Neutral Citation Number: [2020] EWHC 538 (Ch)
Case No: 21 of 2019 and 166 and 167 of 2015

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

IN THE MATTER OF STAY IN STYLE (IN LIQUIDATION)
AND IN THE MATTER OF NIHAL MOHAMMED KAMAL BRAKE
AND IN THE MATTER OF ANDREW YOUNG BRAKE
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Before HHJ Paul Matthews (sitting as a High Court Judge)

B E T W E E N :

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(as trustees of the Brake Family Settlement)
AND OTHERS

Applicants/Respondents

and

(1) SIMON LOWES
(2) RICHARD TOONE
(as joint liquidators of the Stay in Style Partnership (in liquidation))
(3) DUNCAN KENRIC SWIFT
(as former trustee in bankruptcy of Nihal Brake and Andrew Brake)
(4) THE CHEDINGTON COURT ESTATE LIMITED

Respondents/Applicants

APPLICATIONS HEARING ON 2 AND 3 MARCH 2020

AT THE ROLLS BUILDING

ANDREW SUTCLIFFE QC AND WILLIAM DAY (Instructed by **Stewarts**) appeared on behalf of The Chedington Court Estate Limited

STEPHEN DAVIES QC AND DAISY BROWN (Instructed by **Seddons**) appeared on behalf of Mr and Mrs Brake

ANNA LINTNER (Instructed by **Porter Dodson LLP**) appeared on behalf of certain Liquidation Creditors

Tuesday, 3 March 2020

(10.30 am)

Ruling on strike out of Liquidation Application

HHJ PAUL MATTHEWS:

1. Yesterday, I gave judgment in relation to an application relating to what has been called the Bankruptcy Application, and I prefaced that with some background. I am not going to repeat that background, but it is relevant also for the judgment which I am about to give. This concerns a further insolvency application, known as the Liquidation Application, which was issued on 6 February 2019 by Mr and Mrs Brake (to which some of the liquidation creditors were joined on 13 March 2019). I am now giving judgment on the ordinary application issued by Chedington Court Estate Ltd and dated 30 January this year, in substance to strike out the Liquidation Application in relation to the main parts of the relief sought.

2. I should have prefaced this judgment by saying that I am aware that we have had to get quite a lot into a very short time, and so I have not had as much time for consideration as I might have had. Also I have not got an enormous amount of time to give judgment. But I confirm that I have read all the skeleton arguments and all the documents to which I was referred. It is just that, in the time available, obviously, I cannot refer to everything in this judgment.

3. In this application to strike out, Chedington (the applicant) says that the first two applicants in the Liquidation Application, Mr and Mrs Brake, in their capacity as trustees of the Brake family settlement, have no legitimate interest in the relief

which is sought in that Application. It says this because that Application seeks (i) to reverse or set aside the liquidation sale agreement by which the liquidators of Stay-in-Style sold the partnership's interest in West Axnoller Cottage to the former trustee in bankruptcy, Mr Duncan Swift, (ii) a direction that the liquidators should accept the family trust's own bid on 21 December 2019 for the partnership's interest in that property and (iii) a direction for the resale of the cottage.

4. The reason that Chedington says that the trust has no legitimate interest is because the trust is an outsider to the liquidation, in the sense that it is not a creditor or a contributory. Instead, the trust's complaint is that it has been denied the opportunity to acquire the cottage. I was referred to the cases of *Re Edennote* [1996] BCC 718, and *Mahomed v Morris* [2001] BCC 233, both in the Court of Appeal, where that Court expressly said that persons who are not creditors or contributories but are denied an opportunity to acquire property in the liquidation estate have no standing to complain in the insolvency. I referred to these cases in my judgment yesterday and they are just as relevant -- in fact, even more so (because they concern a liquidation rather than a bankruptcy) -- today.

5. The Brakes, on the other side, say that this point about their standing has been raised very late. I agree. It has been raised late. But at the same time, it is still some time before the trial and, if it can be dealt with, as the parties wish me to deal with it, then I shall deal with it. If it is a good point, it is none the worse for being raised at a late stage. The Brakes say that the trust has an interest in this application, because their son lived in the cottage, because their furniture and their other possessions were placed there and used, and because the property was also

used as family overflow accommodation. But, as Mr Sutcliffe QC said, and I agree, these are not interests of the trust *in the relief sought*. The trust's interest here is not as it might be for the Brakes personally, that they were in some way former owners and occupiers, but simply as a disappointed bidder in the sale process. No relief in this application is sought in relation to the furniture or the son's previous occupation. So I do not consider that there is anything in that.

6. The Brakes, as I have said, do not claim in a personal capacity in this application, but simply as the trustees of the family trust. Even if they claimed in that personal capacity, they are not creditors of the partnership. They were formerly contributories, but even if there were a surplus in the estate, they would not get any of it because (as they were formerly bankrupt) it would go to their trustees in bankruptcy.

