracting parties. The obligation as a whole goes beyond a mere licence. It involves an obligation to fulfil the terms of the indenture and involves a liability to damages if there is a breach. This obligation may be revoked by the covenantor, but if he does so he will break the conditions and be liable in damages. The defendants who seek to establish their rights under this document are not seeking to establish them against Mr Leigh but against the plaintiff, the assignee of Mr Leigh – which is not possible at common law as there is no privity of contract between the plaintiff and the defendants, and as the defendants can only enforce these rights on the contract the defence must fail".

143. Romer LJ said (at 491):

> "I think the document merely amounted to a contract with Bruce that Bruce and his assignees should have the exclusive and sole right of exercising these privileges in the theatre. That being so, I confess that I can think of no principle of law or equity which will avail the defendants in this case. They have no right to the legal or equitable estate in the theatre itself."

144. Greer LJ agreed. (I may say that I think the second reference to "Bruce" in the quotation from Romer LJ is a mistake, and should read "Leigh". Otherwise it makes no sense.)

145. In my judgment, this decision confirms that in *Hill v Tupper* (although that case is not actually cited). The grant of the licence by the landowner Bruce to Leigh could not give Leigh (let alone his successors in title) the right to complain about actions by Bruce's assignee which would or might amount to a breach of the contract between Bruce and Lee.

146. In the present case, Chedington also refers to the decision of the House of Lords in *Hunter v Canary Wharf Ltd* [1997] AC 655. This was a claim in nuisance by the occupiers of dwellings in the London Docklands area against the owner and developer of land nearby, the presence of the large and tall building on which interfered with the reception of television broadcasts. The plaintiffs were not only owners or tenants of their homes, but in some cases were licensees or others who shared homes with owners, tenants and licensees. The House of Lords held by a majority (Lord Cooke of Thorndon dissenting) that an action in private nuisance was brought in respect of acts directed against the plaintiff's enjoyment of his rights over the land, so that, generally speaking, only a person with an interest in the land could sue. Because this is a

decision on the law of nuisance, it is plainly not authoritative in relation to a claim to recover possession of land, but the analogy is obvious.

147. However, in this connection, I must also consider the majority decision of the Court of Appeal in *Manchester Airport plc v Dutton* [2000] QB 133. In that case the National Trust owned land next to Manchester Airport, whose proprietor, the plaintiff company, was constructing a second runway on its own land. However, the second runway could only be used if trees on the National Trust's land were cut down. The National Trust granted a licence to the plaintiff to enter and occupy the adjacent woodland for the purpose of tree felling. However, before the licence was granted, the defendants, who were opposed to the works and to the second runway, entered on the National Trust's land with the intention of making it difficult, if not impossible, for the works to be carried out. The plaintiff, which had not yet entered on the land, brought a claim against the defendants for its recovery. The district judge granted a possession order, and an appeal to the High Court judge was dismissed. The defendants appealed to the Court of Appeal, where the appeal was allowed by a majority.

148. Each of the two majority judges, Laws and Kennedy LJJ, gave a judgment for allowing the appeal. Laws LJ said this (at 147C):

> "the question which falls for determination is whether the airport company, being a licensee which is not de facto in occupation or possession of the land, may maintain proceedings to evict the trespassers by way of an order for possession. Now, I think it is clear that if the airport company had been in actual occupation under the licence and the trespassers had then entered on the site, the airport company could have obtained an order for possession; at least if it was in effective control of the land.
>
> […]
>
> But if the airport company, were it in actual occupation and control of the site, could obtain an order for possession against the trespassers, why may it not obtain such an order *before* it enters into occupation, so as to evict the trespassers and enjoy the licence granted to it? As I understand it, the principal objection to the grant of such relief is that it would amount to an ejectment, and ejectment is a remedy available only to a party with title to or estate in the land; which as a mere licensee the airport company plainly lacks. It is clear that this was the old law …
>
> […]
>
> However, in this I hear the rattle of mediaeval chains. Why was ejectment only available to a claimant with title? The answer, as it seems to me, lies in the nature of the remedy before the passing of the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76). Until then, as Cole vividly describes it in *Cole on Ejectment* (1857), ch. 1, pp. 1-2:
>
> 'actions of ejectment were in point of form pure fictions … '

> The Act of 1852 introduced a simplified procedure without fictions. The form of writ prescribed by sections 168 to 170 of the Act required an allegation that the plaintiff was 'entitled [to possession], and to eject all other persons therefrom.' Section 207, however, provided: 'The effect of a judgment in an action of ejectment under this Act shall be the same as that of a judgment in the action of ejectment heretofore used.'
>
> […]
>
> In my judgment the old learning demonstrates only that the remedy of ejectment was simply not concerned with the potential rights of a licensee: a legal creature who, probably, rarely engaged the attention of the courts before 1852 or for some time thereafter.
>
> […]
>
> I think there is a logical mistake in the notion that because ejectment was only available to estate owners, possession cannot be available to licensees who do not enjoy de facto occupation. The mistake inheres in this: if the action for ejectment was by definition concerned *only* with the rights of estate owners, it is necessarily silent upon the question, what relief might be available to a licensee. The limited and specific nature of ejectment means only that it was not available to a licensee; it does not imply the further proposition that *no* remedy by way of possession can now be granted to a licensee not in occupation. Nowadays there is no distinct remedy of ejectment; a plaintiff sues for an order of possession, whether he is himself in occupation or not. The proposition that a plaintiff not in occupation may only obtain the remedy if he is an estate owner assumes that he must bring himself within the old law of ejectment. I think it is a false assumption.
>
> I would hold that the court today has ample power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence. If, as here, that requires an order for possession, the spectre of history (which, in the true tradition of the common law, ought to be a friendly ghost) does not stand in the way. The law of ejectment has no voice in the question; it cannot speak beyond its own limits. …
>
> In my judgment the true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys. This is the same principle as allows a licensee who is in de facto possession to evict a trespasser. There is no respectable distinction, in law or logic, between the two situations. An estate owner may seek an order whether he is in possession or not. So, in my judgment, may a licensee, if other things are equal. … "

149. Kennedy LJ (at 152A) agreed with the reasons given by Laws LJ, though he also gave supplementary reasons based on the wording of RSC Order 113 (the forerunner of the "trespasser" part of CPR Part 55). Laws LJ did not express any view on Kennedy LJ's supplementary reasons.

150. The judge in the minority was Chadwick LJ. He said (at 140E – F):

> "It has been common ground that the defendants had entered the wood and encamped there before the licence of 22 June 1998 was granted. This is not a case in which the plaintiff can rely on its own prior possession to recover possession of land from which it has been ousted. The airport company must rely on the title (if any) which it derives under the licence."

151. Chadwick LJ also said (at 141F-142C):

> "It has long been understood that a licensee who is not in exclusive occupation does not have title to bring an action for ejectment. The position of a non-exclusive occupier was explained by Blackburn J. in *Allan v Liverpool Overseers* (1874) LR 9 QB 180, 191-192 … The question in *Allan v. Liverpool Overseers* was whether a steamship company was liable to be rated in respect of its occupation of certain sheds which it occupied under licence from the Mersey Docks and Harbour Board. As Blackburn J. pointed out, liability for rates fell on a person who had exclusive occupation:
>
> > 'The poor-rate is a rate imposed by the statute on the occupier, and that occupier must be the exclusive occupier, a person who, if there was a trespass committed on the premises, would be the person to bring an action of trespass for it. A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and although his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring ejectment or trespass quare clausum fregit, the maintenance of the action depending on the possession; and he is not rateable.'
>
> That passage, as it seems to me, provides clear authority for the proposition that an action for ejectment - the forerunner of the present action for recovery of land - as well as an action for trespass can only be brought by a person who is in possession or who has a right to be in possession. Further, that possession is synonymous, in this context, with exclusive occupation – that is to say occupation (or a right to occupy) to the exclusion of all others, including the owner or other person with superior title (save in so far as he has reserved a right to enter)."

