Neutral Citation Number: [2020] EWHC 1156 (Ch)

Case No: 166 and 167 of 2015

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

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

Date: 11 May 2020

Before :

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

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Between :

(1) NIHAL MOHAMMED KAMAL BRAKE **(2) ANDREW YOUNG BRAKE** **(as trustees of the Brake Family Settlement)** **(3) NIHAL MOHAMMED KAMAL BRAKE** **(4) ANDREW YOUNG BRAKE**	**Applicants**
- and -	
(1) DUNCAN KENRIC SWIFT **(as trustee of the estates of Nihal Brake and Andrew Brake)** **(2) THE CHEDINGTON COURT ESTATE LIMITED**	**Respondents**

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Stephen Davies QC (instructed by **Seddons LLP**) for the **Applicants**
Andrew Sutcliffe QC and William Day (instructed by **Stewarts Law LLP**) for the **Second Respondent**
The First Respondent was not present or represented

Hearing date: 7 May 2020

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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. On 7 May 2020, I heard two applications made by the applicants ("the Brakes"), relating to a trial listed to start on 13 May 2020 (although in fact it will now begin on 14 May 2020). One was an application by notice dated 4 May 2020, asking me to recuse myself from trying the matter. The other was an application, by notice also dated 4 May 2020, asking for a stay, or alternatively an adjournment, of the trial either generally or pending final determination of appeals against earlier decisions of mine in this litigation. After hearing the arguments on both sides, I gave my decision, dismissing both applications there and then, so that preparation for the trial was not affected. But I also said that I would give my reasons in writing as soon as possible. These are those reasons.

Background to the applications

2. The background to this matter is complex, and is dealt with in a number of earlier judgments, of both Mr John Jarvis QC, sitting as a deputy judge, and myself. Some of these are available on BAILII under neutral citation numbers [2019] EWHC 3332 (Ch), [2020] EWHC 537 (Ch), [2020] EWHC 694 (Ch), and [2020] EWHC 1071 (Ch). In the hope of making this judgment more intelligible for those who have not time to look at those decisions, I will simply say this (although it is by no means a substitute for the full procedural history). The Brakes became bankrupt following the breakup of a partnership with a third party. The first respondent (Mr Swift) was their trustee in bankruptcy. The partnership itself went into liquidation. There were disputes about many aspects of the bankruptcies and the liquidation. In 2019 Mr Swift had entered into a transaction with the liquidators in relation to a property called West Axnoller Cottage ("the cottage"). The second respondent ("Chedington") entered into back to back transactions with Mr Swift in order to acquire the cottage and a strip of land adjacent. Chedington is an investment vehicle for a Dr Geoffrey Guy, and he is the moving spirit behind that company.

3. 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" (as Mr Christian Smith, their solicitor, puts it at paragraph 4 of his sixth witness statement; he refers to the allegations of such collusive conduct as "the Unlawful Conduct"). Chedington subsequently took possession of the cottage, the Brakes say unlawfully. As well as eviction proceedings against Chedington, on 12 February 2019 the Brakes commenced insolvency proceedings (the "Liquidation Application" and the "Bankruptcy Application") against both the liquidators and the trustee.

4. The first purpose of these proceedings was to unwind the disputed transactions (based on the allegations of "the Unlawful Conduct"; Mr Smith calls this unwinding "Reversal"). The second purpose was (as against the trustee) to establish that the Brakes' pre-existing interests in the cottage and the strip revested in them 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 the trustee had not sold them three years later (Mr Smith calls this "the Vesting Issue"). In April 2019, by consent, Chedington was joined as second respondent to the proceedings against the

trustee, because it claimed to be a successor in title to the trustee. In June 2019 Mr Jarvis QC made an order by consent removing the trustee from office, and another appointing his successors. In December 2019 Mr Jarvis QC gave directions for the trial of these insolvency proceedings before me in May this year.

The strike-out applications

5. In January this year Chedington applied to strike out the proceedings against the liquidators and most of those against the trustee and itself, on the basis that the Brakes lacked standing to bring them. I heard those applications in March 2020, and acceded to them: I struck out the whole of the Liquidation Application, and most of the Bankruptcy Application, for lack of standing (on application, I gave permission to appeal). The main matter left still to be tried in May, against the trustee and Chedington, was the revesting issue under section 283A. It was agreed by the parties before me on 3 March that what that would entail fell into three sub-issues: (1) whether the Brakes' unvindicated claim in proprietary estoppel to the cottage as against the liquidators was an interest in a dwelling-house within section 283A; (2) whether the strip of land fell within the definition of a dwelling-house within that section; and (3) whether the cottage and strip were the Brakes' sole or principal residence at the date of bankruptcy. By this stage the trustee accepted that, having ceased to hold office, he no longer had any interest in the proceedings, and did not propose to play any active part. His successors as trustees have not applied to be substituted for him.

Judgment of 23 March 2020

6. On 23 March 2020 I handed down a judgment on further applications made by the Brakes, with which I had been asked to (and did) deal on paper. One of these was an application by notice dated 13 March for a stay or adjournment of the trial. This was sought on the basis of the Brakes' case that Chedington had no valid title to the cottage or the strip, and therefore had no standing to oppose the revesting application. Accordingly, the Brakes said that they should not be put to the expense of a trial at all. Moreover, if the Brakes succeeded in their appeal against my order striking out the rest of their claim against the trustee, their summary judgment application would be revived, and would succeed. And, if on the other hand Chedington failed, they said, it would appeal, which would be pending at the same time as the Brakes' appeals, and this would be procedurally undesirable. I rejected all three submissions. On the first point I held that the question of Chedington's standing could not be dealt with in the way that the Brakes wished,

> "by a brief side-wind (and especially not just on the papers) on the way to deciding to stay or adjourn the determination of that issue. It needs a full trial."

Application of 9 April 2020

7. At that stage I had not heard much argument, but was envisaging that at the trial Chedington would demonstrate its interest in defending the claim to revesting by proving its title. However, on 9 April 2020 Chedington issued an application notice seeking a declaration that it was *not* required to prove its title at trial. I considered it briefly (with other matters) at the pre-trial review on 24 April, but decided that more time was needed to deal with it properly (this was also the Brakes' position: see Mr

Smith's fifth witness statement at [65]). Rather than wait until the trial, I considered it was better to hear it fully as soon as possible. I heard the application in the morning of 1 May 2020, having had the benefit of full written skeleton arguments in advance. Because of the importance of the matter, I reserved my judgment. I prepared and circulated a draft of my judgment to the parties the next day (Saturday 2 May), which I handed down in final form on Monday 4 May, after incorporating suggestions for amendment from the parties.

Judgment of 4 May 2020

8. In paragraph 24 of that judgment I said:

> "The second respondent was interested (at least in a general, non-technical sense) in [the revesting issue under section 283A] because it claimed as *successor in title* to the first respondent. If that created *another* issue to be resolved, that is, the validity and effectiveness of the transactions between the first and second respondents, then that issue would have to be pleaded out and tried so that it could be resolved as rule 19.2 requires. If on the other hand joinder of the second respondent to the Bankruptcy Application did not involve a new issue between the applicants and the second respondent, and was only for the purpose of binding the second respondent to the decision on the revesting issue, then the only issue to be resolved would be that section 283A issue. It may be that Mr John Jarvis QC thought that the answer was the former rather than the latter (although it is fair to say that this was before the strike out application was made). I also thought (but later) that it was the former, and that is one reason why I said what I said in paragraphs 37 and 38 of my judgment of 23 March 2020. The applicants take the same view. But the second respondent submits that the answer is the latter, not the former."

9. I then considered the decision of *Hunt v Conwy County Borough Council* [2015] EWHC 3072 (Ch), which had not previously been cited to me. That was a case where the applicant sought to remove the respondent as a party to a dispute about a pier which, before the applicant's bankruptcy, had belonged to him, and which had since been purportedly disclaimed by his trustee in bankruptcy, escheated to the Crown, and regranted ultimately to the respondent local authority. The underlying proceeding was one for a revesting order, not under section 283A, but under section 320, on the basis that the disclaimer had been invalid. Morgan J dismissed the application to remove the local authority. I said of the decision:

> "29. … It is to be noted that this was a case where the applicant for a vesting order (Mr Hunt) indeed challenged the local authority's title, and argued that the local authority had no business being involved in the case. Yet the judge, far from requiring the local authority to prove its title, summarily dismissed the application to remove it. As he said, the local authority was the obvious respondent."