7. However, the Brakes say that they *are* interested in the bidding process, and it is true that they were bidders, but *in their capacity as trustees*. So their argument has been effectively that it is not just contributories or creditors that can complain about the process carried on inside a liquidation, but also, to some extent, complete outsiders. They rely in particular on a decision of Mr Justice Sales (as he then was) in *Hellard v Michael* [2009] EWHC 2414 (Ch), and a decision of the Privy Council in *Hickox v Brilla Capital Investments Master Fund SPC Ltd* [2015] 2 BCLC 387. *Hellard*, however, was a case where the trustee in bankruptcy was, in fact, the applicant, so the question of standing did not arise. There was no discussion about this at all. It is true that Mr Justice Sales in that case said, in general terms (at [9]), that the court has "a general supervisory jurisdiction in respect of trustees in bankruptcy to ensure that they behave

properly and fairly as between the persons affected by their decisions". But it is also to be noted that, in that case, the (respondent) bankrupt was hardly an outsider. Mr Justice Sales held in that case that the process had not been conducted fairly, and in particular there was an asymmetry of information, so the process was set aside and ordered to be rerun. Because the question of standing was not raised (I assume because the trustee in bankruptcy was the claimant and it did not arise) this is not an authority which really assists the Brakes. However, if it were capable of standing to support the wider proposition that the Brakes put forward, then I would respectfully say that to that extent it cannot stand with the Court of Appeal's decisions in *Re Edennote* and *Mahomed*.

8. So far as concerns *Hickox v Brilla*, that was a claim that the bidding process in which a judge had become involved had been conducted unfairly. It concerned the liquidation of a company. Hickox was a secured creditor, and Brilla was an unsecured creditor. The sale was in accordance with the court order. The liquidator sold a particular asset of the company to Hickox, and Brilla complained. The claim actually failed on the facts. There was no argument about outsiders, there was no discussion about the test for court intervention and, indeed, the only case cited in the whole judgment was the decision in *Carmichael v National Power plc* [1999] 1 WLR 2042, HL. This is an authority on the interpretation of oral statements, about as far removed from the test for intervention by the court under section 168 as it is possible to imagine. I cannot regard this case as an authority for the proposition that an outside bidder can complain under section 168 for failure to follow the bidding process. But, in any event, even if it purported to lay down a wider test than that in *Re Edennote* and

Mahomed, it is a decision of the Privy Council, and in accordance with the rules of precedent I must follow decisions of the Court of Appeal (which are binding on me) in preference to decisions of the Privy Council. So I take the view that these cases do not assist the Brakes in relation to the question of the test. The test is that laid down in the Court of Appeal cases to which I have referred.

9. As I have already said, the Brakes have also argued that the trust has a legitimate interest in the outcome of this application because the family trust of which they are trustees was set up for the benefit of the Brakes' son, Tom. Now, I have, this morning, been supplied -- I asked for it yesterday and it has been supplied this morning – with a copy of the Brake family settlement, which I have read. It is dated June 2013, and it is quite a short document, which sets up an entirely discretionary trust with an overriding power of appointment in favour of the class of beneficiaries. That class consisted, at the outset, of the settlor's son, Thomas Conyers D'Arcy, Mr Brake's niece, and (importantly) any other person or class of persons nominated in writing by the settlor (who, of course, is Mr and Mrs Brake acting jointly), or by any one of the beneficiaries, and whose nomination is accepted in writing by the trustees (Mr and Mrs Brake again). So it is an open-ended class, and effectively could cover anyone in the world, except the "excluded persons", who are defined as the settlor and any future spouse or civil partner of the settlor. That, no doubt, is put in for tax purposes.

10. But it does not seem to me, without more, that I can say that this trust is "for the benefit of Tom", except in the limited sense that he is *potentially* a beneficiary of it. There is no disclosure, for example, of any letter of wishes which says something such as, "We have given you the trustees these discretions, but we

expect you to apply them for the benefit of Tom, who is the primary beneficiary". There is no indication of that sort of thing. So I regard the evidence in favour of the argument that the trust was set up for the benefit of Tom as very thin indeed. It cannot fairly be described as for the benefit of Tom any more than a so-called 'Red Cross' trust can be regarded as for the benefit of the Red Cross. But, in any event, the mere fact that the trust was set up for the benefit of another person or persons does not, in my judgment, take the matter any further.

11. Further arguments that were put forward by the Brakes related to the importance of their rights under article 8 of the European Convention of Human Rights. That article creates a right to respect for private and family life, home and correspondence. It is to be noted that it is not *a right to* private and family life, home and correspondence, but a right to *respect for* private and family life, home and correspondence. So it is not every action which would constitute an infringement, because it depends on there being a *lack of respect* for private and family life, *etc*, rather than any kind of *interference* with it, as such. But, in any event, there is an exception in article 8(2) for the protection of the rights of others, so it is clear that some kind of balancing act would have to be carried out. There is no decision that I am aware of that the trustees of a trust, as such trustees, are entitled to the benefit of this article, or in what respects they would be entitled to that benefit. There are cases which say that, in certain respects, a limited company can enjoy the benefit of article 8, but I am not aware, as I say, of any case relating to trusts.

