Neutral Citation Number: [2020] EWCA Civ 1491

Case No: A2/2020/0537 AND A2/2020/0685

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(Chancery Division)
His Honour Judge Matthews (sitting as a High Court Judge)
[2020] EWHC 537 (Ch) and ([2020] EWHC 538 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/11/2020

Before :

LORD JUSTICE FLOYD
LORD JUSTICE HENDERSON
and
LADY JUSTICE ASPLIN

- -

Between :

In the Liquidation Application A2/2020/0685:

Nihal Mohammed Kamal Brake	**1st Appellant**
Andrew Young Brake	**2nd Appellant**
(as trustees of the Brake Family Settlement)	
Ritchie Phillips LLP	**3rd Appellant**
Rebecca Holt	**4th Appellant**
Slade Associates	**5th Appellant**
Tomasz Wegrzyn	**6th Appellant**
Katarzyna Wegrzyn	**7th Appellant**

- and -

Simon Lowes	**1st Respondent**
Richard Toone	**2nd Respondent**
(as joint liquidators of Stay in Style (in liquidation))	
Duncan Kenric Swift	**3rd Respondent**
(as Trustee of the bankruptcy estates of Nihal and Andrew Brake)	
The Chedington Court Estate Limited	**4th Respondent**

Mr Stephen Davies QC and Ms Daisy Brown (instructed by **Seddons Solicitors**) for the **1st and 2nd Appellants**

Ms Anna Lintner (instructed by **Porter Dodson LLP**) for the **3rd, 4th 5th, 6th and 7th Appellants**
The 1st, 2nd and 3rd Respondents were not represented and did not appear
Mr Andrew Sutcliffe QC and Mr William Day (instructed by **Stewarts Law LLP**) **for the 4th Respondent**

In the Bankruptcy Application A2/2020/0537:

Nihal Mohammed Kamal Brake	**1st Appellant**
Andrew Young Brake	**2nd Appellant**
(as trustees of the Brake Family Settlement)	
Nihal Mohammed Kamal Brake	**3rd Appellant**
Andrew Young Brake	**4th Appellant**
- and -	
Duncan Kenric Swift	**1st Respondent**
(as Trustee of the bankruptcy estates of Nihal And Andrew Brake)	
The Chedington Court Estate Limited	**2nd Respondent**

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Mr Stephen Davies QC and Ms Daisy Brown (instructed by **Seddons Solicitors**) for the **Appellants**
The 1st Respondent was not represented and did not appear
Mr Andrew Sutcliffe QC and Mr William Day (instructed by **Stewarts Law LLP**) for the **2nd Respondent**

Hearing dates: 13th-14th October 2020

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 11.00 a.m. on Friday 13th November 2020.

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

Lady Justice Asplin:

1. These appeals raise two questions. The first is whether discharged bankrupts in their personal capacity or as trustees of a family trust have standing to make an application under section 303(1) Insolvency Act 1986 seeking to impugn the acts and decisions of their former trustee in bankruptcy. The second is whether either or both discharged bankrupts in their capacity as trustees of a family trust or unsecured creditors in a compulsory winding up are persons "aggrieved" for the purposes of challenging the conduct of a liquidator under section 168(5) Insolvency Act 1986 and, accordingly, have standing to make an application under that sub-section.

2. The appeals are closely related and arise from two applications dated 6 February 2019 and 12 February 2019 respectively, which have been referred to as the Liquidation and the Bankruptcy Applications. Amongst other things, Mr and Mrs Brake sought to set aside a sale of certain interests in a property known as West Axnoller Cottage (the "Cottage") and an adjoining strip of land, and have their bid for the Cottage, made in their capacity as trustees of the Brake Family Settlement (the "Settlement"), accepted instead of that of Chedington Court Estate Limited ("Chedington"), the only active Respondent in these appeals. Alternatively, they sought an order that the interests in the Cottage be sold under the direction of the court. Chedington's ultimate owner is a Dr Geoffrey Guy ("Dr Guy"). The Brakes are the First and Second Appellants in both the Liquidation and the Bankruptcy Appeals in their capacity as trustees of the Settlement. They are Third and Fourth Appellants in the Bankruptcy Appeal, in their personal capacities. The Third – Seventh Appellants in the Liquidation Appeal, together referred to as the "Unsecured Creditors", were joined as applicants in the Liquidation Application on 13 March 2019.

3. The transactions in relation to the Cottage and the strip of land took place in late 2018 and early 2019 and involved both the Brakes' trustee in bankruptcy at that time, Mr Swift (the First Respondent in the Bankruptcy Appeal and the Third Respondent in the Liquidation Appeal), and Messrs Lowes and Toone (the First and Second Respondents in the Liquidation Appeal), the joint liquidators of a partnership known as "Stay in Style", in which the Brakes had an interest (the "Partnership").

4. By an order of 3 March 2020, HHJ Paul Matthews, sitting as a judge in the High Court, struck out substantial parts of the Bankruptcy Application and the entirety of the Liquidation Application. He did so in relation to the Bankruptcy Application, on the basis that the Brakes had no standing to seek the relief claimed under section 303(1) Insolvency Act 1986 whether as bankrupts or trustees of the Settlement. In relation to the Liquidation Application, he did so on the basis that neither the Brakes as trustees of the Settlement, nor the Unsecured Creditors, had standing for the purposes of section 168(5) Insolvency Act 1986. See [2020] EWHC 537 (Ch) in relation to the Bankruptcy Application (the "Bankruptcy Judgment") and [2020] EWHC 538 (Ch) in relation to the Liquidation Application (the "Liquidation Judgment"). The judge gave permission to appeal his decisions.

5. Mr and Mrs Brake appeal the judge's order in relation to the Bankruptcy Application in their personal capacity as former bankrupts and as trustees of the Settlement. Those parts of the order relating to the Liquidation Application are appealed by the Unsecured Creditors and by the Brakes as trustees. Neither Mr Swift, the Brakes' former trustee in bankruptcy, nor the joint liquidators of the Partnership took part in the hearing before

the judge, nor were they represented before us. Only Chedington, the successful bidder for the Cottage and the adjoining strip of land, was represented.

Background

6. These appeals arise against a very complex factual background in which there are a number of long running and hostile sets of proceedings between the parties (and between the Brakes and Dr Guy/Chedington, in particular) in relation to the ownership and occupation of the Cottage. The essential background details are as follows. In February 2010, seeking investment in their luxury holiday lettings and wedding venue business, the Brakes entered into the Partnership with Patley Wood Farm LLP ("PWF"), the investment vehicle of a Ms Brehme. In April 2010, the Cottage was acquired by the Partnership and registered in the names of the Brakes and Ms Brehme, who held it on trust for the Partnership. At that time, Mrs Brake was already the registered and beneficial owner of the adjoining strip of land, having purchased it in 2006. Disputes arose between the partners which were referred to arbitration.