152. Chadwick LJ further said (at 143B, E-F):

> "The question is whether a person who has a right to occupy under a licence but who does not have any right to exclusive possession can maintain an action to recover possession. …
>
> […]

> The lessee, having a right to exclusive possession, could, before entry into possession, maintain an action for ejectment. A licensee, if he did not have a right to exclusive possession, could not bring ejectment. A tenant or a licensee who was in actual possession - that is to say, in occupation in circumstances in which he had exclusive possession in fact - could maintain an action for trespass against intruders; but that is because he relied on the fact of his possession and not on his title.
>
> The licence in the present case, as it seems to me, is a clear example of a personal permission to enter the land and use it for some stipulated purpose. In my view, it would be contrary to what Windeyer J. [in *Radaich v Smith* (1959) 101 CLR 209, 222] described as 'long established law' to hold that it conferred on the airport authority rights to bring an action in rem for possession of the land to which it relates."

153. One difficulty with the majority decision is that it does not deal with the decisions in *Hill v Tupper* and *Clore v Theatrical Properties Ltd*. Indeed, neither authority was cited. Although Laws LJ said that the old action in ejectment "is necessarily silent upon the question, what relief might be available to a licensee", each of these is a decision on the ability of a licensee to bring an action to prevent a third party acting inconsistently with the contractual rights granted to the licensee by the licensor. Moreover, *Hill v Tupper* is a decision *after* the Common Law Procedure Act 1852, which abolished the procedural fictions in ejectment, and which according to Laws LJ meant that ejectment could now be concerned with the position of a licensee. But the plaintiff in *Hill v Tupper* was a licensee, and he lost. An interest in land was still necessary in order to make a claim against a third party infringer.

154. In *Mayor of London v Hall* [2011] 1 WLR 504, CA, a decision concerning proceedings brought by the Mayor to evict protesters encamped in Parliament Square in London, *Dutton* was considered. The arguments from inconsistency with *Hill v Tupper* were rehearsed by the defendants. Lord Neuberger MR (with whom Arden and Stanley Burnton LJJ agreed) said:

> "26. As at present advised, at least if one ignores the full effect of sections 384 and 385 [of the Greater London Authority Act 1999], I think that there is real force in the defendants' argument, the erudition of whose contents was matched by the clarity and crispness of its presentation. Certainly, if the law governing the right to claim possession is governed by the same principles as those that governed the right to maintain a claim in ejectment, the argument seems very powerful
>
> 27. However, there is obvious force in the point that the modern law relating to possession claims should not be shackled by the arcane and archaic rules relating to ejectment, and, in particular, that it should develop and adapt to accommodate a claim by anyone entitled to use and control, effectively amounting to possession, of the land in question_along the lines of the views expressed by Laws LJ in *Dutton's* case [2000] QB 133 and by Baroness Hale of Richmond JSC in *Meier's* case [2009] 1 WLR 2780. … "

The actual decision, in favour of the Mayor, granting possession, was ultimately based on the statutory provisions of sections 384-85 of the 1999 Act, conferring powers of management upon the Mayor, although title to the land was vested in the Crown.

155. *In Vehicle Control Services Ltd v HMRC* [2013] EWCA Civ 186, VCS contracted with car park owners to manage and control the car parks. The contract provided for VCS to eject trespassers, and to issue parking penalty charge notices. The question was whether, in receiving such penalties, VCS were providing goods or services (on which VAT would be chargeable) or merely receiving damages, *eg* for trespass (on which it would not).

156. Lewison LJ (with whom Hallett and Treacy LJJ agreed) discussed *Manchester Airport plc v Dutton* and said:

> "34. … In my judgment the two principles that emerge from this case are:
>
> i) The court has power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence; and
>
> ii) In every case the question must be, what is the reach of the right, and whether it is shown that the defendant's acts violate its enjoyment.
>
> 35. The House of Lords dismissed a petition for leave to appeal. It is true that *Hill v Tupper* was not cited, but in *Mayor of London v Hall* [2010] EWCA Civ 817; [2011] 1 WLR 504 this court held that that omission did not impugn the validity of the decision. I do not consider that these two principles are limited to cases in which the licensee has a right to possession or occupation. In my judgment Laws LJ makes it clear that the extent of the remedy is commensurate with the right."

157. *Hill v Tupper* was a decision of the Court of Exchequer, in precedent terms equivalent to the modern High Court. But the other decision, in *Clore v Theatrical Properties Ltd*, was a decision of the Court of Appeal, the same court as in *Dutton*. It too denied to a licensee the right to complain about the conduct of a stranger to the original licence. According to the doctrine of *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, the Court of Appeal is bound by its own decisions, with limited exceptions. One of those exceptions is where the later decision was decided *per incuriam*.

158. Chedington says that the majority decision in *Dutton* was indeed reached *per incuriam*, and that therefore it should not be followed. The doctrine of *per incuriam* is however of more limited reach than is sometimes supposed. It applies to *appellate* courts considering the decisions of co-ordinate (but not superior) jurisdiction. It does not apply to *first-instance* courts considering the decisions of appellate courts. In *Broome v Cassell & Co Ltd* [1972] AC 1027, Lord Diplock said at 1131D:

> "the label per incuriam … is relevant only to the right of an appellate court to decline to follow one of its own previous decisions, not to its right

> to disregard a decision of a higher appellate court or to the right of a judge of the High Court to disregard a decision of the Court of Appeal."

(See also *Rickards v Rickards* [1990] Fam 194, 203, and *Rakhit v Carty* [1990] 2 QB 315, 326.)

159. Moreover, it only applies where the first court acts in ignorance of a statutory rule or a binding precedent which would have caused that court to come to a different conclusion. In *Morelle Ltd v Wakeling* [1955] 2 QB 739, Sir Raymond Evershed MR, giving the judgment of a five-judge constitution of the Court of Appeal, said (at 406):

> "As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong."

(See also *Duke v Reliance Systems Ltd* [1988] QB 108, 113D, per Sir John Donaldson MR, with whom Ralph Gibson and Bingham LJJ agreed.)

160. In my judgment, sitting here at first instance, I am not entitled to refuse to apply an otherwise binding majority decision of the Court of Appeal on the grounds that it was decided *per incuriam*. The Court of Appeal may do so, but I may not. That does not mean that I necessarily consider that the decision was right. It is after all inconsistent with long-standing decisions of the English courts, and has been strongly criticised by academic writers of the highest rank, including Professor Ben McFarlane ("The Numerus Clausus and the Common Law", in *Landmark Cases in Land Law*, ed Gravells 2013), and Professor William Swadling ("Opening the Numerus Clausus", (2000) 116 LQR 354). It has also not been followed in New South Wales, where Chadwick LJ's dissenting judgment has been preferred: *Georgeski v Owners Corporation Sp49833* [2004] NSWSC 1096. However, I do not need to deal here with the substance of the criticisms advanced. This is because what I think of the decision is irrelevant. It is binding on me, and I must apply it loyally where necessary.