12. But, in any event, the article 8 rights which are said to be in play in this case relate to their *home*. They are the rights of the Brakes *as individuals* and not as trustees

of the trust, because it does not matter who the trustees are; it would be the same point whether it was Mr and Mrs Brake who were trustees or a professional trust corporation or some other person, their solicitors or accountants. It cannot make a difference to whether there is an infringement or not, depending on the identity of the particular trustees for the time being of the trust. Mr Davies QC was at pains to emphasise the importance of this argument to the Brakes because they were evicted by Chedington, he says, without a court order and, therefore, unlawfully. Of course, that is yet to be decided, but it is their case, and I must judge it on that basis. It seems to me, however, that an unlawful eviction cannot turn someone who is otherwise an outsider into a person who has standing. If the Brakes already have standing, then they do not need this as well, but, if they do not have standing, in my judgment, it does not give them standing. The law already provides remedies for unlawful eviction, and it is not necessary, in my judgment, that insolvency law should do so also. In any event, it was the Brakes *personally* who were evicted, and not the trustees, who were not, as such, occupying the property. So, again, this is not something which will assist the Brakes.

13. Mr Davies QC also emphasised the importance of natural justice, especially where officers of the court are involved, and he referred to *Re Condon, ex parte James* (1874) LR 9 Ch App 609, a well-known case, and others of that kind, saying, "The court should not contemplate that its officers behave in an unfair manner". I quite understand that. The problem, as it seems to me, is that, to say that where insolvency officials behave badly it gives the court the power to award remedies to persons who are otherwise outsiders to the process, opens the door to

all kinds of interferences with the administration of insolvency processes, because there is no way to test those cases without actually trying them, and that would be very resource-intensive.

14. It seems to me that whether you have a remedy for a faulty bidding process cannot depend, or should not depend, on whether or not the person who is offering the property for sale and binds himself, or herself, to a particular bidding process is either (a) a private individual and full beneficial owner of the property, (b) a private trustee holding on trust for other people, or (iii) an insolvency official operating a statutory system in an insolvency process. In all of these cases, the same process is being gone through. If it is the case that the bidders offer a process of a certain kind, and bind themselves to carry through that process, but they do not, in fact, provide it, or tell lies in the process, then there will already be common law remedies available to the bidders. I do not see why there should be *more* protection given to the bidders in the case where the offeror happens to be an insolvency official compared to the other cases. So, for those reasons, I hold that the Brakes do not have standing in relation to this application.

15. So far as concerns the other liquidation creditors represented by Ms Lintner, Chedington accepts that they are creditors. But it says, further, they have no legitimate interest because they are only continuing to prosecute the application for the benefit of the Brakes rather than for themselves. I was referred in particular to the decision of Mr Nicholas Strauss QC sitting as a deputy judge in *Walker Morris v Khalastchi* [2001] 1 BCLC 1. The matters on which Chedington rely here are that the other creditors were only joined into this application after the

Brakes' own standing had been challenged; that the other creditors used to share solicitors and counsel with the Brakes; that the first time that they had been separately represented has been before me in these applications; and that the other creditors have adopted the Brakes' pleadings in their entirety, even where, according to Chedington, it is contrary to their own interests as creditors. The only one of the creditors who has attempted to explain his interest in the liquidation application is Mr Ritchie. But his complaints are, in fact, all directed at the behaviour of the former *trustee in bankruptcy*, Mr Swift, rather than to anything else, and certainly not to behavior of the liquidators.

16. The respondent, in addition, points to evidence from Mr Ramsbotham and Mr Osgood (former administrator of the partnership) that Mrs Brake obtained proxy votes and used them for her own interests. There is evidence from Dr Guy that AEL, then called Sarafina, engaged Verisona Law Solicitors for the other applicants on the instructions of Mrs Brake, and there is a letter dated 2 February 2017, which I have read, from the lawyers themselves, Verisona Law, to Ritchie Phillips, which says this in terms.

17. There is also the evidence from Mr Gostelow, one of the new trustees in bankruptcy, about the funding arrangements. He says that originally he was told by Mr Ritchie that he (Mr Ritchie) was providing the funding and that it was not restricted to any particular enquiries. Then he was told that *Mrs Brake* was funding it, that the funding was limited and that it was tied to claims against the trustee in bankruptcy. He was subsequently told by Porter Dodson (for the creditors) that no-one except Mrs Brake could actually fund these proceedings. There was also the case of Rebecca Holt, one of the creditors, who claims to be

owed £5,000. She appears to have been willing to provide funding, through a loan from her father, of £150,000. Frankly, this is difficult to accept.

18. Then there was also correspondence between Stewarts (for Chedington) and Porter Dodson (for the creditors), saying, "We would like information about who is paying your bills and whether you are getting instructions from Mrs Brake", and so on. They were the clearest possible questions. Of course there is no obligation on the creditors to answer any of those questions if they do not wish to. However, they do run the risk, as was pointed out to them at the time, that the court looks at it and says, "Well, this is very serious. Why do you not just say it is not true, if it is not true?" And, of course, answer came there none, of any substance.