7. In December 2012, whilst that arbitration was on foot, the Brakes issued separate proceedings in the High Court against Ms Brehme and PWF. As amended, the Brakes' claim sought the transfer of the Cottage from the Partnership to the Brakes in their personal capacity, and included a claim in proprietary estoppel.

8. The arbitration concluded in 2013 with a final award in favour of PWF, a costs order against the Brakes and the dissolution of the Partnership. In March 2015, having failed to pay the costs awarded in the arbitration, the Brakes were adjudicated bankrupt. The Brakes' interest in the Cottage (through their High Court claim) and Mrs Brake's interest in the adjoining strip of land vested in Mr Swift as their trustee in bankruptcy. In May 2017 the Partnership was put into liquidation.

9. Earlier the same year (in February 2017), Chedington had acquired Sarafina Properties Limited. This company owned the mansion and surrounding farmland which were the premises at which the wedding and the luxury holiday lettings businesses were conducted and were adjacent to the Cottage.

10. As I have already mentioned, the transactions which are central to these proceedings took place in late 2018 and 2019. Events surrounding the transactions are in dispute between the parties. For the purposes of the Bankruptcy and Liquidation Applications and, therefore, for the purposes of these appeals, however, it is necessary to proceed on the basis of the Appellants' pleaded case.

11. It is alleged that in around December 2018, Mr Swift colluded with Dr Guy/Chedington and the joint liquidators of the Partnership so that Chedington could purchase the available interests in the Cottage and occupy it before 17 January 2019, when eviction proceedings brought by Dr Guy against the Brakes were due to be heard, thereby denying the Brakes the opportunity to purchase the Cottage themselves, undermining their claims for re-vesting of their beneficial interest in the Cottage pursuant to section 283A Insolvency Act 1986 and facilitating their eviction.

12. On 18 December 2018, Mr Swift, as the Brakes' trustee in bankruptcy, sold the strip of land adjacent to the Cottage along with such rights as he had to horses and furniture owned by the Brakes to Chedington for an aggregate sum of £102,000. These sales

were carried out privately, without informing the Brakes or offering them the chance to bid, and allegedly contrary to marketing advice.

13. On the same date, the joint liquidators of the Partnership invited bids for the Partnership's interest in the Cottage from Dr Guy and Mrs Brake. The bids were required to be made by 21 December 2018 and were subject to certain conditions. Amongst other things, they were required to be made subject to contract only (conditional offers being prohibited) and needed to state the purchaser or vehicle by which the Cottage was to be acquired. Chedington submitted a bid of £500,000 (subject to conditions) on 20 December 2018, and the following day the Brakes (in their capacity as trustees of the Settlement) made a bid of £476,000 which has been described as a cash offer.

14. The liquidators accepted Chedington's bid (subject to contract) but did not reach an agreement for the sale. Instead, it is alleged that Mr Swift and Chedington secretly entered into an agreement in order to facilitate Chedington's purchase of the Cottage. The terms of Mr Swift's role in facilitating these transactions were set out in a letter of engagement from his firm (Moore Stephens (South) R&I LLP) to Chedington dated 10 January 2019. This provided that Chedington would pay to Moore Stephens a sum of £4,000 (plus VAT) in legal costs and a further facilitation fee, comprising a one-off payment of £30,000 (excluding VAT) and a further £3,000 per month until full registration of the transfer of the Cottage to Chedington. Under this agreement, one third of the fee was to be made available to the creditors and two thirds was to be paid to the trustee in bankruptcy in respect of the time spent progressing the transactions.

15. On 10 January 2019, allegedly having borrowed money from Chedington in order to do so, Mr Swift made a bid of £500,000 for the Partnership's interest in the Cottage, which was accepted by the liquidators that day. Thereafter, under the agreements dated 15 January 2019 between Mr Swift, the joint liquidators and Chedington, the joint liquidators sold their interest in the Cottage to Mr Swift and Mr Swift immediately sold on all the interest that he then held in the Cottage to Chedington.

16. The Brakes plead that Mr Swift's conduct in the bidding process was unlawful because he: hired out his statutory powers to Chedington; borrowed money from Chedington in order to make the nominee bid without any power to do so; bought into the bankruptcy estate and immediately sold his resulting interests in the Cottage (again without power to do so); and failed to inform the Brakes or invite them to bid. More broadly, they allege that Mr Swift acted deliberately to conceal the transactions from them.

17. Further, on 15 January 2019 (the same day as the joint liquidators' sale of the Cottage to Mr Swift and the back-to-back sale to Chedington), Mr Swift granted Chedington a licence to occupy the Cottage (the "Licence"). This stipulated that Chedington (i) could only use it for one permitted use, as a residence; and (ii) would not have exclusive possession but would occupy the Cottage in common with Mr Swift.

18. The Brakes allege that the Licence was an ineffective sham on various grounds, including that the back-to-back agreements did not provide Mr Swift with any legal occupation rights, and that any rights were subject to the Brakes' occupation rights.

19. Mr Swift also produced a "to whom it may concern" letter of notice on the same date (the "Notice"), which he provided to Dr Guy. The Notice asserted that Mr Swift had

purchased title, rights and interests in the Cottage; was entitled to use reasonable, lawful and appropriate measures to enter and secure the property; and, by virtue of the Licence he had granted to Chedington, its employees and agents were authorised to enter the property. On 18 January 2019, Dr Guy's employees entered the Cottage, allegedly took boxes of the Brakes' personal and confidential correspondence and passed them to Mr Swift, changed the locks and installed CCTV cameras.

The Strike Out Applications

20. On 30 January 2020, Chedington applied to strike out the Liquidation Application and aspects of the Bankruptcy Application on the basis that the applicants lacked standing under sections 168(5) and 303(1) Insolvency Act 1986 respectively. The strike out applications were heard on 2 and 3 March 2020 and granted by the order of 3 March 2020 to which I have already referred.

21. The remainder of the Bankruptcy Application comprised a claim regarding the re-vesting of the Cottage in the Brakes pursuant to section 283A Insolvency Act 1986. The Brakes argued that the Cottage was their principal residence and accordingly – three years having passed since the date of their bankruptcies – beneficial interests in the property should re-vest in them under section 283A. This claim proceeded to trial before HHJ Matthews in May 2020, and judgment was handed down on 13 July 2020, dismissing the claim. See *Brake & Anr v Swift & Anr* [2020] EWHC 1810 (Ch). Since the hearing in this matter, the Brakes' application for permission to appeal has been dismissed.

The Bankruptcy Judgment

22. In relation to the Bankruptcy Application, in an ex tempore judgment, the judge held that the Brakes in their capacity as trustees of the Settlement were merely unsuccessful bidders for the Cottage and were outsiders to the bankruptcy. As such, they had no legitimate interest in the relief sought and therefore had no standing to make an application under section 303(1) Insolvency Act 1986. See [19] – [21] of the Bankruptcy Judgment.