10. I therefore decided as follows:

> "30. In the light of the second respondent's fuller arguments at the hearing I am persuaded that my earlier view (formed without the benefit of, *inter alia*, *Hunt v Conwy CBC*) was wrong, and that the purpose of joining the second respondent was not to raise a new issue which had to be pleaded and tried out, but instead so

> that the second respondent should be bound by the decision in the claim between the applicants and the first respondent. The issue between the applicants and the first respondent was as to where the rights to the cottage and the strip lay *as between them*. If it were then to be decided that those rights lay with the first respondent as trustee in bankruptcy (*ie* if the claim under section 283A failed) then, so long as there was no prospect of all the creditors being paid and a surplus being realised, the applicants would have no further interest in where the title went after that. On the other hand, the creditors would or might be interested, because, if the first respondent dealt with the property so as not to realise as much as could reasonably be done, then they would lose money. But it would make no difference to the applicants.
>
> 31. Whether the second respondent has a good claim to any rights in the cottage and the strip that the first respondent might have is a matter between the first and second respondents (and possibly the bankruptcy creditors), but it does not concern the applicants. Their concern is with the claim to revesting under section 283A. On the other hand, the second respondent *is* directly affected by the litigation between the applicants and the first respondent, because the second respondent claims under the first respondent. If the first respondent has no rights (because they have been allocated to the applicants by operation of bankruptcy rules) then the second respondent obviously gets nothing. It is in this respect exactly like the *Hunt* case, where the local authority claimed (indirectly) under the trustee in bankruptcy who had disclaimed the fee simple estate, so that it escheated to the Crown. As I have said, Morgan J said, in circumstances where the trustee in bankruptcy had been released and had no further interest in dealing with the claim, that the local authority was the obvious respondent.
>
> 32. In my judgment, that is sufficient to resolve this application. The second respondent was joined because it would be directly affected by the result of the litigation between the applicants and the first respondent, and it is necessary or at least desirable that the second respondent be joined in order that it is bound by the result, thus avoiding a multiplicity of litigation. In my judgment the second respondent is not obliged to go on and prove the validity of transactions between the first respondent and itself. That is not an issue in the section 283A claim. It *was* an issue in other parts of the Bankruptcy Application put forward by the applicants, but they were struck out for lack of standing. It *would* be an issue between the first and second respondents, if the first respondent chose to make it so, or perhaps between the bankruptcy creditors and the respondents, but they have not chosen so to argue."

11. I then went on to refuse the application also on a different ground, concerned with abuse of process. Subsequently, Mr Davies QC formulated and submitted to me written grounds of appeal against my decision, and advanced them at the hearing on 7 May 2020. After hearing both him and Mr Sutcliffe QC, I refused his application for permission to appeal on the basis that most of the grounds put forward had no 'real prospect of success', and, although two points of law that he raised (including the significance of *Hunt v Conwy County Borough Council*) could properly be said to have such a prospect, I considered that it would be better if the Court of Appeal itself decided whether it wished to hear the appeal in relation to them.

The two applications of 4 May 2020

12. About an hour and a half after I handed down my judgment, the Brakes lodged at court the recusal application which is the first of the two the subject of this judgment. The stay/adjournment application was lodged later the same day. Each application was supported, as I have said, by a fresh witness statement of their solicitor. It was clear that they needed to be dealt with as soon as possible, and I immediately directed that they be listed for hearing on the morning of Thursday, 7 May 2020. I subsequently agreed to add to that hearing an application by Chedington for the redaction of evidence filed on behalf of the Brakes, applications relating to the costs of the hearing of 1 May 2020, the Brakes' application for permission to appeal from my decision of 4 May 2020 and two minor housekeeping matters concerned with preparation for the trial (an extension of time for service and lodgement of written openings, and whether to push back the start of the trial by one day). The two main applications took up the morning, and the other matters occupied the rest of the day.

APPLICATION FOR RECUSAL

The law on recusal

13. I deal first with the application for recusal. This is put expressly on the grounds of apparent, rather than actual, bias. The application is supported by the sixth witness statement of the Brakes' solicitor Christian Smith, dated 4 May 2020. I also received and read helpful skeleton arguments from Mr Davies QC and Mr Sutcliffe QC. So far as concerns the law relating to recusal on the basis of apparent bias, both sides were content to refer to the summary of the law in one of my own judgments, *Kimyani v Sandhu* [2017] EWHC 151 (Ch), though other cases were also referred to. *Kimyani v Sandhu* was a case in which a litigant in person applied by notice for me to recuse myself from the hearing of that case on the grounds of "bias and unfair proceedings".

14. In that case I said:

> "46. So far as relevant to this case, there are two important and related rules in the administration of justice. One is that no-one should be a judge in his or her own cause: *Dimes v Grand Union Canal* (1852) 3 HLC 759, 793. The other is, as Lord Hewart CJ once famously remarked,
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> > "that justice should not only be done, but also must be manifestly and undoubtedly be seen to be done": *R v Sussex Justices, ex p McCarthy* [1934] 1 KB 256, 258.
>
> The two rules overlap. It is obvious that, if a person judges his or her own cause, justice will not be done, or at any rate will not be seen to be done. Where a judge has a pecuniary or other significant personal interest in the outcome of the case, such as the promotion of a cause, the judge is automatically disqualified: *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119, HL. It does not matter whether the judge knew or not of the interest.
>
> 47. But the second rule goes wider. It extends beyond cases where the judge has a personal interest to cases of bias. As the Court of Appeal once put it,

> "Bias is an attitude of mind that prevents the judge from making an objective determination of the issues that he [or she] has to resolve": *Re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564, [37].

The law distinguishes actual bias from apparent bias. The former is subjective, and deals with the judge's state of mind, while the latter is objective, and deals with the judge's conduct and the surrounding circumstances. Where a judge is *actually* biased in a decision, then justice has not been done. Where a decision is tainted by *apparent* bias, then justice is not seen to be done. Cases holding that there has been *actual* bias employed by a judge are rare. Most cases dealing with bias are argued and decided on the basis of *apparent* bias.

48. As to the law in relation to recusal by judges for bias, the claimants cited *Howell v Lees-Millais* [2007] EWCA Civ 720 (referring to *Porter v Magill* [2002] 2 AC 357, *Lawal v Northern Spirit* [2003] ICR 856, HL, and *AWG Group v Morison* [2006] 1 WLR 1163, CA). The general principle is not in any doubt. In *Porter v Magill* [2002] 2 AC 357, the House of Lords endorsed the approach taken by Lord Phillips MR in *Re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564, as follows:

> "[85] … The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

It should also be noted that the mere fact that a judge has been guilty of shocking, even deplorable behaviour, is not enough: *Harb v HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz* [2016] EWCA Civ 556, [68].

49. In her skeleton argument, the defendant cited only *Porter v Magill*. That is a case about apparent bias. But she is not a lawyer, and although in section 3 of the application notice she seeks my recusal expressly on the grounds of 'real danger of bias' (see also the evidence at section 10 of the notice), it does appear that she is also making allegations against me of actual bias. I will consider this in more detail shortly.

50. So far as concerns the 'informed and fair-minded observer', in *Harb v HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz* [2016] EWCA Civ 556, the Court of Appeal said:

> '[69] … We would however, emphasise two important points. First, the opinion of the notional informed and fair-minded observer is not to be confused with the opinion of the litigant. The "real possibility" test is an objective test. It ensures that there is a measure of detachment in the assessment of whether there is a real possibility of bias… [T]he litigant is not the fair-minded observer. He lacks the objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate. Litigation is a stressful and expensive business. Most litigants are likely to oppose anything that they perceive might imperil their prospects of success, even if, when viewed objectively, their perception is not well-founded.

> […]
>
> [72] Secondly, the informed and fair-minded observer is to be treated as knowing all the relevant circumstances, and it is for the court to make an assessment of these… It was held in *Virdi v Law Society* [2010] EWCA Civ 100 that the hypothetical fair-minded observer is to be treated as if in possession of all the relevant facts and not only those that are publicly available…'

51. So the hypothetical informed and fair-minded observer knows all the relevant facts, whether publicly available or not, and has a perception of the case which is *not* that of the litigant, but is instead more objective and dispassionate. That is the standard to be applied.