19. Now, in the face of all of that material, if it stood alone, I would hold that that was sufficient to persuade me that Mrs Brake was indeed pulling the strings, and that the creditors were her nominees. The other creditors, however, say, "Well, we are creditors", and Chedington does not deny that. They say "We therefore have standing, unless we are complaining otherwise than in our capacity as creditors, but that is not so in this case". In order to show that the creditors are acting otherwise than in the capacity of creditors, they say that the test is that you have to show, *not only* that there is no benefit to be gained by them as creditors, *but also* that their application is advancing interests which are adverse to the liquidation. They rely on a trio of cases -- *Walker Morris v Khalastchi*, to which I have already referred, the Eastern Caribbean Court of Appeal case of *Re Fairfield Sentry Ltd*, unreported, 20 November 2017, and the decision of Mr Jeremy Cousins QC in *Re Core VCT* [2019] BCC 845. I have read these

cases. There is not time for me to set out the salient passages, but, in my judgment, read fairly, they do not support this novel two-stage test. In my judgment, the test is simply one of legitimate interest as stated, as it happens, very clearly by Mr Strauss QC in *Walker Morris* (at page 7g). In my judgment, it is purely fortuitous that these three cases happen to include statements at various points in the judgments which can be picked out of their context and put together to make some support for the idea of a two-limb test. I do not accept that that is the English law.

20. However, the other creditors also say that the court is not in a position to conclude that the other creditors are nominees of the Brakes, and they rely on a statement by Mr Ritchie in which he expressly says, "My company is not a nominee for the Brakes". There is a witness statement from the creditors' solicitor, Ms Burcher, saying, "I confirm the statements made in Mr Ritchie's witness statement", which seems, therefore, to be along the same lines. There is a further witness statement of Mr Ritchie, but that is really just full of criticisms of the former trustee in bankruptcy and does not actually deny any of the allegations made of fact in the Chedington evidence.

21. So the question arises whether it is open to the court in these circumstances to find, without there having been any cross-examination of the various witnesses on their witness statements, that, in fact, the creditors are acting as nominees of Mrs Brake. The other creditors say, "You cannot do that". They refer to cases such as *Long v Farrer & Co* [2004] EWHC 1774 (Ch), which say that, ordinarily, except in cases where you find that the evidence is not credible, you cannot find that somebody is not telling the truth in a witness statement without there being

cross-examination, and so on.

22. However, the answer given by Chedington is that none of the actual factual allegations that are made in their evidence have been denied by any of the other creditors. What *is* denied, instead, is the *legal conclusion*; that is, that the creditors are *nominees* of the Brakes. In this connection, I notice that the other creditors rely on the decision of Mr Justice Newey in *Chuku v Chuku* [2017] 1 WLR 3137. That is an authority, and a very clear one, on the meaning of the phrase "nominal claimant" for the purposes of the jurisdiction to order security for costs (CPR rules 25.12ff). It is clear from the authorities that bear on that, including *Chuku*, that you need to show an element of a deliberate duplicity or window dressing in order to show that someone is acting as a "nominal claimant" for the purposes of that jurisdiction.

23. But in my judgment, that is not the test which is apt to decide when you are talking about whether one person is, in a general sense, the nominee of another. For example, it is clear on the old authorities which are discussed by Mr Justice Newey in his decision in *Chuku* that trustees, as such, are not without more "nominal claimants" and, therefore, not subject as such to the security for costs jurisdiction. But, as everybody knows, they are often nominees of one sort or another in that general law sense. Yet being a trustee does not necessitate any duplicity or window dressing. So it is clear to me that I should not adopt the test in *Chuku v Chuku* for this purpose.

44. My conclusion on this is that, although Mr Ritchie, and therefore Ms Burcher, deny the *conclusion* that the other creditors are nominees of Mrs Brake, the actual *evidence* as to factual allegations of funding and instructions is unchallenged. It is

cogent. And it is not denied, when it would have been very easy to do so. I find, therefore, for these purposes, that Mrs Brake *is* funding and is instructing the lawyers of the creditors, or for the creditors, to do as she tells them. The creditors are, therefore, not putting forward *their own* case, they are putting forward *Mrs Brake's* case, even if -- and it is not necessary for me to decide this -- they actually agree with it. So they are putting forward the application, for the Brakes. Now the Brakes either have a legitimate interest of their own, or they do not. If they do not, the creditors, therefore, add nothing. In my judgment, the creditors do not have standing on this application and I strike the application out.