23. In respect of the Brakes' personal status as discharged bankrupts, applying the principles in *Deloitte & Touche v AG Johnson* [1999] 1 WLR 1605 and *In re A Debtor (No 400 of 1940) The Debtor v Dodwell* [1949] Ch 276 the judge decided that, in the absence of fraud, a bankrupt may only challenge the decisions of his/her trustee in bankruptcy under s.303(1) Insolvency Act 1986 where there is likely to be a surplus in the estate. See [21] - [22] of the Bankruptcy Judgment. It was common ground that this was not likely and as the Brakes had not pleaded fraud in the common law sense, the judge considered that they did not have standing. He also noted that the bidding took place in the liquidation of the Partnership, not the bankruptcy, and thus prejudice to the Brakes *as bankrupts* arising from that process should be addressed in the Liquidation Application. See the Bankruptcy Judgment at [25]. Finally, he found that any potential exception to the *Dodwell* rule for fraud was limited to fraud in the common law sense, which the Brakes had not pleaded. See the Bankruptcy Judgment at [26].

The Liquidation Judgment

24. In relation to the Liquidation Application, in a further ex tempore judgment, the judge took a similar approach. He stated that as trustees of the Settlement, the Brakes are strangers to the liquidation of the Partnership and as trustees their only interest was in acquiring the Cottage through the bidding process. See the Liquidation Judgment at [6] - [7]. Applying *Re Edennote Ltd, Tottenham Hotspur plc & Ors v Ryman & Anr* [1996] 2 BCLC 389 and *Mahomed v Morris* [2000] BCLC 536, he held that denial of an opportunity to acquire an asset from a liquidation is not a legitimate interest sufficient to establish standing under s.168(5) Insolvency Act 1986. See the Liquidation Judgment at [4], [7] - [8]. Further, he held that the fact that Mrs Brake's son, purportedly a previous occupant of the Cottage, is a beneficiary of the Settlement did not assist the Brakes in establishing an interest, particularly as he is only a discretionary beneficiary. See the Liquidation Judgment at [9] - [10].

25. The judge also rejected the Brakes' submissions that because the Cottage is allegedly their family home, standing to challenge the liquidators' decisions arose under Article 8 ECHR. He noted that he was not aware of any authority that Article 8 rights are enjoyed by a trust; and in any event any Article 8 rights engaged in this case could only be the rights of the Brakes *as individuals* to the Cottage (as their home), not their rights as *trustees*. See the Liquidation Judgment at [11] - [12].

26. The judge also considered *Re Condon, ex parte James* (1874) LR 9 Ch App 609, in which it was held that the court should not allow its officers to behave in an unfair manner. He found this could not justify interference in the insolvency process by outsiders to that process because it would open the floodgates to all manner of interference and be very resource-intensive for the court. If the Brakes were aggrieved by the manner in which the liquidators conducted the bidding process, other common law remedies were available to them; and no further protection should be awarded to outsiders to the liquidation simply because the offeror was a trustee in bankruptcy and therefore an officer of the court. See the Liquidation Judgment at [13] - [14].

27. The judge turned next to the Unsecured Creditors. Chedington accepted that they are creditors of the Partnership, and thus not outsiders to the liquidation. See the Liquidation Judgment at [15]. However, the judge decided on the evidence before him that Mrs Brake was funding the Unsecured Creditors' claim and had instructed their lawyers, and concluded that they were only pursuing the Liquidation Application for the benefit of the Brakes, not themselves. See the Liquidation Judgment at [16] - [18] and [23] - [24]. Applying *Walker Morris v Khalastchi* [2001] 1 BCLC 1, he concluded that those findings of fact were sufficient to establish the Unsecured Creditors had no legitimate interest and, therefore, had no standing to bring the Liquidation Application. He stated that it was not necessary to find that the Unsecured Creditors had interests that were actually *adverse* to the liquidation of the Partnership in order to come to that conclusion. See the Liquidation Judgment at [19].

28. On that basis, the judge concluded that neither the Brakes nor the Unsecured Creditors had standing in the Liquidation Application and struck it out accordingly. See the Liquidation Judgment at [24].

Grounds of Appeal

29. The Appellants' grounds of appeal are numerous and are best addressed in the context of the discussion below. However, in summary, in relation to the Bankruptcy Judgment,

the Brakes contend that the judge was wrong to apply the *Dodwell*, *Deloitte*, *Edennote* and *Mahomed* cases in order to delimit the ability of a bankrupt to challenge the conduct of a trustee in bankruptcy under section 303(1) Insolvency Act 1986 and to hold that a bankrupt has no standing unless he can show that there is a reasonable prospect of surplus in the estate, particularly in the light of Mr Swift's alleged wrongdoing. It was wrong to assume that there were no allegations of bad faith and the judge failed to give any or sufficient weight to Mr Swift's conduct, the supervisory nature of the court over its officers and the policy of the Insolvency Act 1986 to provide certainty and protection to the bankrupt and his family in respect of the re-vesting of his residence and the rehabilitation of the bankrupt. Furthermore, in relation to the Brakes as trustees of the Settlement, it is said that the judge was wrong to treat them as having no interest in preserving the re-vested residence and as if they had no connection with the bankrupts and their interests in securing the family home for occupation by the family.

30. In relation to the Liquidation Judgment it is said that the judge: wrongly applied the principles in the *Edennote* and *Mahomed* cases to delimit the scope of section 168(5); failed to give any or sufficient weight to the fact that having been invited to participate in the bidding process for the Cottage by the liquidators, the Brakes were entitled to be treated fairly and that the court has a supervisory role over that process; and was wrong to treat them as trustees as if their interests as bidders were divorced from those of the Brakes themselves.

31. The Unsecured Creditors contend that if the judge's decision that the Brakes lacked standing in the Liquidation Application is overturned in this appeal, his decision that they were advancing the case of a party with no legitimate interest in the liquidation would no longer apply and his ruling in relation to them should be reversed. Their second ground of appeal is that the judge was wrong to find that the fact that the Brakes were funding them and providing instructions to their counsel was determinative of whether they had a legitimate interest for the purposes of section 168(5). He ought to have asked whether they had an interest in the relief sought and whether that interest was adverse to the interest of the estate.

Sections 168(5) and 303(1) Insolvency Act 1986

32. Before turning to the appeals, it is important to have sections 168(5) and 303(1) of the Insolvency Act 1986 in mind. They are in similar form. Section 168(5) is headed "Supplementary powers" and is as follows:

> ". . .
>
> (5) If any person is aggrieved by an act or decision of the liquidator, that person may apply to the court; and the court may confirm, reverse or modify the act or decision complained of, and make such order in the case as it thinks just."