52. But the court must apply these rules not only for the protection of the litigant against whom bias or apparent bias may operate, but also for the benefit of the other litigants involved, and indeed the wider public. This is because in our system litigants are not permitted to choose their judges. As Chadwick LJ once said:

> 'But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If judges were to recuse themselves whenever a litigant -- whether it be a represented litigant or a litigant in person -- criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised -- whether that criticism was justified or not': *Dobbs v Tridos Bank NV* [2005] EWCA 468; see also *Re JRL, ex parte CJL* (1986) 161 CLR 342, 352, per Mason J.

So the judge asked to recuse him or herself should only do so where the case is properly made out. Another way of putting this point is that the rule is a rule of law, and confers no discretion on the judge. If the case crosses the line, the judge must not hear the case. If it does not do so, the judge cannot decline to do so."

15. Mr Davies QC also referred me to *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, where the Court of Appeal (Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C) said:

> "25. […] By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any

> question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind […]; or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

16. Immediately following that passage, the Court of Appeal went on to say:

> "26. We do not consider that waiver, in this context, raises special problems […]. If, appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias. It would be unjust to the other party and undermine both the reality and the appearance of justice to allow him to do so."

17. Mr Davies QC also referred to *AWG Group Group Ltd v Morrison* [2006] 1 WLR 1163, where the judge shortly before trial disclosed a 30 year friendship with a prospective witness, and stated that he would have difficulty in trying the case if an attack was to be made upon his veracity. The party calling him proposed to substitute another witness in order to meet the difficulty. The judge then went on to decide not to recuse himself, taking into account (as the judge put it),

> "15. […] the undoubted disruption of the administration of justice generally caused by having to find a new judge to try a case of this length at short notice and also the inevitable further cost imposed on the parties resulting from the ensuing delay."

The Court of Appeal allowed an appeal from his decision.

18. Mummery LJ (with whom Latham and Carnwath LJJ agreed) said:

> "29. […] while I fully understand the judge's concerns (see paragraph 15 of his judgment quoted above) about the prejudicial effect that his withdrawal from the trial would have on the parties and on the administration of justice, those concerns are totally irrelevant to the crucial question of the real possibility of bias and automatic disqualification of the judge. In terms of time, cost and listing it might well be more efficient and convenient to proceed with the trial, but efficiency and convenience are not the determinative legal values: the paramount concern of the legal system is to administer justice, which must be, and must be

> seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having."

School friendship with Dr Guy

19. In the present case, a central factual plank of the application that I recuse myself for apparent bias is that Dr Geoffrey Guy (whose investment vehicle is the second respondent) and I were at school together, and in the same form, in the late 1960s and early 1970s. When I first became (briefly) involved in these proceedings in July 2019, I read some of the documents in the case, noted the name and background of Dr Guy, and caused enquiries to be made to see whether it was the same Geoffrey Guy that I had known more than 45 years ago. This was confirmed. I therefore sent an email via my clerk on 31 July 2019 to the parties disclosing what I had just learned.

20. The relevant passage from the email is as follows:

> "I have just ascertained that Dr Geoffrey Guy, director of Chedington Court Estate Ltd, and therefore effectively a party to these proceedings, attended the same school as me, and was indeed in the same form, during the late 1960s and early 1970s. During this time we were friends, although eventually our paths diverged, as he was interested in the science subjects and I in the arts. I do not think we have seen each other for over 40 years. We live in different parts of the country and have pursued different career paths."

21. I went on to state the test for recusal, and my provisional conclusion, as follows:

> "The test for when a judge should recuse himself or herself is that the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility of bias. In the circumstances that I have set out above, I do not consider that there is any such possibility. But I am setting all this out so that the parties can consider whether they wish to take a different view."

For the sake of completeness, I record here that I have had no contact with Dr Guy, direct or indirect, since leaving school in the 1970s.

22. Following that email, both sides confirmed that they had no objection to my dealing with the case. It is right to say that it was not known at that time who would ultimately be trying these proceedings. But I am the Chancery specialist circuit judge sitting in Bristol, and so long as the proceedings were tried in Bristol there was obviously a possibility that it would be me. No-one at any time suggested I should not do so. At the time, Mr John Jarvis QC had dealt with other aspects of these proceedings as a deputy judge, and he dealt with further aspects thereafter (in September, October, November and December 2019). As it happens, having reached the statutory retirement age, he was not able to deal with the trial that he later listed for May 2020, and it was listed before me.

23. I should say that I understand that Mr Jarvis QC, when dealing with the listing in December 2019, referred to the fact that he would be retiring and that the trial would be listed before me, and as I understand it no objection was taken then or thereafter on the part of the Brakes, until this application was issued on 4 May 2020. Lastly on this point, at the start of the hearing on 2 March 2020, I expressly referred once more to

my school friendship with Dr Guy, and asked whether there was any objection to my dealing with the matter. There was none.

The complaints

24. I turn now to consider the complaints made to justify the application that I recuse myself. In doing so I assume that the fair-minded and informed observer has read the relevant witness statements and skeleton arguments and listened to the oral arguments (or read the transcripts of those arguments).

Failure to acknowledge the claims of Unlawful Conduct

25. In his sixth witness statement Mr Smith sets out the primary complaint which forms the basis of the application for recusal as follows:

> "40. […] The concern addressed in this statement is that a fair-minded and informed observer would conclude that there was a real possibility of bias arising out of the manner in which the judge has avoided acknowledging the existence of the central claims of Unlawful Conduct alleged against Dr Guy and the Trustee.
>
> 41. Those claims of Unlawful Conduct on the part of Dr Guy are the claims that form the basis of the relief claimed under s. 303(1) for both Reversal and, against Chedington, on the Vesting Issue. In five separate rulings or judgments, starting with the 2 March Judgment, the judge has not once referred to Dr Guy's Unlawful Conduct. This is not feasible in a case where the main issues that the judge has had to determine since he became involved earlier this year have concerned whether the Applicants and Chedington respectively have a legitimate interest in litigating the dispute about the Unlawful Conduct."

26. The "five separate judgments or rulings" referred to by Mr Smith appeared to be the following:

> 1. Extempore judgment of 2 March 2020, on Chedington's application to strike out most of the Bankruptcy Application for lack of standing;
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> 2. Extempore judgment of 3 March 2020, on Chedington's application to strike out most of the Liquidation Application for lack of standing, and on the Brakes' application to strike out an application concerning the cottage brought by the Trustee;
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> 3. Written judgment of 23 March 2020, on the Brakes' application for a stay of the Bankruptcy Application;
>
> 4. Written ruling of 6 April 2020, on the Brakes' application for permission to appeal against my order of 23 March 2020.
>
> 5. Written judgment of 4 May 2020, on Chedington's application for a negative declaration.

27. The first point to make about this complaint is that in none of the five applications which gave rise to the judgments or rulings concerned was it necessary for me to consider or examine, much less decide, whether there was anything in the allegations of Unlawful Conduct made by the Brakes against the Trustee and Chedington. Those

allegations had been made, were in the pleadings, and underlay the insolvency proceedings concerned. The applications giving rise to numbers 1, 2 (part) and 5 above concerned the question of standing, and not the nature or quality of the allegations made. The application giving rise to another part of number 2 above concerned want of prosecution in relation to an application brought by the Trustee. The application giving rise to number 3 above was for a stay on the grounds that Chedington had no legitimate interest in the remaining part of the Bankruptcy Application, that is, the Vesting Issue (section 283A). I dealt with this on procedural grounds, without needing to deal with any of the substance. The application giving rise to number 4 above was for permission to appeal, and I dealt with this by considering whether there was any real prospect of success on the grounds of appeal advanced. Since in my judgment of 23 March 2020, in relation to which permission to appeal was sought, I had not dealt with any of the substantive points arising in the allegations of Unlawful Conduct, it follows that I did not need to deal with those allegations in deciding whether to give permission to appeal.