161. The question is, how far it is necessary. I remind myself that in *Dutton* Laws LJ said:

> "In my judgment the true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys."

162. In the present case, I have held that there could not in law be a licence from the partnership to the Brakes for them to occupy the cottage, and that, even if there could, it would have long since come to an end. Even if somehow it had not come to an end, all the business of the partnership at the Farm and at the cottage has long ceased, the liquidators of the partnership have sold the

beneficial interest in the cottage to others, and it is difficult to see how it could be necessary to grant possession to the Brakes in order to vindicate that "licence". So the application of *Dutton* simply does not arise in the circumstances. I should say that Chedington also advanced a lengthy and complex argument based on section 35 of the Partnership Act 1890, but I see no practical utility in dealing with that argument at this stage, and accordingly do not do so.

Title generated by possession

163. As I have already said, if one squatter is dispossessed by another, the first squatter may seek recovery of possession against the second, even though neither of them has any formal title to the land. This is because the first squatter has (or may have) *possession* of the land. But this is a legal term of art and requires to be explained. The modern view is based largely on the judgment of Slade J in *Powell v McFarlane* (1979) 38 P&CR 452, as endorsed by the House of Lords in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

164. In *Powell v McFarlane*, Slade J held that possession had "the traditional sense of that degree of occupation or physical control, coupled with the requisite intention commonly referred to as *animus possidendi*" (at 459). The former concept referred to an appropriate degree of physical control in the circumstances, including the nature of the land and the manner in which land of that nature is commonly used or enjoyed. The alleged possessor must have been dealing with the land in question as an occupying owner might have been expected to deal with it and no-one else should have done so (at 470-71).

165. The latter concept involved "the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title … so far as reasonably practicable…" (at 472). The owner of (a legal estate in) the land will be assumed to have the requisite intention to possess, unless the contrary is proved. But when a trespasser has acquired possession "the courts would require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world" (at 473). Where a squatter later seeks to show that he has dispossessed the *owner* he should be required to adduce "compelling evidence" that he had the requisite intention in any case where his use of the land was equivocal (at 476).

166. In *JA Pye (Oxford) Ltd v Graham*, Lord Browne-Wilkinson (with whom the rest of their lordships agreed, though some of them made supplementary remarks as well) approved the analysis and reasoning of Slade J in *Powell v McFarlane*. He said:

> "31. In a remarkable judgment at first instance, *Powell v McFarlane* (1977) 38 P & CR 452, Slade J traced his way successfully through a number of Court of Appeal judgments which were binding on him so as to restore a degree of order to the subject and to state clearly the relevant principles. Although there are one or two minor points on which (unlike Slade J) your Lordships are not bound by authority and can therefore make necessary adjustments, for the most part the principles set out by

> Slade J as subsequently approved by the Court of Appeal in *Buckinghamshire County Council v Moran* [1990] Ch 623 cannot be improved upon."

167. It will be noted that the judgment of Slade J in *Powell v McFarlane* includes the phrase "on one's own behalf" in connection with the intention to exclude others. This point is echoed in the advice of the Privy Council *in Bannerman Town v Eleuthera Properties Ltd* [2018] UKPC 27, where Lord Briggs said:

> "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."

168. Chedington does not dispute that the Brakes were in factual possession of the cottage up to 18 January 2019. They held the only key to the cottage. They controlled access to it, they furnished it and they stored their own property there. That factual possession obviously stopped on 18 January 2019, when they were dispossessed by Chedington. The question is whether on that date they also had the *animus possidendi*, the intention in their own name and on their own behalf to exclude the world at large so far as reasonably practicable. Chedington moreover asserts that the Brakes were not in possession as owners, but as trespassers, and therefore must establish the requisite intention by unequivocal and compelling evidence, rather than by presumption.

169. Chedington says that the Brakes' possession of the cottage between February 2017 (when Chedington acquired Sarafina/AEL) and November 2018 (when they were dismissed) was on behalf of Chedington. It says that the principal purpose of the cottage in this period was to provide the Brakes with overnight accommodation when there were paying guests in the house, for which purpose they needed AEL's employees to clean and make up the beds and the cottage and to move food and other matters to the cottage, reversing the process at the end of the stay. AEL also met various living expenses associated with cottage, such as utilities and insurance. Mrs Brake sought to purchase the cottage from the liquidators as agent for Dr Guy, and it was agreed that the Guy Parties would pay for improvements to the cottage even before they had purchased it on the basis that they were going to own it.

170. Chedington moreover says that, on that basis, the Brakes would have to demonstrate that between their dismissal and their dispossession they changed their previous intention so as to wish to exclude the world at large on their own behalf. Chedington points to the facts that (i) Mrs Brake never went back to the cottage after her dismissal, until she sought to re-enter after she had been dispossessed, (ii) Mr Brake never stayed overnight at the cottage after his dismissal, although his evidence was that he did visit from time to time to have lunch or take showers, (iii) Tom D'Arcy used the cottage to meet friends and play computer games, although that stopped on 20 December 2018. Chedington further points to the unchallenged evidence of Mr Lyons as to the

state of the cottage on 18 January 2019, which was to the effect that it was not being lived in at that time.

171. Chedington accepts that the Brakes left their chattels at the cottage, but says that this is "insufficiently unequivocal or compelling evidence to constitute intention to possess". In this respect it relies on *Leigh v Jack* (1879) 5 Ex D 264, 271, CA, *Wallis's Cayton Bay Holiday Camp v Shell-Mex and BP Ltd* [1975] QB 94, 103, and *Treloar v Nute* [1976] 1 WLR 1295, 1300. At trial Chedington sought to demonstrate that the Brakes had abandoned possession of the cottage by 18 January 2018. It now submits overall that the Brakes cannot prove that they had possession in law as at 18 January 2019, and hence the claim to possession must fail.

172. It may be that, during the currency of the partnership, the Brakes occupied the cottage on behalf of the partnership rather than in their own beneficial right. Chedington does not however argue that that position continued during the time that followed Chedington's acquisition of Sarafina. Instead it argues that the Brakes occupied on behalf of Chedington. But this was not pleaded and, as a factual allegation, it should have been.

173. But in any event I do not think that this can be right. It is true that there is considerable evidence to show that the Brakes were acting on behalf of Chedington in a number of respects concerning the cottage. The key question is whether they were *occupying* the cottage on behalf of Chedington. The cottage did not belong to Chedington, legally or beneficially, after the acquisition of Sarafina, and Chedington had no right to use it.

174. During the subsistence of the partnership, the Brakes had been able to occupy it because they were partners, and they did not have to account to the partnership for this benefit because of clause 8.4. During the time that Sarafina owned the Farm, it too had no right to use the cottage. The Brakes continued to occupy it, because they could. Neither the administrators nor the liquidators of the partnership attempted to deal with it or realise it for the benefit of creditors. So the Brakes carried on using it. I do not think that the character in which the Brakes occupied the cottage changed after the sale of Sarafina to Chedington.