Section 303(1) is headed "General control of trustee by the court" and is in the following form:

> "If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt's estate, he may apply to the court; and on such an application the court may confirm,

> reverse or modify any act or decision of the trustee, may give him directions or may make such other order it thinks fit."

33. Mr Davies QC, who appeared with Ms Brown on behalf of the Brakes, accepted that "dissatisfied" in section 303(1) has the same meaning as "aggrieved", a term which was used in the forerunners to that section and is also used in section 168(5). As Nourse LJ explained in the *Edennote* case at 393g-i, in the context of an application under section 168(5), the phrase "any person aggrieved" which was used in section 20 Bankruptcy Act 1869, was mere shorthand for "any creditor, debtor or other person aggrieved".

34. There is considerable overlap, therefore, between sections 168(5) and 303(1). Furthermore, the background which forms the basis of the Unsecured Creditors' and the Brakes' complaints is essentially the same. For the sake of clarity, however, I shall consider the appeals separately beginning with the appeal in relation to the Bankruptcy Judgment which was the first in time.

Bankruptcy Appeal

35. As I have already mentioned, the Bankruptcy Application was made by the Brakes both in their personal capacity as former bankrupts and in their capacity as trustees of the Settlement. For the sake of convenience, I will consider their position as trustees first.

Standing as Trustees of the Settlement

36. Did the Brakes as bidders for the Cottage, in their capacity as trustees of the Settlement, have standing for the purposes of section 303(1) Insolvency Act 1986? Are they persons who were "dissatisfied . . ." for the purposes of that section? The judge's reasoning in this regard was very brief. First, having quoted from the *Edennote* and *Mahomed* cases, the judge noted that Chedington submitted that the principles in those cases, which were concerned with challenges to the conduct of liquidators under section 168(5), applied equally to a trustee in bankruptcy under section 303(1). See [10] – [12] of the Bankruptcy Judgment. He went on to set out Chedington's contention that the *Edennote* and *Mahomed* cases were against the Brakes and that they had been merely denied the opportunity to acquire the Cottage and had no standing to complain about the conduct of the trustee in bankruptcy. See [14] of the Bankruptcy Judgment. Thereafter, he pointed out that it was important to distinguish between the Brakes in their personal capacities as bankrupts and in their capacity as trustees of the Settlement and noted that the bankrupts, as such, were not bidders. See [19] and [20] of the Bankruptcy Judgment. He went on to conclude that:

> "19. . . . As trustees of the family settlement, the Brakes are essentially outside the insolvency process, because they are the trustees of property for the benefit of other people. It is a matter of chance that the same persons happen to be trustees of the settlement as happen to be the bankrupts themselves."

37. The Brakes appeal on the basis that it was wrong to treat them in their capacity as trustees as having no interest in preserving the re-vested residence and/or as if they had no connection to the bankrupts and their interest in securing the family home for occupation by the family.

38. Put narrowly in this way, I cannot see that this ground has any prospect of success. Mr Sutcliffe QC, who appeared with Mr Day on behalf of Chedington, emphasised that the Brakes as trustees were not the bankrupts and their two capacities should not be elided. Furthermore, as trustees no debt was owed to them in the bankruptcy and there was no evidence that they had any other interest in the bankruptcy estate.

39. As the judge pointed out, it was a matter of chance that the Brakes were also the trustees of the Settlement. As trustees, they were not directly interested in any interest in the Cottage and the re-vesting was a matter for the Brakes in their personal capacities. The Settlement is a discretionary trust with a wide class of potential beneficiaries. The Brakes themselves are expressly excluded from any beneficial interest. It seems to me, therefore, that to suggest that in their capacity as trustees, the Brakes had an interest in preserving the "re-vested residence" or in supporting the Brakes' personal interest in retaining the Cottage as a family home, is to seek to elide the Brakes' personal interests with that of the Settlement.

40. Does their entry into the bidding process make a difference? Did they become persons "dissatisfied" for the purposes of section 303(1) Insolvency Act 1986, as a result? As I have already mentioned, Mr Davies, on behalf of the Brakes, accepted that "dissatisfied" in section 303(1) has the same meaning as "aggrieved" which is used in section 168(5). It follows that the authorities relating to one provision are relevant to the other and vice versa.

41. Mr Davies submits that the Brakes were invited to bid for the Cottage, in a process which was unfair, unlawful and unconscionable and with which Mr Swift was involved, and that accordingly, they are "persons dissatisfied" for the purposes of section 303(1). In particular, Mr Davies drew our attention to passages in *Lehman Bros Australia Ltd v MacNamara & Ors* [2020] EWCA Civ 321. That was a case in which the applicant company which was in liquidation was an unsecured creditor of the respondent company which was in administration. The companies entered into a claim determination deed pursuant to which the applicant's claim as a creditor was agreed at £23.35m. Due to a clerical error by the respondent's administrators the figure was too low. Nevertheless, the deed was executed and the sum was paid before the error was noticed. The administrators acknowledged the error but relied upon a release clause in the deed to decline to correct it. The liquidators of the under-paid creditor company applied to the court for directions that the administrators increase the figure either under the court's inherent jurisdiction to control the conduct of its officers or the court's discretion under paragraph 74 of Schedule B1 to the Insolvency Act 1986.

42. David Richards LJ, with whom Newey and Patten LJJ agreed, held that the figure should be increased whether under the inherent jurisdiction of the court or paragraph 74 of Schedule B1. David Richards LJ set out a lengthy exposition of the case law, including the principle in *Ex p James* at 614 regarding the inherent jurisdiction of the court in relation to the conduct of its officers. He stated, amongst other things, as follows:

> "35. As a public authority and given its role in society, the court is expected to apply standards to its own conduct which may go beyond bare legal rights and duties. A specific example is a sale of property made by the court in accordance with its powers: *Else v Else* (1872) LR 13 Eq 196. Trustees in bankruptcy, liquidators in compulsory liquidations and

> administrators are all officers of the court. In the case of administrators, this is expressly provided by paragraph 5 of Schedule B1. As such, they are acting on behalf of the court and they will accordingly be held to these standards by the court.
>
> . . .
>
> 68. While the formulation of the test in the authorities, involving so many phrases with perhaps different shades of meaning, has something of the quality of dancing on pinheads, resolution of this issue lies in going back to the fundamental principle underlying the jurisdiction. The court will not permit its officers to act in a way that it would be clearly wrong for the court itself to act. That is to be judged by the standard of the right-thinking person, representing the current view of society. If one were to pose the question "would it be proper for the court to act unfairly?", only one answer is possible. It is interesting to note that fairness was introduced by some judges in the cases dealing with *Ex p James* at a comparatively early stage, but in general "fairness" as a test in substantive, as opposed to procedural, law has grown significantly since many of those cases were decided. In so far as it involves a broader test than, say, dishonourable, it reflects a development in the standards of conduct to be expected of the court and its officers.
>
> 69. The application of the principle in *Ex p James* in any case will critically turn on the particular facts of that case.
>
> . . .
>
> 81. The office of administrator is a statutory creation. An administrator is empowered to take only those steps for which there is express or implied statutory authority. If, therefore, an administrator acted in a manner for which there was no such authority, he would be acting unlawfully and an aggrieved creditor would not need to rely on paragraph 74 [of Schedule B1]. Equally, if an administrator exercised a power in bad faith or for an improper purpose, it would be an unlawful exercise of the power. By contrast, paragraph 74(5) provides that a claim may be made under paragraph 74(1) whether or not the action in question is within the administrator's powers under Schedule B1."