28. The second point to make about this complaint is that, in some of the judgments concerned, I *did*, in fact, refer to the allegations referred to as the Unlawful Conduct. These references are: in judgment 1 at [16], in judgment 2 at [2] of the ruling striking out the Cottage Application, and at [2] of the costs ruling on that application, in ruling 4 at [2] (in the grounds), and in judgment 5 at [2] (although obliquely). This shows that I have been acutely aware of the serious nature of the allegations made against Chedington and its moving spirit Dr Guy from the outset. But as I have said, for the purposes of the applications the subject of these judgments and rulings, it was not necessary to for me to deal with them in any detail. Indeed, since these did not arise, it would have been inappropriate to do so. In my judgment, a failure on my part to deal with these allegations in the judgments and rulings could not lead a fair-minded and informed observer to conclude that there was a real danger that I was biased.

Failure to address the Brakes' "principal submissions"

29. A further complaint made by Mr Smith is that in my judgment of 4 May 2020 I did not address what he calls (at [46.2] of his sixth witness statement) the Brakes' "principal submissions". He summarises them at paragraph 36 of that witness statement as follows:

> "In the 4 May judgment, the judge does not address any of the following submissions of the Applicants:
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> > 36.1 The No Appeal Point – the judge has not identified the jurisdiction he was exercising in the absence of an appeal against the earlier decisions that the question of Chedington status should be tried on the pleadings.
> >
> > 36.2 The No Dispute Point – the judge has not addressed the fact that there is no longer any dispute between the persons whom he found in paragraph 24 to be the true parties to the Vesting Issue (in respect of which Chedington was to play a passive role under a Type 1 joinder).
> >
> > 36.3 The Inconsistency Point – the judge has not considered Chedington's conduct in avoiding determination of the question whether it has any interest in the Cottage Eviction Proceedings by successfully persuading that court

that the nature and extent of its interest was to be determined in the Bankruptcy Application.

36.4 The Timing Point – the judge has not addressed the submission that Chedington should have taken the point when it was fully debated and decided at the CMC on 12 December 2019.

36.5 The Purpose Point – the judge has not considered the lengths to which Chedington has gone to avoid the court looking at the merits of its claim to have acquired an interest in the Cottage.

36.6 The No Strike out Point – although it is not clear, the judge appears to have proceeded in paragraphs 34 and 35 of the judgment of 4 May on the basis that the Applicants' pleaded case that Chedington has no legitimate interest is struck out without referring to the No Strike out Point.

36.7 The If Not Now, When? Point – the judge has overlooked the Applicants' submission that, after it made the Declaration Application, Chedington itself has acknowledged that the question of its status must be tried, but has not identified when.

36.8 The Unviable Declaration Point – the judge has not explained the basis upon which any court could make the declaration sought, namely, that a court would try a case at the instigation of a person who has no legitimate interest in the outcome.

36.9 The Counter-Factual Point – the judge has failed to address the fundamental change of circumstances since 10 May 2019 or the submission that Chedington would not have been joined under CPR 19.2 if there was no dispute inside the bankruptcy and if Chedington had submitted that it had no legitimate interest in the outcome."

30. Mr Smith's fifth witness statement was made on 20 April 2020

> "in relation to issues at the forthcoming pre-trial review listed for Friday, 24 April 2020".

In it, Mr Smith expressly dealt with Chedington's application of 9 April 2020 at paragraphs 62 to 68, stating at [65] that the Brakes' position was that this application could not be determined at the pre-trial review. I agreed with them, and listed the application for hearing on 1 May 2020. But, given that these are the Brakes' "principal submissions", it is surprising that there is nothing in Mr Smith's fifth witness statement even remotely equivalent to the list which he sets out in his sixth witness statement and says I did not deal with. Nor, perhaps more surprisingly, is there any such list in either of the skeleton arguments for the hearings on 24 April and 1 May 2020, respectively, prepared by Mr Davies QC and his junior Ms Brown, both of which were before me at the hearing on 1 May. The list is set out in the skeleton argument of Mr Davies QC, prepared for the recusal hearing on 7 May, at [14]. And, at the end of the list, Mr Davies QC says:

> "Good or bad, or a mixture of each, these submissions had to be addressed."

31. Given the absence of any such list in the Brakes' preparatory materials for the hearing of 1 May 2020, it is unfortunate that there are no references given, either in the sixth witness statement of Mr Smith of 4 May 2020, or in the skeleton argument of Mr Davies QC of 5 May 2020, as to where, in the transcript of the hearing on 1 May, these individual submissions are to be found. I do not recall this list of issues being raised at the hearing, and, having looked again at that transcript, I have not been able to find any such list, though of course I accept that my memory may be at fault, or I may have missed something in going through it. What I dealt with in my judgment were what I considered to be the principal submissions made to me at the hearing, taking into account the preparatory materials, and based on my notes of the hearing: see at [15]-[18] of my judgment of 4 May 2020. Nowhere at the hearing was I told that there were nine "principal submissions", or anything like that. I did deal with the Brakes' argument based on legitimate interest, which appears to underlie several of the "principal submissions", at [22] of my judgment.

32. In my judgment, it is not necessary for me to deal now in detail with these "principal submissions". The fair-minded and informed observer, having read the preparatory materials and listened to the arguments, or read the transcript, would not have been aware that the Brakes were advancing these nine "principal submissions" at the hearing of 1 May. But even if that observer *had* so thought, or at any rate had thought that the Brakes were advancing *some* of those submissions, that observer would know that a judge's reasons for decision must be read on the assumption that the judge knew how to perform the judicial functions and the matters which had to be taken into account: *Piglowska v Piglowska* [1999] 1 WLR 1360, 1372.

33. Secondly, he or she would know that, although judges must take into consideration all the evidence presented and weigh all the arguments made, they are not obliged to deal in their judgments with every single point that is argued: *Weymont v Place* [2015] EWCA Civ 289, [6]; *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] 4 WLR 112, [46]. Moreover, I dealt with the preparation of the judgment at some speed. As it happened, I was unable to do more than begin the judgment that afternoon because of other urgent matters. But I continued it that evening, and finished it just before lunch on the next day (Saturday), sending it out in draft to the parties in the early afternoon. Bearing in mind the limited time that I had to prepare the judgment, such an observer would not think that any failure of mine to deal with the "principal submissions" as such could lead him or her to conclude that there was a real danger that I was biased.

Reliance on arguments not advanced at the hearing

34. A further argument made in support of the application for recusal, made both in Mr Smith's evidence and in Mr Davies QC's skeleton argument, is that in my judgment I relied "conclusively" upon arguments that were not advanced or argued at the hearing. As Mr Davies QC puts it at [27.3], it is said that I relied on

> "the creation of new concepts of Type I and Type II joinders as a means of avoiding having to try the question whether Dr Guy was guilty of Unlawful Conduct".

35. It is however not correct to say that these are new concepts. CPR rule 19.2 provides:

> "(2) The court may order a person to be added as a new party if –

> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

The so-called "Type I and Type II joinders" were intended by me to correspond to the situations set out in subparagraphs (a) and (b) of rule 19.2(2). And rule 19.2(2) was addressed by the parties at the hearing, so it was not unargued. Even if I were wrong in law in the way in which I described these two types of joinder, this would not be something which would lead the informed and fair-minded observer to conclude that there was a real possibility of bias. The remedy would be an application for permission to appeal.

36. Nor is it correct to argue that I relied on these concepts in order to avoid "having to try the question whether Dr Guy was guilty of Unlawful Conduct". This is an underlying argument in Mr Davies QC's skeleton argument, though so far as I can see it does not find any place in Mr Smith's witness statement. It is based on the fact that, as discussed earlier in this judgment, and as disclosed in July 2019, I went to school with Dr Guy in the late 1960s, although I have had no contact with him since the early 1970s. Mr Davies QC put it this way in his skeleton argument:

> "12. **Crucially**, the Declaration Application was expressly made on the footing that, if it was not granted, Chedington would have to call Dr Guy as a witness. The choice provided to the Judge was: do not try the pleaded case or we will have to call Dr Guy. At that stage, there was no witness statement from Dr Guy and Chedington made it clear that it was not intended to call Dr Guy. Chedington was even going to call the Trustee – *ie* Dr Guy's collaborator in the alleged Unlawful Conduct. But there was no intention to call Dr Guy *unless the Declaration Application was dismissed*. And so the Judge was faced, in reality, with the decision whether or not to preside over a trial in which his former school friend (who is a party in all but name) would be cross-examined on the basis that he had participated in and/or had notice of the Unlawful Conduct."