(10.58 am)

ooOoo

(12.34 pm)

Ruling on striking out the Cottage Application

HHJ PAUL MATTHEWS:

1. This is an application by the Brakes to strike out or otherwise obtain summary judgment on an application known as the Cottage Application, which was brought by Mr Duncan Swift, the former trustee in bankruptcy. That application asked for various relief, including declarations concerning the validity of the transactions involving the cottage, West Axnoller Cottage, which Mr Swift had bought, it may be as a nominee, for Dr Guy or Chedington Court Estate from the liquidators of Stay-in-Style.
2. The basis upon which the application to strike out or for summary judgment was put has rather changed. Before me it was founded essentially on an abuse of process by the former trustee in bankruptcy. That was not, in fact, in the Brakes'

application notice. It is not actually discussed in their skeleton argument. As I understand it, it is not even pleaded in the particulars of claim. But that does not matter, for present purposes, because I am satisfied that the proper course to take in relation to this application is not to deal with it on the basis of abuse of process, even though the evidence put forward, if accepted, would demonstrate a rather alarming state of affairs. That is something which may or may not have to be dealt with hereafter.

3. For present purposes, what I am concerned with is the fact that the applicant, Mr Swift, knowing of today's hearing, has not appeared to support his application or to defend it in any way, and has not put in any evidence directed to the application to strike out or for summary judgment. What he *has* put in is a witness statement for the trial in May, and there is an argument as to whether or not the contents of that witness statement are, or are not, relevant to the purposes of today's application. I have not read that witness statement. It arrived, or at any rate was sent to me, over the weekend, and I have not previously been referred to it.

4. So the position is that Mr Swift is not here to defend his own application. He has indicated he does not want to, or he accepts that he has no power to continue with it. He certainly has no interest in the subject matter anymore, having been removed from office as trustee in bankruptcy, and his successors as trustees in bankruptcy have not unreasonably taken the view that they are not prepared to carry on the application at this stage. They perhaps seek time in order to consider their position. But the fact is that this application has been made and I must deal with it on the basis of the matters or the facts as they are today. I consider that

enough is enough. We cannot have applications being dragged out to the crack of doom simply in order to put off the day when the court has to grapple with it.

5. It appears the concern of Chedington has been the fear that there would be some kind of *res judicata* caused by the application being struck out. Mr Davies QC, on behalf of the Brakes, has made a number of comments which I think have gone some way towards assuaging those fears. For my part, I am doubtful that the successor trustees (not being parties) would be bound in the same way as Mr Swift would be bound by an order of the court putting an end to these proceedings. I think that the right course for the court to take in these circumstances, therefore, is to say that, since the applicant does not want to go on with them, has not appeared to defend them and his successors in title have not indicated that they wish to do so, I should therefore treat this as a case of want of prosecution. As Mr Davies QC reminded me towards the end of his submissions, where want of prosecution is made out, the appropriate course normally is to strike out such a claim. So I am striking it out, not deciding it on its merits.

(12.39 pm)

oo0oo

(12.41 pm)

Ruling on costs of Cottage Application

HHJ PAUL MATTHEWS:

1. Mr Davies QC applies for his costs of the Cottage Application against Mr Duncan Swift, who is not here. He says that this is a case where there has been a serious breach of duty by the trustee in bankruptcy. Accordingly, I should not only order Mr Swift to pay the Brakes' costs of the cottage application, but I should order

them to be paid on the indemnity basis.

2. I have to say that, if the evidence which I have been taken to is true, as I have said in my main judgment, that would disclose a rather alarming state of affairs.

I think it right, however, to give Mr Swift an opportunity to say why I should not make such an order against him. I will therefore order that I will consider any written representation that he makes which is lodged with the court within the next three weeks, so 21 days from today at 4.00 pm. That will be Tuesday, the 24th. I will consider any such written representations. Alternatively, he can seek a hearing at which he can be represented or attend in person, and Mr Davies QC or his junior Ms Brown can appear, and I will deal with the question of costs then.

(12.42 pm)

oo0oo

(3.06 pm)

Ruling on Disclosure Application

HHJ PAUL MATTHEWS:

1. This is an application by notice dated 30 January 2020 on behalf of Chedington Court Estate Limited for an unless order in relation to the provision of documents set out in a schedule in a draft order annexed to the application notice.

2. There are six categories of documents sought. They are in schedule 1, and are as follows:

> "1. Electricity bills and utilities bills for West Axnoller Cottage for the period 1 January 2010 18 January 2019
>
> 2. Documents confirming the purchase and/or payment of any TV licences and TV subscription services (e.g. Sky), registered at the Cottage and/or

West Axnoller Cottage Farm (or any other property at which they were resident) for the period 1 January 2010 to 18 January 2019

3. Documents evidencing the Brakes' registered address for voting purposes for the period 1 January 2010 to 18 January 2019

4. Copies of the 21 photograph files and complete with their original meta data pursuant to PD 51U paras 2.6, 13.1(1) and 13.2

5. Copies of the videos disclosed at item 33 of the Brakes disclosure list with their original meta data pursuant to PD 51U paras 2.6, 13.1(1) and 13.2

6. Photographs and videos of the Brakes in West Axnoller House during 1 January 2015 to 31 December 2015."

3. They concern documents which are said to be relevant to the issue whether the Brakes were occupying West Axnoller Cottage at the time of their bankruptcy in 2015 as their only, or principal, home. That is relevant to an issue which has to be tried between the parties arising under section 283A of the Insolvency Act 1986. The trial is to take place in May.