Mr Davies submits that it is clear that at the very least, Mr Swift's involvement in the bidding process fell below the standards of an officer of the court. He goes as far as to say that Mr Swift's conduct was outwith his statutory powers and, therefore, is unlawful in many respects and that, accordingly, the Brakes as bidders are persons who are "dissatisfied" for the purposes of section 303(1).

43. Mr Davies also submits that the judge was wrong to rely upon the *Edennote* and *Mahomed* cases in order to conclude that the Brakes as trustee bidders were outsiders to the bankruptcy and, accordingly, were not "dissatisfied" for the purposes of section 303(1). He relies instead upon the approach of Sales J (as he then was) in *Re Michael (A Bankrupt) Hellard v Michael & Anr* [2010] BPIR 418 and that of Registrar Baister in *Woodbridge v Smith* [2004] BPIR 247.

44. The *Edennote* case was concerned with section 168(5) Insolvency Act 1986 rather that section 303(1). The liquidator of Edennote Ltd had assigned its rights in an action to Mr Venables for £7,000 and 10% of the net proceeds of the action, despite objections that more could have been obtained. Mr Venables was both an unsecured creditor and a contributory of Edennote Ltd. The applicants who were also unsecured creditors applied to set aside the assignment on the ground that it was an improper exercise of the liquidator's power of sale since he had had regard only to the interests of Mr Venables and not those of the creditors as a whole. At 393 d-g, Nourse LJ, with whom Millett LJ agreed, stated as follows:

> "It is neither necessary nor desirable to attempt a classification of those who may be a person aggrieved by an act or decision of a liquidator in a compulsory winding up. On the footing that the claims of secured creditors have been or will be satisfied, it is perfectly clear that unless and until there proves to be a surplus available for contributories (a most improbable event), 'persons aggrieved' must include the company's unsecured creditors. If the liquidator disposes of an asset of the company at an undervalue, their interests are prejudiced and each of them can claim to be a person aggrieved by his act. Such was the position of the applicants here. Mr Rayner James submitted that they brought the application not as creditors but as persons who had not been given an opportunity to make an offer for the asset. In the latter capacity alone, like any other outsider to the liquidation, they would not have had the locus standi to apply under section 168(5). But even if that were wrong, they would still have been able to apply in a dual capacity."

45. Nourse LJ went on to consider whether Sir John Vinelott at first instance had applied the correct criterion in relation to the substantive issue, namely, whether the assignment should have been set aside. It was accepted that the correct approach was to be found in a series of cases including the *Dodwell* decision and that the authorities referred to propounded the following test: "(fraud and bad faith apart) that the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it. . . ." See 394 b-d. Nourse LJ went on at 395a to hold that in doing so, the judge had applied the correct test.

46. The *Mahomed* case was also concerned with standing for the purposes of section 168(5) Insolvency Act 1986 and the appropriate substantive test to be applied. Peter Gibson LJ dealt first with the preliminary question of standing for the purposes of section 168(5) and decided that the application under that section had been misconceived and that the appeal should fail for lack of standing. He went on, nevertheless, to consider the substantive point raised on the permission to appeal and in doing so, impliedly accepted that but for the exception in *Mitchell v Buckingham International plc* [1998] 2 BCLC 369, (which is not relevant for our purposes) the appropriate test for justifying interference with the decisions of a liquidator is the perversity test in the *Edennote* case. See *Mahomed* at [31] per Peter Gibson LJ.

47. In relation to standing for the purposes of section 168(5), Peter Gibson LJ held at [24] and [26], as follows:

> "24. . . . The words 'any person … aggrieved' are very wide at first sight and are not on their face limited to creditors and contributories. The

provision goes back a long way. It first appeared as s. 24 of the Companies (Winding up) Act 1890. It was borrowed from s. 90 of the Bankruptcy Act 1883 which was enacted in part to remedy the injustice created by the disability of the bankrupt to sue, even where he had been gravely wronged by his assignee (see *Williams and Muir Hunter on Bankruptcy* (19th edn, 1979, Sweet & Maxwell), p. 426). With a solitary exception no authority has been cited to us where a person not being a creditor or contributory has been allowed to apply under the subsection. That exception is *Re Hans Place Ltd* [1992] BCC 737. In that case a landlord was held able to challenge under s. 168(5) the exercise by a liquidator of the power conferred on liquidators by s. 178 of the Insolvency Act 1986 to disclaim onerous property such as a lease. But there must be some limit to the class of persons who can complain under s. 168(5). An example is provided in *Re Edennote Ltd* [1996] BCC 718. Nourse LJ (with whom Millett LJ agreed) said (at p. 721G) of applicants under s. 168(5) who were both unsecured creditors and persons denied an opportunity to purchase an asset of a company in compulsory liquidation sold by the liquidators:

> 'In the latter capacity alone, like any other outsider to the liquidation, they would not have had the locus standi to apply under s. 168(5).'

. . .

26. It could not have been the intention of Parliament that any outsider to the liquidation, dissatisfied with some act or decision of the liquidator, could attack that act or decision by the special procedure of s. 168(5) … the mere fact that the act or decision is that of a liquidator in respect of an asset of the company the proceeds of which would be available for unsecured creditors is not enough, as can be seen from the example of the persons denied an opportunity to buy an asset of the company from the liquidators in *Re Edennote*. . . ."

48. *Hellard v Michael* was concerned with an application made under section 303 rather than section 168(5) Insolvency Act 1986. The question of the standing of the applicant under section 303(1), however, did not arise. The application was made by the bankruptcy trustee himself under section 303(2) Insolvency Act 1986. Sales J was concerned, therefore, purely with the substantive application itself. The bankruptcy trustee applied for directions in relation to the disposal of the principal asset in the estate, which was a counterclaim in an action commenced against the bankrupt. It was clear that any realisation would be used to meet the petitioning creditor's costs and legal costs, that the trustee in bankruptcy was not going to receive any settlement of his costs and that there was no prospect of any recovery for the creditors. The trustee in bankruptcy offered the counterclaim for assignment to the bankrupt and the claimant in the action and, ultimately, accepted the claimant's bid. The bankrupt argued that the bidding process was unfair because he had been unaware that the trustee's costs of the assignment and the application, which the successful bidder would be required to bear, had been capped at £5,000.