37. I record, simply in order to avoid its being said I have not done so, that the suggestion that I would somehow prefer to make a wrong decision in order to avoid presiding over the cross-examination of someone I last saw in the early 1970s at school, when we were both schoolboys, and whom I have not seen since, is not only untrue, but frankly ridiculous. I have no idea what sort of man Dr Guy has turned out to be. I do not even know what he looks like now. Since the Brakes do not suggest that I was actuated by *actual* bias, I therefore understand the argument to be that in these circumstances the fair-minded and informed observer would nevertheless conclude that, objectively viewed, in the circumstances there was a real danger of bias. As I said in *Kimyani*,

> "51. […] the hypothetical informed and fair-minded observer knows all the relevant facts, whether publicly available or not, and has a perception of the case which is *not* that of the litigant, but is instead more objective and dispassionate."

In my judgment, that hypothetical informed and fair-minded observer could not possibly think that there was any real possibility of bias in that situation.

38. In any event, even if I were wrong about that, to the extent that such an observer would conclude that there was a real possibility of bias because of my school friendship with Dr Guy more than 45 years before, this was disclosed and no objection was taken, both initially and then even once it was clear that I was to try the Bankruptcy Application. Accordingly, the Brakes have waived this objection.

The failure summarily to dismiss the application of 9 April 2020

39. In the Brakes' skeleton argument, at [25], it is said of the Chedington application of 9 April that "it was completely unforeseeable", and that the informed and fair-minded "Observer would be … entitled to expect its summary dismissal". Mr Davies QC supports this argument with the following observations:

> "26. This was especially so in circumstances where:
>
> 26.1 There had been no appeal against the earlier decisions that the issue should be tried.
>
> 26.2 The issue was fully pleaded and no application to strike out had been attempted.
>
> 26.3 There had been no material change of circumstances since 23 March 2020 when the question had been determined decisively.
>
> 26.4 The need for a trial of Chedington's status was particularly acute because there was otherwise no dispute between the proper parties (i.e. within the bankruptcy).
>
> 26.5 Even without the procedural history and assuming all other considerations in Chedington's favour, it could cite no authority, textbook or other learning in support of the proposition that a party could insist on a full trial of an issue without having a legitimate interest in its determination."

40. It is also supported by attacks made on other aspects of the legal reasoning of the judgment of 4 May 2020. For example, in his skeleton argument at [27.3] Mr Davies QC attacks "the creation of new concepts of Type I and Type II joinders" (which I have explained above). He also attacks my reliance on *Hunt v Conwy CBC* (at [19]) as legally wrong, on the basis that that decision is "incapable of supporting" my view. And he stigmatises my judgment by saying (at [27]) that the informed and fair-minded "Observer would also be shocked. It represents a sea change from all that has gone before." Here in the context Mr Davies QC is saying that I have departed from long-standing insolvency law.

41. It seems to me, with great respect to Mr Davies QC, that this line of argument is elevating the "informed and fair-minded observer" from an intelligent layman to an appellate judge. I am not aware of any authority holding that such an observer is entitled, much less obliged, to take positions on the correctness of the legal judgments made by the judge. My understanding of the position on a recusal application is that it was the judge's behaviour and his or her relationship with the parties and witnesses which was in issue, rather than whether the judge had got the law right. In my judgment, these arguments from Mr Davies QC are irrelevant to the issue of recusal.

42. However, I will make this comment. Mr Davies QC refers (at [26.3]) to the question whether Chedington would have to prove its title or not as having been "determined decisively" by me on 23 March. This is not so. In that judgment I was dealing with *the Brakes'* application by notice of 13 March for a stay or adjournment of the trial. It is correct that one of the arguments made by the Brakes in support of this application was that Chedington had no valid title to the cottage or the strip, and therefore had no standing to oppose the revesting application. In my *judgment* I said that I was not prepared to deal with that issue on the papers (as the Brakes wished) on the way to deciding whether or not to stay the trial, because it had to be dealt with more fully than that. At that time, of course, I simply assumed that it was going to be dealt with at the trial. My *order* therefore dismissed the Brakes' application for a stay.

43. I therefore did not determine (decisively or otherwise) how the question of Chedington's standing should be dealt with. I simply said the question could not be dealt with in this way. As is well known, appeals are against orders, not reasons for orders: *Marino v Secretary of State for Work and Pensions* [2007] 1 WLR 3033, [6], per Maurice Kay LJ. Chedington having opposed the Brakes' application could not therefore have appealed my order dismissing it. Whether it could have appealed the original listing direction by Mr Jarvis QC, and if so why it did not, I do not know. Perhaps it thought that it would not have to prove its title at the trial and it was only my judgment of 23 March that alerted it to the point. Since it is *my* conduct in question on this application, however, that does not matter.

Declining to grant the declaration because too close to trial but proceeding as if it had been made

44. A further complaint is advanced by Mr Smith at [46.4] in the following terms:

> "Declining to make the declaration sought on grounds that the parties are too close to trial when, in fact, the reason is more likely to be an acknowledgement that no court could reasonably make a declaration in the terms sought".

In his skeleton argument, Mr Davies QC puts the point slightly differently:

> "27.2 The judge decided not to make the declaration (it is inferred because no court would do so in the terms sought) but to proceed to trial as if it had been made."

45. There is nothing in this point. To deal first with the point made by Mr Smith, I did not decline to grant the declaration because the parties were too close to trial. I said:

> "37 In the present case I do not think that a declaration is necessary, because the purposes for which it is sought relate to a hearing before the court beginning shortly. It is not needed, for instance, in order to persuade a third party to behave in a particular way, as in the example given by Lord Woolf above. The court will obviously take notice of what it has previously held on this application."

The reason for declining to grant the declaration was simply, as I expressly stated, that it was not needed to persuade any third party, but in order to regulate the future conduct of this claim by the court itself, and the court does not need a declaration to

do that. The fact that the trial was due to begin shortly was true, but irrelevant. No informed and fair-minded observer could have thought differently.

Indicating a preliminary view in favour of Chedington

46. In his skeleton argument, Mr Davies QC also said this:

> "13 At the PTR, the judge indicated a preliminary view in favour of having a trial without establishing Chedington's right to oppose it – effectively of reversing his decision of a few weeks earlier, ignoring the pleadings and avoiding the need to call Dr Guy."

47. I am afraid that I do not recall having so indicated at the PTR, and certainly never intended to do so. Mr Davies QC does not cite any part of the transcript in support of his submission. What I *did* say at the PTR (at page 35) was:

> "… having an open mind, which I certainly do because I haven't heard any arguments yet as to what the tests ought to be except from Mr Sutcliffe, and therefore I'm interested to know what your arguments are, I can't measure the arguments until I have both sides…"

And at [30] of my judgment I said:

> "In the light of the second respondent's fuller arguments at the hearing I am persuaded that my earlier view (formed without the benefit of, *inter alia*, *Hunt v Conwy CBC*) was wrong, and that the purpose of joining the second respondent was not to raise a new issue which had to be pleaded and tried out, but instead so that the second respondent should be bound by the decision in the claim between the applicants and the first respondent."

48. That statement in my judgment is predicated on my having previously assumed that Chedington was going to prove its title at the trial. It was only in the light of the argument on 1 May 2020 that I was persuaded that that assumption was wrong. No informed and fair-minded observer, knowing of all these circumstances, would conclude that at the PTR I was indicating "a preliminary view in favour of having a trial without establishing Chedington's right to oppose it," and that therefore there was a real possibility of bias.

Public criticism of the Brakes

49. At paragraph 48 of his witness statement Mr Smith refers to what he calls my

> "public criticisms of the applicants in relation to relatively minor procedural matters (as evidenced from the 23 March judgment)…"

This is picked up in paragraph 29 of skeleton argument of Mr Davies QC:

> "29 … the Observer would see that the judge has been hyper-critical of the Applicants he has criticised publicly and extensively on procedural matters."