4. This application, however, follows earlier disclosure orders that were made in this litigation by Mr John Jarvis QC, sitting as a deputy judge. The first such order I think was made in April 2019, and the most recent in December 2019. It is clear that the court directed Model B disclosure under the disclosure pilot in CPR Practice Direction 51U, which essentially covers (i) key documents relied on by the party giving disclosure and (ii) known adverse documents. The order in December 2019 envisaged that there would be some further points of dispute between the parties and that, therefore, there would have to be, or there would be,

an application made to the court for further disclosure, and a hearing of approximately one day was contemplated. This is, in effect, that hearing.

5. The disclosure pilot provides a new system of disclosure for cases which fall within its scope, cases in the Business and Property Courts. It provides not only for model-based disclosure, which is different from the old standard disclosure and enhanced disclosure regime in CPR part 31, but it also provides for a new regime for seeking orders for further disclosure, or for variation of existing orders. Application can be made under paragraph 17 of the Practice Direction when there has been, or is alleged to have been, a failure adequately to comply with an order for extended disclosure, and there can be an application under paragraph 18 where it is desired to vary an existing order for extended disclosure to make an addition, or make an additional order for disclosure of specific documents. I should say that, for this purpose, "extended disclosure" means any disclosure beyond initial disclosure and, therefore, applies to all the disclosure models, including Model B.

6. It is, I think, reasonably clear that what Chedington Court Estate is asking for in this case is an order varying the existing order, and so, therefore, paragraph 18 is in play. Paragraph 18.2 reads:

> "The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for extended disclosure is necessary for the just disposal of proceedings and is reasonable and proportionate, as defined in paragraph 6.4."

Then paragraph 18.3 provides:

> "An application for an order under paragraph 18.1 must be supported by a witness statement explaining the circumstances in which the original

> order for extended disclosure was made and why it is considered that that order should be varied."

So those are the relevant rules for the application that is made here.

7. I should also mention very briefly the decision of the Chancellor of the High Court in the *Sheffield United Limited LLC* case [2019] EWHC 914. There the Chancellor made absolutely clear that there is to be a culture change in the way in which disclosure is dealt with in the Business and Property Courts. It is worth bearing in mind that the rationale for introducing the disclosure pilot was because industry, in particular, was concerned about the cost of disclosure exercises under CPR in modern litigation. It was therefore considered necessary to do all that could be done in order to reduce the burden of that disclosure exercise.

8. I also refer very briefly to a more recent decision of the Chancellor in *McParland & Partners Limited v Whitehead* [2020] EWHC 298 (Ch) where, at [54], the Chancellor says:

> "It is clear that some parties to litigation in all areas of the business and property courts have sought to use the disclosure pilot as a stick with which to beat their opponents. Such conduct is entirely unacceptable and parties can expect to be met with immediately payable adverse costs orders if that is what has happened."

So, on the one hand, we have a desire to make disclosure less onerous, less time consuming, less expensive and, on the other, a recognition that it is still possible for parties to use it as a stick with which to beat their opponents. The court should therefore be vigilant to prevent that happening.

9. Now, in the present case, I have been taken to the relevant correspondence, and it

is clear that, first of all, it was contemplated that there would be some additional disclosure issues which arose, and it was contemplated that there might well have to be an application to the court. So far, so good. However, the request that was originally made in the correspondence, and then followed up in this application, is for documents over a wide period of time (2011-2019). This strikes me as unnecessarily burdensome and oppressive, in order to provide a basis for testing the assertion of the Brakes that they were occupying West Axnoller Cottage as their only or principal residence as at *the time of their bankruptcy*. My view is that you do not need such wide categories of documents for this, even though some of them may be helpful in that respect. A more restrictive request might have seen a greater degree of co-operation, perhaps, but at least any application based on it would appear to be a more reasonable one.

10. It has been said that the reason why such a wide period was taken was because that was the period during which the Brakes were asserting that they were in occupation. But the point is that the only issue is whether or not it was their only or principal home *at the time of the bankruptcy*, which is a specific date in 2015, so there is no need to take it as widely as that. It is not helped, of course, by the fact that the response was also lengthy, also detailed and perhaps unnecessarily provocative. But it does not matter at the end of the day, because what I have to do is to consider whether, in accordance with the terms of the Practice Direction, it is possible for the court to make the order as requested.

11. In particular, there is the question under paragraph 18.3 of whether there is a sufficient witness statement explaining the circumstances in which the original order for extended disclosure was made and why it is considered that that order

should be varied. That is something new. It is so that the court, when once it has seen that a disclosure order has been made under the pilot, does not vary that order without properly understanding what led to the order being made in the first place. Now, it is quite true that Dr Guy's witness statement, which I am sure was not prepared by him alone, but on the advice of his lawyers, does provide some information about the background, the genesis, of the disclosure order.