175. The question therefore is whether, as at 18 January 2019, the Brakes had "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…" In this respect, I do not think it would be right to regard the Brakes as *owner*-occupiers, on the basis that they were (and still are) two of the three joint legal owners of the fee simple estate in the cottage. Their legal ownership was strictly as trustees for the partnership, and the benefit of the partnership's interest was under the control of, first, the administrators, and then the liquidators, of the partnership. To the extent that the Brakes had any personal beneficial interest adverse to the partnership, then that had vested in the trustee in bankruptcy.

176. 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.

177. Accordingly, I find that the Brakes had both a sufficient degree of physical control and the *animus possidendi* to give them possession in law, sufficient to found an action for the recovery of possession (but without prejudice to the question whether the defendant to the action could show a better title).

Claim under the Protection from Eviction Act 1977

178. The Brakes also make a claim under section 3 of the Protection from Eviction Act 1977. This relevantly provides:

> "3.— Prohibition of eviction without due process of law.
>
> (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.
>
> [(2A) Subsections (1) and (2) above apply in relation to any restricted contract (within the meaning of the Rent Act 1977) which—
>
> > (a) creates a licence; and
> >
> > (b) is entered into after the commencement of section 69 of the Housing Act 1980;
>
> as they apply in relation to a restricted contract which creates a 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.

(2C) … 'excluded licence' shall be construed in accordance with section 3A below.]

[…]"

179. Section 3A relevantly provides:

"[3A.— Excluded tenancies and licences.

(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) it confers on the tenant or licensee the right to occupy the premises for a holiday only;

or

(b) it is granted otherwise than for money or money's worth.

[…]]."

180. The first question is whether section 3 applies at all on the facts of this case. The Brakes do not claim to have had a tenancy of the cottage, but they do claim to have had a licence. This is to be treated as if it were a tenancy under section 3(2B), unless it is an "excluded licence". As to whether there was a licence at all, I have held that the terms of the partnership agreement, by clause 8.4, did not in fact confer a licence upon the Brakes from the partnership. So, section 3 does not apply anyway.

181. Even if there *had* been a licence, Chedington says that section 3 could not apply, *unless* under section 3(2A) the rights granted to the Brakes also amounted to a 'restricted contract' within the meaning of the Rent Act 1977. The definition of that term in that Act, by section 19(2), requires that a restricted contract be granted in consideration of "a rent which includes payment for the use of furniture or for services". But, says Chedington, this was not that case.

182. I agree that, if there had been any licence granted to the Brakes under clause 8(4), it would not have amounted to a 'restricted contract' within section 19(2). But I do not agree that section 3(2A) is a necessary *precondition* of the application of section 3. Section 3(1) applies where "premises have been let as a dwelling under a tenancy", though with exceptions irrelevant in the present case, and there is a person "lawfully residing in the premises" at the termination of the tenancy. Section 3(2A) *extends* these provisions to cases of

a restricted contract under the 1977 Act, and section 3(2B) *extends* them to cases where there is a licence, other than an "excluded licence". Section 3(2A) is therefore simply an *alternative* to section 3(2) itself.

183. Looking then at the other alternative, section 3(2B), if there had been a licence in this case, it would have been necessary to ascertain whether it was an "excluded licence". If I were wrong about the effect of clause 8.4 of the partnership agreement, and there really were a licence granted to the Brakes by the partnership, Chedington says that it would have been an excluded licence, because it would have been one granted "otherwise than for money or money's worth". The point was not pleaded, but, given that the relevant documents have all been pleaded, this is a point of construction of a written document, and therefore a point of law.

184. Chedington points to the words "rent free" in clause 8.4, and says that any such licence could only have been a bare licence. I disagree. If there had been any such licence granted by virtue of clause 8.4, then it would have been part and parcel of the whole commercial arrangement between the partners, with consideration on all sides, as Mrs Brehme accepted in cross-examination (day 14, pages 45-46). It would not have been a bare licence at all. The words "rent free" merely serve to show that there was to be no setting off of the benefit as against the drawings of the Brakes.

185. In *Polar Park Enterprises v Allason* [2007] EWHC 1088 (Ch), for example, the claimant company owned a house. The shares in the claimant company were settled on trusts which inter alia permitted the trustees to allow any discretionary object to reside in such house, but only on terms that the discretionary object "shall maintain and keep the said property in good and substantial repair and condition … and shall keep the same property insured against fire damage and other perils…" The trustees permitted the defendant's wife (who was an object of the trust, but, as it happens, also the settlor of the trust) to reside in the house with her husband and children. However the defendant and his wife later separated and divorced. She left the property, but he remained. The question was whether the defendant was protected by section 3. This in turn depended on whether the licence was one granted for money or money's worth.

186. Briggs J held that it was. He said:

> "30. Turning to Mr Fancourt's [counsel for the defendant] second submission that there was no evidence of a qualifying licence, in my judgment the licence proved to have been granted to Mrs Allason up to 1996 was for money's worth. …
>
> 31. Having the property kept repaired and insured was a valuable benefit to Polar Park and was the *quid pro quo* for the licence. … "

187. In my judgment, however, the situation is not precisely analogous here. The obligations undertaken by the licensee were continuous, and related directly to the condition of the property. Here, occupying partnership property for personal purposes (the cottage) without having to account for the benefit was

simply one of the benefits stipulated for by the Brakes as part of the partnership transaction. The Brakes' contribution to the partnership, unlike the promises in *Polar Park*, had nothing to do with the property itself or its condition. If there had been a licence at all, it would have been an *excluded licence* during the continuance of the partnership.

188. If I were wrong about that, the question would arise whether, if it were not *originally* an excluded contract, it would have become so once the partnership was dissolved and the cottage became an asset of the administration and subsequently of the liquidation. The policy behind section 3 is to protect those who pay their landlords (in money or money's worth) for their right to occupy. Once the partnership ceases to carry on business and to occupy the cottage for the purposes of that business, there is no further "money or money's worth" being provided in return for the licence. There are two possibilities. Either (1) the licence then becomes "excluded" at that time, or (2) it never does (because the *entire* consideration for the licence was provided "upfront"), and so it continues not to be excluded *in perpetuity*. I do not think that the latter is what Parliament intended section 3 to achieve, and therefore in my judgment any licence becomes an excluded licence once the consideration can no longer benefit the landlord.

189. There is a further point. 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.

190. Lastly on this part of the case, Chedington argues that section 3 of the 1977 Act does not create a cause of action in the occupier. It says that the section "simply deprives a defendant of a particular defence in a common law action". In *McCall v Abelesz* [1976] QB 585, 597, a case about depriving tenants of services under section 30 of the Rent Act 1965, Ormrod LJ referred (at 597 B-C) also to the effect of sections 31 and 32 (section 32 being the predecessor of section 3 of the 1977 Act):

> "The restrictions on the owner's common law and contractual rights of re-entry or to recover possession have been put into sections 31 and 32 respectively. Neither of these sections provides a specific remedy for breach of its terms but the effect of them, as before, is to deprive the owner of his defence to an action for trespass."