50. I will deal with Mr Davies QC's examples of criticism in a moment. But I assume first of all that Mr Smith's reference to "relatively minor procedural matters" does not include the criticism I made in my judgment of 23 March, where I said:

> "41. It seems to me that, in essence, what the Brakes are seeking to do by these two applications is to subvert the substantive decisions which I made on 2 and 3 March 2020. What I then decided was that the only matter of substance to be determined in May was the section 283A issue. The Brakes would have me sweep that aside, and replace it with an entirely new issue, not disclosed on the pleadings as they stand, dealing instead with the validity of the Licence. In my judgment, this is quite wrong, and I have no hesitation, for the reasons given above, in refusing the Notice Application."

51. That was a *significant* procedural criticism, rather than a minor one, and I consider it entirely justified. It is in the nature of judicial management of litigation that criticism of the parties' behaviour on procedural issues is sometimes made. In the present case, I have criticised *both* sides and not (as the Brakes appear to suggest) only one. For example, in my ruling of 18 March 2020 on the form of order following the hearings on 2 and 3 March 2020, I said:

> "1. On 2 and 3 March 2020 I heard and decided a number of matters arising in this lengthy and hard-fought insolvency litigation. Since then the parties have been unable to agree a form of order to give effect to my various rulings given on those days. I have seen emails from counsel for both the Brakes and Chedington, giving their views on what the form of order should be. It is therefore necessary for me to rule further on the matter.
>
> 2. I may say that I do not do so with any enthusiasm. This matter is already consuming far more of scarce judicial resources than is appropriate or proportionate. For some reason, both of the main protagonists in this matter seem inclined to devote unlimited resources to this litigation. Every point that can possibly be taken on each side is being taken, and the result is close to stalemate."

52. In eleven sub-paragraphs of paragraph 29, Mr Davies QC gives examples of criticisms that he says I have made of the Brakes. In paragraph 29.1 of his skeleton argument, Mr Davies QC refers to paragraph 21 of my reasons for refusing permission to appeal dated 6 April 2020. In that paragraph I referred to court time taken up in historic proceedings between the Brakes and their former partner (which ultimately led to the Brakes' bankruptcies). Mr Davies QC says:

> "It is inferred that [the judge] considers that the Applicants were responsible for overuse of court time in these historic proceedings".

53. That is not what I intended, and is not a fair inference. In the previous paragraph of my reasons I had said:

> "Finally, I have more than once in this long-running litigation had cause to mention the heavy claim that it is making on scarce judicial resources…"

I then followed that comment with a reference to the number of occasions the present litigation had been before the court, and then made the reference to historic

proceedings, to make good my statement that a heavy claim was being made on judicial resources.

54. All this, however, was merely a prelude to the criticism which I then *did* go on to make of Mr Davies QC that

> " … It is simply not proportionate to make an application over 19 pages of typescript for permission to appeal against a 12 page judgment dismissing what are essentially case management decisions about whether to list a preliminary issue and whether to stay or adjourn a forthcoming hearing. Other litigants have cases too. The lack of proportionality is starkly shown by the fact that the respondent was able to make all the points it wished in reply in two short paragraphs."

55. This criticism appears to be the one referred to at paragraph 29.8 of the skeleton. In my view, it was perfectly justified. I note that Mr Davies QC in paragraph 29.8 does not in fact refer to the *actual* criticism I made (of overlong written submissions), but instead refers to the fact that I said that the judgment contained "typical case management conditions which will not be lightly overturned by an appellate court". But this is a statement which represents my understanding of the current law, and cannot justify an informed and fair-minded observer in concluding that there was a real possibility of bias.

Irregularity in title of proceedings

56. In paragraph 29.2 of his skeleton, Mr Davies QC refers to a point I made in my ruling of 2 March 2020 about the Brakes' names appearing twice (representing different capacities) in the title to the proceedings. What I said was:

> "7. … I mention in passing that this is an irregularity, because parties should not appear on the record in two separate capacities. There are a number of authorities which deal with that … But I do not pause to deal further with it now. In the present case it does not make any difference in substance, at least for present purposes."

This was very much a passing comment, simply a reminder to litigants for the future. It made no difference to how I dealt with the proceedings.

Payment of issue fees

57. In paragraph 29.3 of his skeleton argument, Mr Davies QC says that I criticised the applicants not having paid the appropriate issue fee in respect of the Eviction Proceedings "without relevance to relevant CPR which appeared to dictate that they pay a much lesser fee in respect of possession proceedings". At the time I was not aware that there was any doubt about what the CPR required in terms of fees, and the point was only explained to me in a subsequent hearing by junior counsel for the Brakes, Ms Brown, when she agreed that the higher fees would indeed be paid. The problem appears to have been that the Brakes' legal team were looking at the matter as if they were proceedings under CPR Part 55, whereas in fact they were proceedings under Part 7.

Lack of formal application

58. In paragraph 29.4 of his skeleton, Mr Davies QC says that

> "In paragraphs 4 to 7 of the 23 March judgment … the judge expressed concern that there was no formal application before him to lift the stay of the Cottage Eviction Proceedings".

59. So far as I can see, it is only in paragraph 4 that this matter is mentioned at all. What I said was:

> "On 10 March 2020 Mr Stephen Davies QC for the Brakes submitted a skeleton argument in order to make and support an application (as foreseen at the hearing on 2 and 3 March 2020) to lift the stay imposed by Mr John Jarvis QC on 12 December 2019 on the Eviction Proceedings, pending trial of the Bankruptcy Application and the Liquidation Application, then listed for seven days from 11 May 2020. So far as I am aware, no formal application notice has ever been issued, or any fee paid. As agreed at the hearing of 3 March, but especially in the circumstances of the present health emergency, where the courts are being urged to deal with cases so far as possible without a physical court hearing, I have dealt with the matter on paper."

I had thought that I was simply setting out the procedural circumstances in which the matter came before me, rather than making a criticism of the Brakes or their legal team. I expressed no concern at, and certainly took no point on, the absence of a formal application notice, but went on to deal with the matter.

The application for a preliminary issue

60. In paragraph 29.5 of his skeleton, Mr Davies QC refers to paragraphs 14 to 29 of the 23 March judgment, and says that they

> "contain various detailed criticisms of the Brakes for trying to foreshorten the proceedings by having a trial of Chedington's interest as a preliminary issue".

I will not set out those paragraphs here in full, but I will simply say that they contain the legal reasoning with which I dealt with the application for a preliminary issue, and were not intended to amount to criticism of the Brakes, even if that is how they have been received by them.

Possible abuse of process

61. In paragraph 29.6 of his skeleton, Mr Davies QC refers to paragraphs 34 and 35 of the 23 March judgment, where he says that I

> "criticised the Brakes for changing tack on an issue despite the lack of any prejudice caused to Chedington – referring to a possible abuse of process by the Applicants".

Junior counsel for Chedington, Mr Day, had submitted that the application of 13 March 2020 for a stay was an abuse of process. I did not accept that submission, and in any event it caused no loss to Chedington. What I did say, however, was:

> "I accept that this behaviour on behalf of the Brakes is unhelpful, and wasteful of judicial and other resources. It is indeed unfortunately symptomatic of the unnecessarily aggressive approach taken hitherto by both sides in this litigation, and is much to be deprecated."

In my judgment, this comment was entirely justified on the facts. It is to be noted that, though it refers in this instance to conduct of the Brakes, it says it is symptomatic of the behaviour of *both sides*.

62. I have already dealt above with the points made by Mr Davies QC in paragraphs 29.7 and 29.8 of his skeleton argument.

Warning against further skirmishing

63. In paragraph 29.9 of his skeleton, Mr Davies QC correctly says that in my ruling of 6 April 2020 refusing permission to appeal I said:

> "It seems to me that the interests of justice here demand that the issues between the parties should be dealt with at trial as soon as possible, with no more skirmishing between them."

In so far as that is a criticism, it is a criticism of both sides.

No real prospect of success on ground of appeal

64. In paragraph 29.10 of his skeleton, Mr Davies QC complains of my conclusion that there was no real prospect of success on ground 3 of the grounds of appeal. That is not a criticism of the Brakes (or indeed of their legal team). It is simply an adjudication on the legal merits of the point made.