49. Sales J gave directions for a further bidding process and stated:

> "8. The usual test is that laid down in *Re Edennote Ltd, Tottenham Hotspur plc and Others v Ryman and Another* [1996] 2 BCLC 389, which concerned the actions of the liquidator of a company. It is common ground that the same test applies in relation to the actions of a trustee in bankruptcy in a case of personal insolvency. The test for intervention by the court was put in this way by the Court of Appeal, as summarised in the head note:
>
> > "Fraud and bad faith apart, the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable person would have done it."
>
> The basic approach is that the court should be very slow to second-guess commercial decisions made by a trustee in bankruptcy in the exercise of the statutory discretion conferred on him by section 305(2) of the Insolvency Act.
>
> 9. In my view, however, the test in *Re Edennote Ltd* does not exhaustively state the grounds for intervention by the court. As is clear from the provisions of the Insolvency Act 1986, the court retains a general supervisory jurisdiction in respect of trustees in bankruptcy to ensure they behave properly and fairly as between persons affected by their decisions.
>
> . . .
>
> 36. . . . in light of the unfairness to Mr Michael [the bankrupt] of the way in which the first bid process was conducted, it would, in my view, be utterly unreasonable (within the terms of the Court of Appeal's judgment in *Re Edennote Limited*) for the trustee now to proceed to give effect to that bid process."

50. In *Woodbridge v Smith* [2004] BPIR 247, Registrar Baister held that the wife of a bankrupt had standing to challenge the trustee in bankruptcy's fees for the purposes of section 303(1), in circumstances in which the husband's debts had been repaid (trustee fees aside) and an annulment of the bankruptcy was being sought. The Registrar held:

> "6. In my judgment the words of s 303 of the 1986 Act ought indeed to be construed widely . . . Mrs Woodbridge clearly satisfies the test and can demonstrate a substantial interest in the bankruptcy, the conduct of which may not as yet have affected her adversely but will certainly do so if Mr Smith applies to sell the house in which she is living.
>
> 7. I do not accept Mr Hanham's submission that the trustee's fees are not Mrs Woodbridge's concern. In circumstances such as these it is artificial to draw too fine a distinction between husband and wife. . . . Mr Woodbridge's apparent obligation to pay the trustee's fees in the sum

> being claimed and the consequential danger to the property which is Mrs Woodbridge's home are, in my view, factors which give her a substantial interest in the conduct of the bankruptcy and which adversely affect her enjoyment of that property now or will do so in the future."

51. Mr Davies also relied upon *Re Dennis Michael Cook* [1999] BPIR 881 as an illustration of the breadth of the term "dissatisfied" in section 303(1). In that case, the former solicitor of a bankrupt applied to the court for directions under section 303(1) Insolvency Act 1986. The Serious Fraud Office was investigating the bankrupt's affairs, and sought information from his trustee in bankruptcy, who authorised the applicant solicitor to provide all relevant documents to the SFO. The bankrupt threatened proceedings against the former solicitor for any disclosure of privileged documents and so the latter sought directions from the court in respect of the trustee's previous authorisation. Neither the bankrupt nor the trustee was represented at the hearing of the application.

52. Stanley Burnton QC (sitting as a deputy judge of the High Court) decided that the applicant solicitor was a "person dissatisfied" under the meaning of s.303(1) Insolvency Act 1986. He noted that the statutory precursors to s.303(1) had referred to a person "aggrieved" rather than "dissatisfied" and held at 883 that "[I]t may be that no change of substance was intended by the change in wording, but 'dissatisfied' is certainly no narrower than 'aggrieved', and is arguably wider." The judge quoted from the Privy Council case *Attorney General of the Gambia v N'Jie* [1961] 2 AC 617 at p.634, in which Lord Denning noted that the words "person aggrieved" were words of "wide import which should not be given a restrictive interpretation. They do not include, of course, a mere busybody who is interfering with things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests". The Privy Council decision in the *Deloitte* case concerning standing, to which I refer in detail below, was not cited and the decision on the substantive issue of the vesting of the right to waive privilege in the trustee in bankruptcy has since been overturned by the Court of Appeal in *Shlosberg v Avonwick Holdings Ltd* [2017] Ch 210.

53. Mr Davies also referred us to a number of authorities relating to foreign statutes which were set out in a lengthy schedule. He mentioned three cases in particular concerning frustrated bidders for property in an insolvency estate. First, *Hickox v Brilla* [2015] UKPC 30 in which the Privy Council upheld a court order authorising a liquidator to ignore a bid submitted after the bidding deadline had passed and accept a lower but compliant bid instead because the liquidators had to act "properly" (see Lord Neuberger at [46]).

54. Second, *In Re Tounisidis, Druker v Dandurand* (1985) 61 CBR 273, in which the Quebec Superior Court (in Bankruptcy) considered concurrent applications brought by a frustrated bidder and the trustee in bankruptcy, both of which concerned an auction conducted by the latter. The trustee had offered the bankrupt's farm for sale, and the applicant had made the highest bid. However, shortly before his bankruptcy, the bankrupt had agreed to sell the farm to his brother, so the trustee invited the brother to match the highest bid. He did so, and the trustee sought to convene another auction between the brother and the highest bidder. The latter applied to the court for a declaration that his original high bid be accepted without a further auction, and the

trustee applied for directions. The court ordered the trustee to accept the highest bid. It recognised a general principle that the highest tender should be accepted, and any procedure which allowed "shopping against tenders" should be discouraged as inhibiting the free bidding process.

55. Third, Mr Davies mentioned *Re Golden Shield Resources Ltd* (1990) 79 CBR 172, a case in the Supreme Court of Ontario, in which the applicant had sought to purchase equipment belonging to a bankrupt company from its trustee. The trustee reneged on the sale agreement as it did not have authority to enter into it, and the applicant sought the court's permission under s. 215 of the Federal Bankruptcy and Insolvency Act RSC 1985 to bring a claim for damages against the trustee for breach of contract and breach of warranty or authority. Steele J refused the application on the basis that the claim should have been made in the bankruptcy court under s.37 of that Act, which is in similar terms to section 303(1) Insolvency Act 1986 and provides that:

> "Where the bankrupt or any of the creditors or any other person is aggrieved by an act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just."

56. The judge found at [5] that the applicant clearly constituted "any other person" within the meaning of the Act, and the Canadian authorities indicated the bankruptcy court had jurisdiction to deal with this kind of complaint. At [6], Steele J noted that an improper act of a trustee could delay repayment of creditors, and thus (where possible) it was appropriate that challenges to its conduct were determined not in ordinary proceedings, but in the more expeditious bankruptcy proceedings:

> "Where the allegation relates entirely to the acts of the trustee within the Act, generally it would be inappropriate to grant leave to commence an action in the regular course. The appropriate remedy is for the moving party to apply for a trial of an issue within the bankruptcy court."