191. And, in *Smith v Khan* [2019] 1 P&CR 4, the defendant landlord had granted an assured shorthold tenancy of a flat in June 2014 for 12 months to the claimant's husband. In April the defendant gave the claimant notice to terminate the tenancy and two weeks later changed the locks so as to exclude the claimant from the property. The claimant issued proceedings seeking an order for reinstatement and damages for unlawful eviction. But it appeared that the defendant had re-let the property, and so thereafter the claim proceeded as one for damages only. Patten LJ (with whom Henderson and Newey LJJ agreed) said:

> "Mr Khan was undoubtedly in breach of s.3 when he excluded Mrs Smith from the Property on 15 April but Mrs Smith made no claim and the District Judge was not asked to make any award on the basis of a breach of s.3 because the 1977 Act does not create a statutory cause of action. It merely confirms that Mrs Smith's removal was unlawful."

192. In the circumstances, I do not consider that it is necessary for me to express a concluded view on this point. However, the point has been argued, and it is right to say that my current thinking is that, on its true construction, section 3 does not create a cause of action separate and distinct from that available at common law. As the judges have said in the cases to which I have referred, the true effect of section 3 is to merely deprive the defendant of a defence to that common law claim.

The effect of Mr Swift's Licence

193. As I have already said, on 15 January 2019 Mr Swift executed a document described as a "Licence", granted in relation to the cottage by Mr Swift to Chedington. The material part is contained in clause 2.1, as follows:

> "Subject to clause 3 and clause 4, and only insofar as [Mr Swift] has the ability to do so, [Mr Swift] permits [Chedington] to occupy the Property for the Permitted Use for the Licence Period in common with [Mr Swift] and all others authorised by [him]."

The Licence Period was defined in terms which would run for a maximum of two years to 15 January 2021. The Permitted Use was defined as "as a residential property".

194. The question is, what effect (if any) this document and any rights granted by it had on the relationship between the Brakes on the one hand and Chedington on the other. Before this document, the Brakes were, as I have held above, in possession of the cottage, both in the sense of having factual possession and also having the *animus possidendi* that I have already discussed. This would be a basis for recovering possession by legal action against a mere trespasser who dispossessed the Brakes of the cottage. The question is whether Mr Swift's licence, coupled with Chedington's actually taking possession of the cottage, changes the position.

195. As set out earlier in this judgment, the transactions between the liquidators of the partnership, the trustee in bankruptcy Mr Swift, and Chedington, if valid and effective, had a number of effects. First, they resulted in Mr Swift acquiring the beneficial interest in the cottage belonging to the partnership. This would be added to, and conjoined with, any existing beneficial rights to the property which had belonged to the Brakes (for example, in relation to claims in proprietary estoppel), and never revested in the Brakes under the Insolvency Act 1986, section 283A. In principle, therefore, he would now have the entire beneficial interest in the property. Secondly, he entered into a conditional sale agreement with Chedington, whereby Mr Swift was to apply to the court to obtain the legal title which he would then pass to Chedington together with the beneficial interest. Thirdly, Mr Swift gave authority to

Chedington in the meantime to enter and use the cottage in accordance with the licence document which he executed. Chedington did so.

196. In this claim by the Brakes for possession against Chedington, based on Chedington's dispossession of the Brakes, Chedington thus defends as the licensee of the beneficial owner of the cottage. The Brakes object to this, saying not only that the "back-to-back" transactions were invalid, but also that the licence granted by Mr Swift is of no effect, on several grounds. I shall have to consider these latter grounds later. As to the Brakes' arguments of invalidity, I first observe that the Brakes cannot complain of the liquidators' sale of the beneficial interest in the cottage to Mr Swift. This is because that part of the insolvency applications launched by them was struck out, and an application for permission to appeal dismissed. So far as concerns Mr Swift's purchase and sale on to Chedington, this is the subject of the remaining part of the insolvency proceedings, which remained unresolved after the decision of the Court of Appeal allowing an appeal against my order striking it out. But the Supreme Court has given permission to appeal against the order of the Court of Appeal, so that the question remains unresolved. The present proceedings are not an appropriate vehicle for determining the question (not least since Mr Swift is not a party, and the matter has not been fully pleaded out). Accordingly, I must proceed on the basis that the transactions are and remain of full force and effect.

197. I turn therefore to the several grounds of objection by the Brakes. First, I intend to look at the legal positions of the trustees and the beneficial owner in stages. An orthodox analysis would run as follows. Suppose land owned by trustees, and held on trust for the use or benefit of a particular beneficiary, who was then solely entitled in possession under the trust for the time being (*eg* a life interest or an absolute interest). Suppose further that this land was not let, but instead was occupied by the trustees for their own purposes. If the beneficiary simply took possession of it, it would be for the trustees, if they objected, to bring proceedings for the recovery of possession. They would have the legal title, and normally that carries with it the presumption of the right to possession sufficient to bring such an action. But here they hold the land in order to benefit the beneficiary, whether by allowing use in specie or by exploiting it (*eg* by letting) and paying the income to the beneficiary. Instead of which, they have been occupying it for themselves, perhaps in breach of trust.

198. If the trustees brought proceedings for recovery, they would have to show a better title to the land than the beneficiary. They could have two ways to do this. One would be that as legal owners they were *presumed* to have the right to possession, because of their title. The other would be that they had possession *in law* before they were dispossessed, and normally this would be enough (certainly against a squatter, say). 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.

199. Does it then matter that it is not the *beneficiary* that dispossesses the trustee, but his or her *licensee* that does so instead? I think not. If the *licensor* (*ie* the beneficiary) has a right to take possession, but delegates the exercise of that right to the licensee, in my judgment the licensee occupies in right of the licensor and on the licensor's behalf: see *eg* the quotation from the recent advice of the Privy Council in *Bannerman Town*, already cited at [167] above. If the claimant could not succeed against the licensor, then the claimant should not be able to succeed against the licensee.

200. A more modern analysis might focus more on the position of the *beneficiary*, and would run like this. Since 1997, a claim by a beneficiary against a trustee to be put into occupation of land held in trust is brought under the Trusts of Land and Appointment of Trustees Act 1996, sections 12-14. But that would be a trust claim, and not a claim in ejectment. In *Hawk Recovery Ltd v Hall* [2017] 4 WLR 40, the defendants were the registered proprietors of the legal estate in the residential property in which they lived. The claimant issued a claim seeking (inter alia) repayment of, or alternatively to trace, monies paid from a remuneration trust to the defendants (who were not beneficiaries), and used to purchase that property, and to claim the beneficial interest in it. It was alleged that the trustee of the remuneration trust had assigned the trust's claim to the claimant. During the course of the litigation, the defendants were adjudged bankrupt on the petition of a creditor who was connected with the remuneration trust. The defendants said that the money was a gift to them from the creditor, as they were the parents of the creditor's then partner.

201. Two days after the defendants became bankrupt, the claimant applied for summary judgment on the claim. The defendant trustee in bankruptcy said he had no funds to become involved, and it was left to the defendants (who had previously been represented, but were no longer) to deal with the matter in person. At the hearing of the summary judgment application, the deputy master made a declaration that the beneficial interest in the property vested in the claimant, and ordered the defendants to execute a transfer of the legal title to the claimant.

202. The defendants however did not comply with that order. The claimant therefore applied (in the same action) for an order that the defendants give up possession of the property. A different deputy master (me, as it happens) refused that application, based on the premise that the claimant had failed to establish any better right to possession of the property than the defendants. It is also to be noted that I mistakenly understood that the claimant had not applied for an order to be put into possession. But it had, albeit by an application made after the summary judgment decision. This plainly engaged the jurisdiction under the 1996 Act.