65. I have already dealt above with the points made by Mr Davies QC in paragraph 29.11 of his skeleton.

Overall on criticisms

66. In my judgment, overall, the informed and fair-minded observer knowing that judges have to deal with case management and procedural matters, and adjudicate on the rights of the parties in relation to them, would not regard criticism of a party on procedural matters, let alone criticism directed at both sides, as leading to the conclusion that there was a real possibility of bias on the part of the judge.

Lack of urgency

67. In paragraph 49 of his witness statement, Mr Smith refers to the fair-minded and informed observer as considering that there was

> "no urgency to have a trial of the Vesting Issue without also determining whether Chedington has any legitimate interest to oppose it",

and that

> "the circumstances and terms on which the judge wishes to oblige the Applicants to have a trial against Chedington next week call into questions the reasons for insisting that it should proceed".

68. In my judgment, there is nothing in either point. First, it is not a question of urgency. The trial was fixed last December by Mr Jarvis QC. Since then I have struck out some of the matters which were to have been tried at the trial. But the section 283A issue, which always was intended to be tried at that time, remains and can still be tried at that time. It does not show bias simply to try a case when it was intended to be tried. Secondly, I am not obliging the Brakes to have a trial at all. It was the Brakes that issued the claim, including the section 283A issue, they consented to the joinder of Chedington, and it was after their input into the directions hearing before Mr Jarvis QC that the trial was fixed for matters including that issue. As late as the hearing on 3 March, following my decision on strike out, it was clear that the Brakes realised that there would be a trial of the section 283A issue in May. However, if they do not wish to have a trial of it now, they can of course discontinue. The informed and fair-minded observer would not conclude from this that there was any real possibility of bias.

Chedington can do no wrong

69. Finally on the question of recusal, in paragraph 8 of his skeleton argument Mr Davies QC says that, immediately before issuing the application of 9 April 2020, it was a "reasonable assumption … that Chedington considered that it could do no wrong with the judge". In my judgment, the informed and fair-minded observer would not have assumed any such thing. By that stage, although I had struck out the greater part of the bankruptcy application and the whole of the liquidation application, I had given the Brakes permission to appeal against those decisions. I had also dismissed Chedington's application for disclosure, and acceded to the Brakes' application to strike out the application of the trustee in relation to the cottage (against the opposition of Chedington), and made associated costs orders against Chedington.

70. At the hearing Mr Davies went on to say that at the PTR

> "the court displayed a willingness to give Chedington what it wanted" (transcript page 18).

It is fair to say that after hearing both sides at the PTR I gave Chedington at least some of what it asked for. But I also gave relief from sanctions to the Brakes in relation to their failure to pay the trial fee, and I agreed with them that Chedington's application of 9 April 2020 could not be dealt with at the PTR. So there is nothing in this point. As I have already said earlier in this judgment, I have criticised Chedington's procedural behaviour as I have criticised that of the Brakes.

Reservation in the December 2019 order

71. A point which Mr Davies QC made something of at the hearing was that at the directions hearing in December 2019 Mr Jarvis QC gave permission to Chedington to amend its defence to the Bankruptcy Application subject to *reservations*

> "that the applicants could contend at trial that Chedington had no standing to defend and its amended points of defence disclose no reasonably arguable defence in that respect, and that was reserved for trial" (transcript, page 6).

In fact the order of 12 December 2019 stated that permission to amend was given

> "without prejudice to the objection of the Brakes and the Liquidation Creditors to the standing of Chedington to defend the Insolvency Applications and/or the Brakes' position",

and the words "at trial" do not appear.

72. Of course, this was said before the strike-out applications were made in January. Plainly, the judge was anxious not to be taken to have decided the question *whether* Chedington had standing to oppose the Bankruptcy Application and the Liquidation Application. But equally the judge was saying nothing that made permission to amend *conditional* on the issue of standing being dealt with at trial. It was simply something that he was not deciding at that stage. As it happens, the matter was raised and decided on the application of 9 April 2020 before me, that is, by my judgment of 4 May 2020.

Late additions to the trial bundle

73. Mr Davies QC also complained, in this part of his argument (rather than in the application for a stay or adjournment), that on 6 May Chedington had added some 2670 further pages for the proposed File E for the trial bundle. He posed the rhetorical question whether these further pages were needed for the resolution of the section 283A dispute, and answered his own question "Of course they're not" (transcript page 23).

74. Mr Sutcliffe QC responded on this point that File E consisted of four volumes, covering different time periods. He said the cross-examination of the Brakes' witnesses would be likely to focus on the second volume, covering the period October 2014 to September 2015. He also said that "the vast majority of the documents in the third and fourth volumes have been included at the Brakes' request on the basis that Chedington's standing was an issue to be tried" (transcript page 51). Moreover "the majority of the documents in the fourth volume are vast numbers of transcripts before other judges in the litigation between the parties" (transcript page 52). He said that had the Brakes not insisted on the inclusion of documents which they said were relevant to Chedington's standing, File E would have been about half its current size.

75. I am in no position to resolve this dispute conclusively, but I note that in his reply Mr Davies QC did not seek to controvert anything which Mr Sutcliffe QC had said about the contents of File E. Having been a litigation solicitor in practice myself over many years, and having been involved in large-scale litigation as large as – or even larger than – the present, I have to say that I am not very much impressed by Mr Davies' complaint on this point. The business of putting together the trial bundle in a large case is nearly always difficult, even when the parties are co-operating closely. I certainly do not consider that this is something of any substance for the recusal application.

Conclusion

76. For all of these reasons, therefore, at the hearing on 7 May 2020 I dismissed the application by the Brakes that I recuse myself from the trial of the section 283A issue.

APPLICATION FOR STAY OR ADJOURNMENT

Earlier applications

77. I turn now to the application for a stay or an adjournment. The relief sought in the application notice of 4 May 2020 is identical to that in the notice previously issued by the Brakes on 13 March 2020 and dismissed by me on 23 March 2020. It seeks:

> "(i) An order under CPR 3.1(2)(f) that the Bankruptcy Application be stayed generally or pending final determination of the appeal of the decisions of HHJ Paul Matthews dated 3 March 2020 (the Appeal) and the trial of the Bankruptcy Application listed in the w/c 11 May 2020 (the Trial) be vacated; or in the alternative: –
>
> (ii) An order under CPR 3.1(2)(b) that the Trial be adjourned generally or pending final determination of the Appeal."

78. In addition to the application for a stay or adjournment dismissed by me on 23 March, a further application for a stay (pending the making of an application to the Court of Appeal of an application for permission to appeal my order of 23 March) was dismissed by me on 6 April 2020. On that occasion, after referring to the CPR and relevant authorities, I said:

> "In the light of the rules, and the default position that they create, the burden is on the Brakes to show that a stay should be granted. However, there is no evidence (or even argument) to show that any harm, let alone any irreparable harm (see *DEFRA v Downs*, above, at [9]), will be done to them in the meantime if execution of the order is not stayed and yet the appeal is successful. And, on the material before me, I see no other basis for ordering a stay of the order. I therefore refuse a stay."

Change of circumstances

79. So this application is the third such application in less than two months. It is therefore incumbent on the Brakes to show why the court should revisit the question now. The application is supported by the seventh witness statement of the Brakes' solicitor Christian Smith, also dated 4 May 2020. In it, he says

> "4. The 4 May judgment represents a substantial change of circumstance since the court dismissed the applicant's application for a stay/adjournment for the reasons given in the 23 March judgment.
>
> 5. At that time, the court had decided that there was to be a full trial of the question whether Chedington has any legitimate interest in the Vesting Issue. In its 4 May judgment, this decision has been reversed…"

80. As I have pointed out earlier in this judgment, my decision on 23 March 2020 was merely that the court could not deal on paper with the question of Chedington's standing to oppose the section 283A issue, but that it needed to be dealt with more fully, and at that time I assumed that this would take place at the trial. So my decision (as reflected in my order) was simply to dismiss the Brakes' application by notice dated 13 March 2020 to stay or adjourn the trial on the grounds that Chedington had no standing to oppose it. I made no substantive decision as to what issues were for trial in May. All I had done up until that point was to strike issues out from the original insolvency proceedings, leaving the section 283A issue to be determined at trial. It then became apparent to the parties that they were proceeding on different assumptions as to whether or not Chedington had to demonstrate standing in order to take part in the trial in May. Plainly the matter had to be resolved as soon as possible. On 9 April 2020 Chedington issued its application for a declaration about its standing. The application was before me at the PTR on 24 April 2020, but I considered that it could not be dealt with on that occasion, and so adjourned consideration of it to 1 May 2020, handing down my formal judgment on 4 May 2020.