12. What it does not do is explain why the court decided on Model B disclosure. Therefore, the court is not in a position today to decide whether or not that purpose has gone or whether it should be supplanted or whatever. Secondly, the witness statement does not, in my judgment, explain *why* the order should be varied. It simply says, "We would like this disclosure. We think we ought to have it because this is an issue which has to be dealt with". The fact is, as I have already said, it would have been possible to formulate the requests in a more moderate manner and then to provide the relevant witness statement which is required by paragraph 18.3. That was not, in fact, done.

13. So in my judgment, the threshold condition for making an order under paragraph 18 is not met. It is said this is an unduly technical approach to take. Yet, the whole point of paragraph 18.3, as I understand it, is to ensure that the court, before making a variation order and thus changing the rules, as it were, for disclosure and therefore incurring further expense for the parties, should be put into a position in which it knew why the court had done what it did in the first place. That is not something which I have the advantage of knowing today. I do not regard this as a technical defect. I regard this as something rather more substantive. It may be that if paragraph 18.3 had been satisfied, I would have been

satisfied under paragraph 18.2 that the variation, certainly not as originally requested, but as restricted, might have been necessary for the just disposal of the proceedings. But that question simply does not arise because, in my judgment, I cannot vary the order in the circumstances. I therefore dismiss the application.

(3.19 pm)

oo0oo

(3.50 pm)

Ruling on permission to appeal in relation to Bankruptcy Application

HHJ PAUL MATTHEWS:

1. In relation to the first judgment which I gave yesterday (in the Bankruptcy Application), Mr Davies QC applies for permission to appeal. Contrary to the submission of Mr Sutcliffe QC, I consider that there is a real prospect, in the rather narrow sense in which that phrase is used here, of success on that appeal. This is because, although I applied, or tried to apply, existing authority which is binding on me, nevertheless, the Court of Appeal might decide, for example, that in the rather extreme circumstances claimed to exist in this case there should be a remedy in the insolvency jurisdiction. There is, indeed, no case where such things as are alleged to have happened here have happened before. So although I do not think I was wrong, and think that I applied the authorities, nevertheless it is possible that the Court of Appeal may come to a different conclusion on the allegations made in this case. So I am satisfied there is a real prospect of success.
2. The question that then arises is whether I should decide on the question of permission to appeal at this stage. Mr Sutcliffe suggests that I should not, because

then there will be the decision on the revesting question, and that would affect the questions which would otherwise go to appeal. He alternatively says that, in the exercise of my discretion, I should simply extend time for appeal until May.

I think that is really kicking the tin can down the road. I think I have to grasp the nettle and say what I think about this case. It seems to me that simply saying I am not going to decide the question yet is -- I will not say it is a "cop-out", but I say it is not really desirable. It is better to make decisions.

3. So the question is, therefore, whether, in the exercise of my discretion, I think it appropriate to give permission to appeal. I think that the circumstances in which this case appears to me now, or has always appeared to me, are ones which could well justify the time for the Court of Appeal being taken up. In the exercise of my discretion, I will give permission to appeal on this judgment.

(3.52 pm)

oo0oo

(3.58 pm)

Ruling on permission to appeal in relation to Liquidation Application (Brakes)

HHJ PAUL MATTHEWS:

1. Mr Davies QC applies for permission to appeal on behalf of the Brakes in relation to the second judgment (concerning the Liquidation Application). Some similar considerations apply here as in relation to the bankruptcy application, but, as Mr Sutcliffe QC points out, this is a more direct application of the relevant authorities. He therefore says that, whereas the other was reading across from the corporate insolvency to the individual insolvency context, this is a direct application of these authorities.

2. That is true, but I think it is not the end of the story. I think Mr Davies is quite right to point out that the process point has not been addressed in this way by the Court of Appeal, certainly so far as I am aware, and that it is perfectly possible that that Court might come to a different conclusion from me. The question, therefore, is, does that mean there is a real prospect of success of an appeal to the Court of Appeal? In my judgment, it does.

3. As a matter of discretion, I think it is very difficult for me, having given permission in the bankruptcy case, not to give permission in relation to the liquidation case, because, again, as Mr Davies says, it is all covering the same facts and one sequence. So I will give permission to Mr and Mrs Brake in relation to the second judgment.

(4.00 pm)

oo0oo

(4.04 pm)

Ruling on permission to appeal in relation to Bankruptcy Application (Liquidation creditors)

HHJ PAUL MATTHEWS:

1. Ms Lintner, on behalf of the other liquidation creditors, asks for permission to appeal against my decision in the second judgment. She has three grounds on which she relies. Firstly, she says that I have found that the creditors were putting forward the Brakes' case, but if the Brakes, having been given permission to appeal, were to establish that they had a legitimate interest, then it could not be said that the creditors were putting forward a case of someone who had no legitimate interest. I think that is a good point and I think there is a real prospect

of success. Therefore, on that point, and in the exercise of my discretion, I should give permission on that ground.