203. The claimant appealed, and the appeal succeeded. The judge asked himself this question:

> "49. … In the context of land, does a bare legal owner in possession have a better right to possession than the beneficial owner in circumstances where: (a) the beneficial owner has the benefit of an order of the court requiring that legal owner to transfer the legal title to him but (b) the legal owner refuses to comply with that order?"

204. The judge answered his own question in the following way:

> "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."

205. It will be seen that the reasoning of the decision in this case depends upon the twin facts that the legal owner or owners (1) has or have been ordered to transfer the legal title to the absolutely entitled beneficiary, under the rule in *Saunders v Vautier*, but (2) has or have not yet done so. It is also the case that there the beneficiary had asked to be put in possession, *as against the trustee*, and *as such beneficiary*. It is not clear whether the judge is treating it as a trust claim, or as a common law ejectment. But, either way, the decision does not deal with the case where the legal owners have not been asked, much less been ordered, to transfer the legal title to the beneficiary. Nor does it deal with the question whether the beneficiary, or, at any rate, his licensee, has sufficient title to resist a claim in ejectment by the evicted trustees, the legal owners. But that is the present case, and it is therefore *that* question that I must accordingly address.

206. The first stage is to consider whether the beneficiary out of possession could have succeeded in an action of ejectment against the trustees in possession. Before 1875, the answer would have been No (probably accompanied by looks of puzzlement), as trust beneficiaries had no relevant rights against trustees cognisable in the common law courts, and ejectment could not be brought in a court of equity. After 1875, the orthodox view would still be No, as the 1873 legislation did not relevantly alter the substantive rules of law and equity. It simply made it possible for a judge to administer both sets of rules simultaneously, in the same proceedings in the same court: see the Supreme Court of Judicature Act 1873, section 24, repeated in the Supreme Court of Judicature (Consolidation) Act 1925, section 36 and following, and now found in the Senior Courts Act 1981, section 49.

207. But the majority view of the Court of Appeal in *Dutton* has now changed the landscape. A licensee given rights to occupy the land may now succeed in ejectment *against third party trespassers*. As Laws LJ put it,

> "a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys".

The question which immediately asks itself is why, if a *licensee* may do this to vindicate his rights under the licence, a *trust beneficiary* may not do so too, in order to vindicate his or her rights of occupation under the trust. I confess that I cannot see why a trust beneficiary should be in a *worse* position than a mere licensee. Such a beneficiary's rights are, at their lowest, rights *in personam* against the trustee, but usually rather more, in the sense that they bind all third parties in relation to the property concerned, except good faith purchasers of a legal estate for value without notice. Obviously, the beneficiary's rights under a particular trust may be more or less, on terms or subject to conditions (just as a licence may) and possession may or may not be the "necessary" remedy in the particular case. But, if it is, then the beneficiary should surely obtain it.

208. If that is so, the next question is whether that also applies as between licensee and licensor, or beneficiary and trustees. It is hard to see why not. If the would-be occupier's rights are good against *third parties*, who did not agree to them, and who may be prejudiced by their exercise, how much stronger must be the case against the licensor or trustee, who *voluntarily assumed those obligations* as against the licensee or beneficiary. I conclude that a beneficiary who is otherwise entitled under the trust to occupy the land but who has been kept out of such occupation may now, since *Dutton*, succeed in an action against the trustees for the recovery of the land as against the trustees.

209. The second stage of the analysis is to consider how far, if at all, it matters that the *beneficiary* simply took possession, and it is the trustees who claim in *ejectment*. I cannot think that the reversal of positions in the litigation can make any difference. The third, and final, stage is to consider how far the answer would be different if it was the *licensee* of the beneficial owner who took possession, and the trustees who claimed in ejectment against the licensee. The answer should be the same as I have already given. If the claimant could not succeed against the beneficiary/licensor, then the claimant should not be able to succeed against the licensee.

210. The Brakes however put forward a number of arguments to the effect that the "Licence" is ineffective, and I must deal with them. The first is that it was a sham. A sham consists in one (genuine) transaction having taken place between the parties, or perhaps no transaction at all, but another (different) transaction being *said* to have taken place. The sham is not what actually happened (or did not) but what is *said to have happened*. Usually (but not always) there is a document which purports to show the second (non-existent) transaction. The *sham* is the pretence that a transaction *different* from the real one has taken place. Accordingly, all the parties to the pretence "must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating": see *Snook v London and Western Riding Investments Ltd* [1967] 2 QB 786, 802, per Diplock LJ.

211. However, the proposition that Dr Guy and Mr Swift had such a common intention was never put to either of them in cross-examination. Moreover, it is simply not borne out by the evidence. On the contrary, the evidence satisfies me that they took this transaction very seriously, and did indeed intend to create a licence. I reject the sham argument on the facts.

212. The second argument put forward is that the trustee in bankruptcy as the owner of the beneficial interest in land was not in a position to give a licence or otherwise deal with possession of the cottage. For this proposition, the Brakes rely on the statement of Lord Brandon in *Leigh & Sillivan Ltd v Aliakmon* [1986] AC 785, 809, that

> "in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred".

213. I reject this argument. In this quotation, Lord Brandon was dealing with the requirements for a claim in the tort of negligence, and not with actions for the recovery of the possession of land. Moreover, this decision was given before the landmark majority Court of Appeal decision in *Dutton*. I have already explained above why I consider that a claim by the trustees against the beneficiary entitled to occupy the land would fail, and why it would equally fail against the beneficiary's licensee.

214. The third reason put forward is that the licence "did not confer any occupation or possession rights" on Chedington. I reject this reason too. Clause 2.1 of the licence expressly purports to grant permission to Chedington to occupy the cottage in accordance with the terms of the licence. Frankly, I do not see how the licence could have been any clearer in this respect.

215. Next, the Brakes complained that the licence did not confer *exclusive* possessory or occupational rights. That is of course correct. Chedington was permitted to occupy the cottage expressly *in common with* the licensor and anyone else authorised by the licensor. However, since the Brakes were not also authorised by the licensor, that is also irrelevant. The licensee in *Dutton* was authorised to enter the land for a stipulated purpose and did not obtain exclusive possession.

216. The Brakes also alleged that the rights granted by the licence were subordinated to their own rights. It is correct that the licence made clear that Mr Swift was giving no warranties as to title and that he only had "such right, title and interest in" the cottage as may have been transferred to him under the sale by the liquidators. But those words do not mean that the rights granted thereby are subordinated to the rights of the Brakes. It merely means that Mr Swift is selling only what he has, and that, should it turn out that the Brakes have superior rights, Chedington cannot complain to Mr Swift that it has not obtained what it bargained for (a matter of contract law, not property).

217. Lastly, the Brakes said that the licence came to an end when Mr Swift ceased to be the trustee in bankruptcy. No authorities were cited to me on this point, and I think I should leave it to be decided in a case where it matters. It does not matter here, because, if a person by licence does an act on the land of another which would amount to a trespass if not licensed by the owner, that act does not retrospectively become a trespass because the landowner subsequently ceases to be the landowner. Moreover, in the present case, that latter event occurred, not by specific transfer of the land to another person, but

by removal from office, and there may be special considerations attaching to the office of trustee in bankruptcy of which I am not currently aware..