81. In my judgment, my judgment of 4 May 2020 does not represent a change in circumstances. It represents a considered decision on a point which divided the parties, and needed to be resolved before the trial. Although I had made the assumption in my judgment of 23 March 2020 that Chedington would have to demonstrate its standing at the trial, that was no part of my actual decision and formed no part of my order.

82. Even if I were wrong, and I had decided substantively on 23 March 2020 that Chedington would have to prove its standing at trial, this would not be sufficient change in circumstances to justify revisiting the question whether there should be a stay or adjournment of the trial. This is because the effect of my decision of 4 May 2020 was to make no change on the scope of the trial from Chedington's point of view (because it had previously thought it did not have to prove standing at the trial), but to *narrow* the scope of the trial from the Brakes' point of view. So from their point of view it made the trial shorter and easier.

Disruption to trial preparation

83. Mr Smith says in paragraph 9 of his witness statement that the application of 9 April 2020 "has caused very considerable disruption to trial preparation" and that it will be necessary for the Brakes "to go through their filed evidence with a view to excising large parts of it". I accept that some disruption will have been caused by this application. You cannot make an omelette without breaking eggs. But I do not accept that it means that this trial has to be adjourned. There will have been some diversion of resources to dealing with the application itself. But the consequence of the judgment of 4 May 2020 is, as I have said, to *narrow* the trial rather than *broaden* it. So far as concerns the need to go through filed evidence with a view to excising parts of it is concerned, I accept that this is an exercise which would have had to be done. But in fact it *has* now been done. It was done in fact during the remainder of the hearing before me in the afternoon of 7 May 2020, and Chedington has taken upon itself the responsibility to produce redacted versions. All that the Brakes will need to do is to check the result, to see that it conforms to what I directed during the hearing. So that is no longer an issue.

84. In paragraph 10 of his witness statement, Mr Smith says that Chedington has an unusually large team of lawyers working on its litigation, whereas the Brakes legal team is considerably smaller. I am afraid that, in itself, this cuts no ice. There are many 'niche' or 'boutique' litigation law firms that regularly take on 'Magic Circle' or other big City law firms in large-scale litigation, requiring significant resources to be deployed at short notice. But it goes with the territory. In paragraph 11 Mr Smith in effect says that to continue with the trial as listed would be to punish the Brakes for having failed to anticipate the reversal of paragraph 38 of the 23 March judgment. I cannot accept this. First of all, paragraph 38 of the judgment is not the order that was made. What I said in paragraph 38 was based on my assumption at the time, and not on any substantive decision I had made. So in my judgment of 4 May 2020 I have not 'reversed' paragraph 38. On the contrary, I have for the first time answered the question put to me, which is, does Chedington need to prove its standing at or before the trial? Moreover, to characterise going on with the trial as already listed as "punishing" a party is to use over-extravagant language.

85. It is necessary to keep in mind that the trial which will now take place covers a narrow compass and is listed for two days of evidence (for which a timetable has been set) before the weekend and one day of submissions after it. It will deal with the three sub-issues of the section 283A issue, as agreed by the parties after the hearing on 3 March 2020, that is, (i) a legal issue as to whether a proprietary estoppel claim as yet unvindicated and not declared by the court to exist could be an interest in land for the purposes of section 283A, (ii) a factual point as to whether the cottage was the applicants' principal or sole residence on 12 May 2015 (the date of their bankruptcies), and (iii) a question of mixed law and fact as to whether the ransom strip could be a dwelling-house for the purposes of the section. This is not a lengthy or complicated trial. I accept that there is other litigation pending between the parties, but this is all that is being tried now. I accept also that this trial will have to take place remotely, by videoconferencing, and that that will make things more difficult than usual, but the experience of the Business and Property Courts so far is that it is possible, even in these extraordinary circumstances, fairly and expeditiously to carry out even large-scale trials, much larger than this, by such means.

Arguments about order of play

86. Mr Davies QC in his oral submissions argued that the effect of the judgment of 4 May 2020 was that Chedington's standing was not going to be tried and would never be tried. On the other hand, if the Brakes' appeal on standing (arising out of the strike outs on 2 and 3 March 2020) were allowed, Chedington's standing *would* be tried, because the Brakes would apply successfully for summary judgment on the Bankruptcy Application, thus demonstrating that Chedington had no title. He said this begged the question as to why it was necessary to have this trial on section 283A, as opposed to waiting for the appeal to be decided, and then the Brakes' summary judgment application heard. The section 283A issue would simply fall away, because, with Chedington excluded on the grounds of no title and therefore no standing, and the former trustee Mr Swift and his successors Messrs Gostelow and Nimmo declining to oppose it, there would be no need for a trial. Therefore holding the section 283A trial now would be a waste of time and money.

87. The response of Mr Sutcliffe QC to this argument was that the appeal on the standing question would not need to proceed if the Brakes were successful on the section 283A

issue. If the section 283A issue went against the Brakes, they would still have their appeal on standing, and if they won that they would be able to continue with their case that Chedington has no standing.

88. It seems to me that this is a matter in which both sides think they have the knockout argument, and want to be able to put it first, so that the other side has nothing left to argue about. If the Brakes can show that Chedington has no title then they think that they will get to keep the cottage, because the (successor) trustees in bankruptcy will not defend the section 283A proceedings. But Chedington thinks that, if it defeats the Brakes on the section 283A issue, then their opposition to the transactions between the trustee and Chedington will fall away and Chedington will get to keep the cottage. At present, the section 283A issue is listed for trial, and, as a result of my judgment of 4 May 2020, Chedington's standing is not. The Brakes want to reverse that position, whereas Chedington wants to keep it.

89. In my judgment the burden must lie upon the Brakes to show why the position should be changed. Moreover, since they have already sought a stay or adjournment, they have to show that there is some good reason why the court should revisit the question. As I have already said, the judgment of 4 May 2020 is not that reason. Nor is it sufficient to show that, if the Brakes win the appeal and then obtain summary judgment, the section 283A issue will fall away (if it will). If the section 283A issue is tried and *Chedington* wins, the Brakes will have no basis for complaining that they have been deprived of the cottage, because they would not have recovered it anyway.

Problems with the trial bundle

90. Mr Davies QC also argued that the matter could not be tried as listed because he had not yet seen the trial bundle. This was not of his side's making, because the application of 9 April 2020 had had a fundamental effect on trial preparation. He also complained that it was not clear what parts of the pleadings remained in force.

91. Mr Sutcliffe QC answered the complaint about the absence of the trial bundle by saying that it had been lodged in fact just one day later than the timetable laid down. This was essentially a two-day trial, in which both sides' legal teams were already very familiar with the events in question and the documents which would form part of the trial bundle. No one was coming to it afresh. If the court could accommodate it, the trial could perhaps be moved back one day. (In fact at the hearing I so directed in any event, because this would mean separating the closing submissions from the evidence by the interposition of a weekend, which would assist counsel.)

92. Moreover, Mr Sutcliffe said that although neither he nor Mr Davies QC had so far received a hardcopy of the trial bundle (because they both lived in the country) everyone had received an electronic version, and the hardcopy would be delivered as soon as possible. So far as the pleadings were concerned, Mr Sutcliffe stated that his cross-examination of the Brakes' witnesses would be confined to the issue whether the cottage and the strip were the principal or sole residence of the Brakes, and the issue whether the strip was a dwellinghouse within section 283A. The other issue, namely whether an unvindicated claim in proprietary estoppel could be an interest in a dwellinghouse for the purposes of the section was a pure point of law. He accepted, however, that if any necessary points of fact had not been pleaded by Chedington, then that was its problem.

93. In my judgment, problems about receipt of the trial bundle and preparation time would not justify staying the proceedings or adjourning the trial until after the appeal on standing had been heard and disposed of. At most, they would justify a short adjournment of a few days or a few weeks at most. But in any event I was not satisfied that the problems were as real or as significant as Mr Davies QC submitted. It was for these reasons that at the conclusion of the argument that I announced that I would dismiss the application for reasons to be given later in writing.