Conclusions

57. There can be little doubt that the court will grant substantive relief whether under section 303(1) or section 168(5) Insolvency Act 1986 to put a bidding process right or to require the process to be repeated where the trustee or liquidator has acted unfairly or outside his powers. It is also beyond question that the court has power to supervise the conduct of its officers. Those propositions do not assist, however, with the question of whether an applicant who is a mere bidder has standing under section 303(1) to complain about the process.

58. In my judgment, the judge was right to apply the dicta in the *Edennote* and *Mahomed* cases. As was common ground in the *Hellard* case, it is well established that the same test for intervention by the court applies in relation to both the actions of a liquidator and those of a trustee in bankruptcy. Similarly, there is no reason to consider that the same restrictions on the standing of outsiders to a liquidation under section 168(5) should not apply equally to the standing of outsiders to a bankruptcy under section 303(1). As Peter Gibson LJ put it in the *Mahomed* case, it could not have been the intention of Parliament that any outsider to the liquidation, dissatisfied with some act or decision of the liquidator, could attack that act or decision by the special procedure,

in that case, under section 168(5). The same must be true of the special bankruptcy procedure under s.303(1).

59. It seems to me that the decision in *Hellard* is of very little assistance to Mr Davies. The issue of standing whether for the purposes of section 303(1) or section 168(5) was not relevant and did not arise because the application was made by the trustee in bankruptcy himself under section 303(2). Furthermore, although Sales J (as he then was) took a broader view of the circumstances in which the court would intervene than that adopted in the *Edennote* case, he was not faced with a case in which the bidder was an outsider to the bankruptcy. It was the bankrupt himself who had bid and was complaining about the unfairness of the process.

60. The circumstances in the *Woodbridge* case were also far removed from those with which we are concerned. The bankrupt's wife quite clearly was interested in the level of the trustee in bankruptcy's fees. Furthermore, the *Deloitte* case in the Privy Council in which standing is considered and which I consider in more detail below, was not cited to the court in either *Woodbridge* or in *Re Dennis Michael Cook*.

61. In my judgment, the judge was right to find that the Brakes as trustees were strangers to the bankruptcy and had no direct interest in the Cottage or the Brakes' occupation of it, other than as bidders.

62. Further, none of the foreign authorities to which I have referred, save for the *Golden Shield* case, was concerned directly with the question of standing under equivalent legislation. As for *Golden Shield*, it is far from clear that the comments of a Canadian court regarding the policy considerations underpinning its domestic bankruptcy legislation have any resonance in this jurisdiction, particularly given the clear statements of the Court of Appeal in the *Edennote* and *Mohamed* cases on the standing of strangers to an insolvency.

63. Furthermore, it seems to me that it is of no assistance to seek to rely upon the jurisdiction of the court to supervise its officers, articulated most recently in the *Lehman* case. In order to invoke that jurisdiction in this context, it remains necessary to show that one has an interest in the bankruptcy itself and, therefore, has standing for the purposes of section 303(1). See the *Deloitte* case (at 1612). In their capacity as trustees of the Settlement, the Brakes were mere bidders with no direct interest in the bankruptcy itself, the Cottage, or their personal occupation of it.

64. It follows, from what I have already said, that I do not consider that the Brakes as trustees ceased to be outsiders to the bankruptcy and liquidation because of the invitation to bid. The invitation appears to have been contained in letters dated 18 December 2018, from BDB Pitmans LLP, acting on behalf of the joint liquidators to Dr Guy and Mrs Brake respectively. The substance of the letters was identical. The bidding process and the basis upon which bids should be made was set out in numbered points. The last point was that "the offer must state the purchaser or vehicle in which [West Axnoller] Cottage is to be acquired". In the circumstances, therefore, it cannot be said that the trustees of the Settlement were invited to bid. The invitation was made to Mrs Brake and she chose to use the Settlement as the potential purchaser. Having done so, she cannot avoid the legal consequences of having made the bid in a different capacity.

65. For all the reasons set out above, I would dismiss the Brakes' bankruptcy appeal in their capacity as trustees of the Settlement.

The Brakes in their capacity as former bankrupts

66. What of the Brakes in their personal capacity as former bankrupts? Section 303(1) itself expressly includes bankrupts in the list of those who may apply in relation to the acts and omissions of a trustee in bankruptcy. No point was taken as to whether "bankrupts" includes former bankrupts and in any event, it seems clear to me that they are included.

67. Is it sufficient, however, that the status of bankrupt is included expressly in section 303(1)? Mr Davies did not press this argument in his oral submissions and appeared to accept that there is a further requirement before a bankrupt can invoke section 303(1). Furthermore, the argument does not feature in the grounds of appeal. It is in Mr Davies' supplemental skeleton, however, and therefore I should mention it briefly.

68. The argument is based upon the recent decision of this court in *Fakhry and Fry v Pagden* [2020] EWCA Civ 1207. That case was concerned with the restoration of a company to the register under section 1029(2) Companies Act 2006, and, in particular, with standing in relation to a restoration application. David Richards LJ, with whom Newey and Floyd LJJ agreed, held that the appellant, a former member of the company, did have standing and stated as follows:

> "46. I deal first with the position of Mr Fakhry who, like Mr Grattan, is a member of each Company. Section 1029(2) sets out eleven categories of person who may apply for a restoration order, including a former member of the company ("former" because the company has been dissolved). In addition, it permits the application to be made by "any other person appearing to the court to have an interest in the matter" (emphasis added). A former member is, by virtue of that status alone, considered to be a person with a sufficient interest in the restoration of the company to be designated as a person who may make the application. If a restoration order is made, it will directly affect all the members. The company of which they were members will be revived and, if they were members at the date of dissolution, their status as such will also be revived. They will become again the owners of an asset, their shares in the company. . . They may indeed have many legitimate reasons to support or to oppose restoration. For the same reasons, it is clear that they are "directly affected" by a restoration order for the purposes of CPR 40.9 and so have standing to apply to the court to vary or set aside a restoration order."

69. It seems to me that David Richards LJ's reasoning related directly to section 1029(2) Companies Act 2006 and is not of general application. The former members of a company are intimately and directly involved with whether it should be restored to the register. If it is restored, they become the owners of an asset once again. The position of bankrupts under section 303(1) is entirely different. As Harman J explained in the *Dodwell* case, as long ago as 1949, the bankruptcy regime is based upon the principle that "the bankrupt is relieved of his debts and freed from the oppression of his creditors, but at a price which is that he is stripped of all his property, that property vesting in a person who . . . has been described as the trustee. . . . He is not a trustee of it for the bankrupt, but for the creditors, and the bankrupt till the bankruptcy process is worked

out has no further interest in the assigned assets. That is the price he pays for obtaining his discharge and for being freed from the fetters of his debts." See 240. Accordingly, it is settled law that a bankrupt needs to show more in order to question the conduct of the trustee in bankruptcy.