218. However, and in any event, the critical point is that the Brakes found their claim on an act of dispossession by Chedington, the matter must accordingly be judged at the moment of that dispossession. At that stage, there can be no doubt that Mr Swift was still trustee in bankruptcy and the licence he had granted still had whatever effect it might have in law. Anything that was lawful then remains lawful. It is not rendered unlawful by anything that happens later, such as Mr Swift vacating office.

219. An argument was made by the Brakes that the conditions in the conditional contract of sale entered into between Mr Swift and Chedington had not been satisfied, and therefore the contract was ineffective to transfer the beneficial (let alone legal) title to the cottage to Chedington. This raises interesting issues about the so-called constructive trust that arises when a purchaser agrees to buy land and pays the purchase price, but the transaction has not yet been completed: *London and South Western Railway Co v Gomm* (1882) 20 ChD 562, 581; *Neville v Wilson* [1997] Ch 144. But I do not need to decide this, because Chedington relies on the licence granted to it by Mr Swift, and not on its own purchase of the beneficial interest from Mr Swift. That licence is not rendered invalid merely because Chedington may not have acquired the beneficial interest (if indeed that be the case).

220. Accordingly, I conclude that none of the objections raised by the Brakes to the licence as such is good, and that the claim by the Brakes to possession of the land must fail. The question of damages does not therefore arise.

Claims in respect of chattels in the cottage

221. I turn now to the claims made by the Brakes in respect of the chattels in the cottage at the time that possession was taken by Chedington. The claims made are both in trespass and in conversion. As for the claim in trespass, the problem is that the Brakes do not now have possession of the chattels in respect of which they claim. In *Ward v Macauley* (1791) 4 TR 489, the plaintiff had let a house ready furnished to a tenant. A writ of execution was issued against the tenant, and the sheriff executing the writ seized the furniture. The plaintiff sued the defendant in trespass. The problem was that, by letting the house with the furniture, the plaintiff had given up possession of the furniture to the tenant.

222. Lord Kenyon CJ said:

> "The distinction between the actions of trespass and trover [the old name for conversion] is well settled; the former is founded on possession: the latter on property. Here the plaintiff had no possession; his remedy was an action in trover founded on his property in the goods taken."

That is still the law today, as evidenced by its continued citation in *Clerk & Lindsell on Torts*, 23rd ed 2020, at paragraph 16.138. There are a limited number of exceptions to the rule, but none of them applies in this case.

223. Even if the Brakes still had possession of the chattels, it would not be a trespass for Chedington, having taken possession of the cottage, to have refused the Brakes access to the rooms in the cottage where the chattels in question are situated. The Brakes would need to show an act of *taking* to amount to a trespass. But here there is no evidence that Chedington has taken or interfered with any of the Brakes' chattels. Indeed, the evidence is to the contrary: see paragraph [242] below.

224. In *Hartley v Moxham* (1842) 3 QB 701, the defendant claimed that his lodger, the plaintiff, owed him money, and locked up the room in which the lodger's chattels were kept. The lodger brought a claim in trespass, but failed. Lord Denman CJ said (at 702):

> "Cases like the present must often have occurred; yet there is no authority for an action of trespass under the circumstances."

225. Turning then to the question of a claim in conversion (formerly called 'trover and conversion', or simply trover), the Brakes have the burden of establishing an act of conversion by Chedington. In *Clerk & Lindsell on Torts*, 23rd ed 2020, the law is stated thus:

> "16-14 Taking possession of premises in which someone else's goods are deposited is not necessarily a conversion: it is so only if the defendant evinced an intention thereby to exercise dominion over the goods. … "

226. The authority cited for this proposition is *Thorogood v Robinson* (1845) 6 QB 769. In that case the defendant had recovered possession of the land after succeeding in an action in ejectment against the plaintiff. He entered the land under a writ of possession, and turned the plaintiff's servants out. The plaintiff was a limeburner, and some of his lime was left on the land when his servants were excluded. He sued in conversion in respect of the lime.

227. Lord Denman CJ said:

> "The defendant entered the premises with right, and had a right to turn off the plaintiff's servants. The plaintiff certainly had a right to the goods; but he should have sent some one with a proper authority to demand and receive them: if the defendant had then refused to deliver them or to permit the plaintiff or his servants to remove them, there would have been a clear conversion; but it does not necessarily result from the facts proved in this case that the defendant was guilty of a conversion. … ."

228. Of the other judges, Patteson J said:

> "The mere turning the plaintiff's servants off the premises could not amount to a conversion of the goods; for the defendant had a right to turn the servants off."

And Coleridge J said:

> "Neither the plaintiff nor his servants had any right to be upon the land; nor was the defendant bound to let them remain there for, the purpose of removing the plaintiff's goods; what he was bound to do was, on demand, to let the plaintiff remove the goods; or to remove them himself to some convenient place for the plaintiff."

229. The facts of this case are different, in that Chedington had not had its right to take possession of the cottage established by a court of law at the time it did so. However, I have held, and proceed on the basis that, Chedington had a better right to possession of the cottage than the Brakes, and is now lawfully in possession of it, even if the licence from Mr Swift has now expired. I see no reason therefore not to apply *Thorogood v Robinson*. The question is simply whether refusing to allow the Brakes onto the land in the present circumstances amounts to a conversion of such of the chattels there as belong to them (and only them, not – for example – Loxley & Brake Ltd, who are not parties to the claim).

230. In modern times the elements of conversion have been stated by Lord Nicholls (with whom, on this point, all their Lordships agreed) in *Kuwait Airways Corporation v Iraqi Airways (Nos 4 and 5)* [2002] 2 AC 883. That was a case where Iraq had invaded Kuwait, and removed the claimant's aircraft to Iraq, integrating the aircraft into the defendant's fleet, and using them for its own purposes. It was held that those acts were acts of conversion in English law.

231. Lord Nicholls said this:

> "39. … Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible. In general, the basic features of the tort are threefold. First, the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods. The contrast is with lesser acts of interference. If these cause damage they may give rise to claims for trespass or in negligence, but they do not constitute conversion."

232. Lord Nicholls also made clear (at [40]-[42]) that it was not necessary for the wrongdoer actually to take possession from the owner. The question was whether the wrongdoer "exercised dominion over" the goods, and the intention with which acts were done might be material. Again, mere unauthorised retention of goods did not necessarily show an intention to keep the goods adverse to the owner.

233. Thus, in *Fouldes v Willoughby* (1841) 8 M & W 540, where a ferryman turned the plaintiff's horses off the ferry, Alderson B said that if this

> "was done with the intention of converting them to [the defendant's] own use, *ie* with the intention of impugning, even for a moment, the plaintiff's general right of dominion over them … it would be a conversion; otherwise not".

234. So the question for me is whether, when Chedington took possession of the cottage, its conduct was so extensive an encroachment on the rights of the owner of the chattels as to exclude that owner from use and possession of the goods, or, to put it another way, Chedington exercised dominion over the chattels there, intending to keep them adverse to the owner.

235. I have already set out what happened following the taking of possession of the cottage by Chedington. There is no evidence that Chedington made any substantive use of any of the chattels in the cottage. Chedington allowed Tom D'Arcy to enter, accompanied, to retrieve some of his property, and told him he could come back again if he wished. Although Chedington refused to allow the Brakes themselves access into the cottage to retrieve their chattels themselves, their agents from the beginning were prepared to find items requested by the Brakes (Mrs Brake's medication) and hand it over to her. It was the Brakes who refused that offer. Later their solicitors proposed that access be given to the Brakes' solicitors to oversee the retrieval of items identified as belonging to them. When that produced no resolution, further proposals were made, but ultimately nothing was agreed between the parties.