2. As to the second ground, which relates to the evidence of Mr Ritchie and Ms Burcher, Ms Lintner says that, effectively, I am finding that they are not telling the truth without having a cross-examination, and so on. I do not think that is actually right, because what I have done is say that the difference between the evidence put forward by Ritchie and Burcher, on the one hand, and that put forward on behalf of Chedington, on the other, is that Ritchie and Burcher have characterised what has happened as -- they are not nominees, as they would say, as a matter of law, whereas the facts put forward or the allegations put forward in the Chedington evidence leads the Chedington side to say that they are nominees. That is not a disagreement about the allegations themselves. There is no challenge to the actual fact about the funding, about giving instructions, and so on. Therefore, in my judgment, *Long v Farrer* does not apply to this, because there is no inconsistency between the *evidence* put forward on behalf of Chedington and the evidence put forward by Ritchie and Burcher. So I do not give permission on ground 2.

3. As to ground 3, this is that I should not have found that the creditors did not make their applications in the capacity of creditor for the partnership. This, I think, is different again, in that I have found various facts and welded them into a legal conclusion based on my rejection of the test, which Ms Lintner urged on me. I do not personally think it is very likely, but I cannot say there is no real prospect of the Court of Appeal taking a different view on that. Therefore, she crosses the line. I am satisfied, therefore, I should give permission to appeal on ground 3.

(4.07 pm)

oo0oo

(4.52 pm)

Ruling on costs (in principle)

HHJ PAUL MATTHEWS:

1. I am asked to deal with the question in principle of the costs of these last two days. The rules are well known. The court has a complete discretion in relation to costs, but if the court decides to make an order about costs, there is a so-called general rule. This is that the losing party, the unsuccessful party, should pay the successful party's costs, but the court has the discretion to make a different order in appropriate circumstances. In deciding what order to make, and whether to make a different order, the court will take into account all the circumstances of the case, including a number of factors which are specifically mentioned in the rules.

2. That is all very well and good in principle, but this is a very complicated case, and has a large number of different strands which, over the last two days, have had to be argued out and resolved, and I have given a number of separate judgments for that purpose. I bear in mind that the court is encouraged not to make issue-based costs orders, because it creates difficulties in identifying the relevant costs and it creates costs about costs. That is undoubtedly a sensible approach, but there are going to be cases where it is unavoidable to make some kind of distinction. Otherwise, you are trying to compare apples and oranges and put them all together and call them the same thing, and that's not sensible either. So I look at the matters that I have had to deal with.

3. First of all, the applications which took up most of the time -- not all day -- yesterday arose out of an application notice of 30 January 2020 issued by the Chedington side, and in relation to both of those matters, the two standing issues, Chedington were successful. However, the costs which are sought are only the costs of and occasioned by that application notice and nothing in relation to the underlying applications in which the strike-out application was made. But, of course, they do include preparation of other things than the standing issues. They include the disclosure question, which was in fact heard this afternoon, and resulted in success for the Brakes, and then there was also the cottage application which had to be dealt with, and which took up most of this morning. That question, in my judgment, was resolved essentially in favour of the Brakes, although it is clear that there was a particular concern of Chedington which had to be addressed and finally was addressed.

4. So I do not think, in all the circumstances, that I am able to simply take a global view of all these different pieces of litigation, parts of the litigation, and say the overall winner, balancing all the apples and oranges together, was this side or that side. That doesn't seem, to me, to be a sensible approach. Mr Davies QC suggested that I try and do it by time, and say, "Today is ours and yesterday -- well, some of yesterday -- was the Chedington's". That is a beguiling submission. It has the merit, as far as the costs of the hearing are concerned, of being relatively straightforward. What it doesn't do -- and I do not blame Mr Davies for this, because he is not a solicitor -- is help the solicitors to work out where all those costs find their origins, so to speak. So I am not terribly keen on that idea either.

5. What I can say is that, if I were looking at it in terms of issues, I would definitely say that the Chedington side should have the costs of and occasioned by their application of 30 January, so far as relates to the questions of standing, and also the (alternative) question of security for costs, because that had to be prepared but became unnecessary once the standing point was resolved. If I were then going on to deal with the application being made, or originally made, by Mr Swift relating to the cottage, the cottage application, I would say that, overall, the Brakes were the winners, but that, in the circumstances, I would not give them more than a percentage of their costs of that application to represent the fact that the matter could and should have been resolved earlier than the hearing, and that the hearing was largely -- I won't say it was unnecessary, but it was deprived of much of its necessity, and I would only give them 60 per cent of those costs. Then there is the question of the disclosure application, which I think that the Brakes won quite clearly.

6. So the question is whether it would be sensible for me to deal with this as an issue-based matter or not. Whilst I am reluctant to disregard the encouragement of the higher courts, I think this is one of those rare cases where it will have to be an issue-based order in order to reflect the justice of the case, and I am hopeful that modern solicitor systems will have answers to at least most of the costs, rather than perhaps all of them.

11. So I will make an issue-based costs order in the manner that I have indicated: that is, in relation to the application notice of 30 January, the Chedington side have the costs of and occasioned by that application, so far as relates to standing and security for costs; and in relation to the Swift application, the Brakes have

60 per cent of their costs; and in relation to the disclosure application, the Brakes have 100 per cent of their costs, all on the standard basis.

(4.59 pm)

oo0oo