236. In *Clayton v Le Roy* [1911] 2 KB 1031, CA, the plaintiff's watch had been stolen, and turned up at the shop of the defendant, by whom it had been originally sold. The defendant notified both the plaintiff of its being found, and the consignor of its having been stolen. The plaintiff's solicitor without more issued a writ for detinue and conversion and visited the defendant's shop to demand the watch. The defendant refused immediately to return the watch, and the plaintiff's solicitor served the writ. The action failed because the majority of the court held that there was no evidence of a demand and a refusal to return the watch at the time that the writ was issued. But all the members of the court commented, *obiter*, on the position of the defendant in having two competing claimants for the watch, whilst not claiming it for himself.

237. Fletcher Moulton LJ said (at 1051-52, emphasis supplied):

> "The authorities shew clearly, as one would expect, that a man does not act unlawfully in refusing to deliver up property immediately upon demand made. He is entitled to take adequate time to inquire into the rights of the claimant. The proper course for the plaintiff to have taken would have been to state his wishes to the defendant, who would probably have replied that he would communicate them to [the consignor] and ascertain before parting with the watch which of them was entitled to it. The plaintiff contends that at that date there could be no doubt as to the person to whom the watch belonged, but *I think that the question as to title was one which might most properly be a subject for inquiry; the moment had not then arrived for the defendant's final decision*."

238. Farwell LJ said (at 1053):

> "The man sent to demand the watch was a solicitor's clerk, a stranger to the defendant, who produced no written authority to receive it. I cannot conceive any one in the position of the defendant being so foolish as to

> hand over a watch to a man whom he had never seen before and who presented no credentials in writing. The writ in this action was admittedly issued before the demand for the watch was made. In my opinion it was the duty of the defendant under the circumstances to refuse to hand the watch over."

239. Vaughan Williams LJ dissented on the facts, and therefore in the result, but expressed a similar idea about making inquiries before handing over the watch. He said (at 1055, emphasis supplied):

> "A man may not assert any other person's title, but he may nevertheless do an act which is inconsistent with the dominion of the true owner. *Very often such an act may be justified, as, for instance, if the thing is detained for the purpose of making a reasonable inquiry about the title.* As to the title to this watch, there was in my opinion no room for doubt upon the facts then before the parties; the watch was the very one which had been stolen. There was not only no room for inquiry, but the defendant never pretended that he wanted to inquire; it is clear that his intention was to give the plaintiff an opportunity of compensating [the consignor]."

240. *Clayton v Le Roy* and other cases were discussed by Stephen Morris QC, sitting as a deputy High Court judge (as he then was), in *R (Atapattu) v Home Secretary* [2011] EWHC 1388 (Admin). In that case, the claimant sought compensation for the defendant's failure to return his Sri Lankan passport after it had been redemanded. The judge concluded on the authorities as follows:

> "89. … My conclusions are as follows. *First,* for there to be conversion by 'keeping', there has to be conduct which amounts to deliberate withholding or interference: see *Clayton*, supra, per Farwell LJ in particular and *Barclays Mercantile* , supra, per Millett J. *Secondly*, such conduct is commonly, but not invariably, found in a demand followed by a refusal: see *Barclays Mercantile* supra. *Thirdly*, where demand and refusal is relied upon, the refusal must be clear or unequivocal. *Fourthly,* however that does not mean the refusal must be found in express words. A refusal *may* be inferred from other action or inaction. This is the essence of the analysis in *Schwarzschild* §22. Whether such action or inaction amounts to an unequivocal refusal is a question of fact, in all the circumstances. Thus, *fifthly*, delay in responding to a demand, beyond a reasonable time, is a common example of a refusal inferred from circumstances: see *Clerk & Lindsell* §17-26 above and *Mitchell*. Further, in any particular case, mere failure to redeliver or inaction or silence may be sufficiently unequivocal to constitute a refusal. In this way, the conduct cited in footnote 115 to *Clerk & Lindsell* (a defendant who simply does nothing) would be sufficiently unequivocal to constitute a refusal, a result consistent with the analysis in *Schwarzschild*. To seek to 'stymie' proceedings in this way is exactly the sort of case where the inference of refusal would properly be drawn."

241. The judge went on to apply the law to the facts:

> "90. Applying this analysis, I am satisfied that, on the facts, the Defendant did, clearly and unequivocally, refuse to return the passport to Mr. Atapattu. Although the refusal was not made expressly, it can be inferred from the facts, for two main reasons. First, the refusal can be inferred from the Defendant's failure, over several months, to respond at all to Mr. Atapattu's demands, made in May and June 2010. There was in fact no response at all until well after the issue of these proceedings. The delay, of over three months, was an unreasonable delay and far beyond any period reasonably required by the Defendant to make inquiries: see *Clerk & Lindsell* § 17-26. In my judgment, whilst the Defendant might have reasonably taken a few days or perhaps even a couple of weeks to inquire, it was unreasonable of the Defendant not to respond at all. By mid-May a reasonable time for looking into matters had expired, and, from then on, the Defendant had failed to meet the demand for return of the passport. That was certainly a reasonable time; given the High Commission's own statement, in the auto-reply dating back to February 2010, that the passport would be returned within 15 working days (paragraph 35 above). Secondly, this inference is supported by the fact that the Defendant was under a positive duty to act. As a matter of public law, the Defendant was required to return the passport within a reasonable time. This is not a case where inaction was otherwise 'neutral'."

242. My assessment of the present case is as follows. First of all, Chedington did not take away the chattels in the cottage. Instead it took possession of the cottage, which happened to contain the chattels. Secondly, Chedington permitted Tom D'Arcy to enter and retrieve some of his personal property when he asked, and offered to retrieve medication for Mrs Brake (although not for her to enter and retrieve it herself) when she asked. Thirdly, Chedington has not sought to make any deliberate use of the chattels in the cottage. The evidence is that the security men have brought everything that they needed into the cottage from outside. As they told Tom D'Arcy (see at [105] above),

> "we are not here to touch, we are just here to take possession of the property not the contents or anything like that, okay."

Fourthly, in the complex circumstances of the history of this litigation, Chedington can reasonably take the view that the chattels in the cottage could belong to any of a number of people, including the Brakes, Loxley & Brake Ltd, itself, the trustee in bankruptcy and the partnership. They need to be handed over to the right people.

243. Whilst most of the chattels and the cottage may be ordinary household implements or furniture, it is clear from the evidence that there are some more valuable pieces of furniture stored there. Chedington has put forward proposals to enable the Brakes to identify and retrieve the chattels belonging to them from the cottage, but the Brakes have not engaged with those proposals. They have rejected them. There is nothing here to show that Chedington intends or wishes to convert any of these chattels to its own use. Indeed, it has shown itself willing to engage with the Brakes to resolve the questions of ownership, so that any chattels that belong to the Brakes can be returned to them.

244. In my judgment, this conduct falls far short of an encroachment on the rights of the owners of the chattels such as to exclude those owners from their use and possession, or of an exercise of dominion over them, intending to keep them adverse to the owner. The claim in conversion must accordingly fail, and there is no need for any inquiry as to damages.

CONCLUSION

245. For the reasons given above, all the claimants' claims in this action fail and are dismissed.