70. The real question, therefore, is what more is required in order to have standing under section 303(1)? As I have already mentioned, the judge relied upon the dicta in the *Deloitte* and *Dodwell* cases to reach the conclusion that the Brakes had no standing under section 303(1) because, in addition to being named in the statute, there must be a surplus in the estate in order for a bankrupt to have a legitimate interest in the relief sought. Mr Davies submits that the judge was wrong to apply the dicta in those cases. As I have already mentioned, however, he impliedly accepted that something more than a mere status as a bankrupt is necessary. The thrust of his submissions was that there is no need for a potential surplus in the bankruptcy, that other substantial interests were sufficient, and that the Brakes had such an interest as a result of Mr Swift's allegedly unconscionable and wrongful conduct. In particular, he pointed out that it was pleaded that Mr Swift's conduct was beyond his powers as a trustee in bankruptcy, that he had colluded with Chedington and Dr Guy and accordingly, to the extent that his powers had been exercised there was a fraud on a power, and that the Brakes had a direct interest, in particular, in the creation of the Licence.

71. Harman J considered the question of the extent to which a bankrupt could call into question the conduct of his trustee under the Bankruptcy Act 1914 in the *Dodwell* case. The debtor was adjudicated bankrupt in 1940 and was discharged in 1943. He owned a large number of small houses. Much of the property consisted of short term leaseholds and much of it was mortgaged. It was impossible to realise it at a reasonable figure and so the trustee carried on the management of the business for some years. In 1948 he proposed to sell the remaining properties and pay the creditors in full. At that stage, the bankrupt issued a motion complaining about the trustee in bankruptcy's administration of the estate. The question was whether the former bankrupt was a "person aggrieved" in the relevant section. There was no allegation of fraud or dishonesty. Having explained the nature of the bankruptcy regime, Harman J stated at 240 – 241, as follows:

> ". . . to what extent, if any can the bankrupt call the trustee in his bankruptcy to account for his management and disposition of the estate. The point, of course, can only arise where the bankrupt can show that there is, or will, or might (but for the trustee's action or inaction), be a surplus in the trustee's hands after satisfying in full all the claims of the creditors. Where, as in the vast majority of cases, the estate is insolvent, the bankrupt has clearly no interest in it and it matters not to him how it is administered, but the bankrupt has a statutory right to any surplus under s. 69 of the Act, and is, therefore, clearly concerned to increase, if he can, its amount.
>
> . . . there must be circumstances in which the court can interfere at the instance of a bankrupt to control the actions of the trustee: . . . I need not, I think, attempt to define what these circumstances are. They cannot, I think (in the absence of fraud) justify interference in the day-to-day administration of the estate, nor entitle the bankrupt to question the exercise by the trustee in good faith of his discretion, nor to hold him accountable for an error of judgment. . . ."

72. The additional qualification or filter was also considered by Lord Millett in the Privy Council in the *Deloitte* case (which was concerned with a liquidation, although for these purposes I consider the same principles apply equally in the bankruptcy and liquidation context). That was a case in which a company incorporated in the Cayman Islands was placed in voluntary liquidation. The joint liquidators caused the company to institute proceedings for negligence in relation to the audit of the company's financial statements. The plaintiff, which was not a creditor or contributory of the company but one of the defendants to the company's action, applied under section 106(1) Companies Law (1995 rev) for an order removing the liquidators, or alternatively restraining them from continuing the proceedings against them on the grounds that the liquidators had a conflict of interest. The statute did not contain any reference to the category of persons who were eligible to apply. The liquidators applied to strike out the application on the grounds that the plaintiff had no standing to make the application or real interest in seeking such relief.

73. Lord Millett held at 1611D – H in the following terms:

> "Where the court is asked to exercise a statutory power therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the plaintiff submits, that he "has an interest in making the application or may be affected by its outcome." It means that he has a legitimate interest *in the relief sought*. Thus even though the statute does not limit the category of person who may make the application the court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor. . . .
>
> The standing of an applicant cannot therefore be considered separately and without regard to the nature of the relief for which the application is made. Section 106(1) does not limit the category of person who may make the application. The plaintiff, therefore, does not lack a statutory qualification to invoke the section. But the question remains whether it has a legitimate interest in the relief which it seeks. . . .
>
> The company is insolvent. The liquidation is continuing under the supervision of the court. The only person who could have any legitimate interest of their own in having the liquidators removed from office as liquidators are the persons entitled to participate in the ultimate distribution of the company's assets, that is to say the creditors. The liquidators are willing and able to continue to act, and the creditors have taken no step to remove them. The plaintiff is not merely a stranger to the liquidation; its interests are adverse to the liquidation and the interests of the creditors. In their Lordships' opinion, it has no legitimate interest in the identity of the liquidators, and is not a proper person to invoke the statutory jurisdiction of the court to remove the incumbent office-holders."

74. Lord Millett went on to consider the relevance of the inherent jurisdiction of the court over its own officers at 1612D in the following terms:

> "As liquidators of the company the liquidators are officers of the court. The court's inherent jurisdiction to control the conduct of its own officers is beyond dispute. But it does not follow that the plaintiff is a proper person to invoke that jurisdiction. It says that the liquidators are behaving unconscionably by reason of their conflict of interest. But it cannot say that the liquidators are acting unconscionably *to it.* It does not plead any such duty. It alleges that the liquidators have an interest which conflicts with their duty to the company and its creditors. If such a conflict exists, it is for the creditors alone to decide what if anything to do about it."

75. A similar approach was adopted by the Eastern Caribbean Supreme Court sitting as a court of appeal from a decision in the Virgin Islands in *In the Matter of Fairfield Sentry Limited* (unreported) 20 November 2017. The court was concerned with section 273 of the Virgin Islands Insolvency Act 2003 which bears a very close resemblance to section 168(5) Insolvency Act 1986. The Court applied the principle in the *Deloitte* and *Edennote* cases and held that "a person cannot be considered as being "aggrieved" unless that person has sufficient interest in the outcome of an act, omission or decision taken by a liquidator in the liquidation or shortly put, a sufficient interest in the relief sought". See [34] per Pereira CJ.

76. The question was also addressed by Ferris J in *Engel v Peri* [2002] BPIR 961 and by Harman J in *Port v Auger* [1994] 1 WLR 862 at 874. *Engel v Peri* was concerned with an application by a bankrupt to challenge the trustee in bankruptcy's expenses in an annulment application. The application was granted in the County Court, which conditionally annulled the bankruptcy (subject to payment into court of the outstanding debts and expenses) and ordered that the trustee's fees and expenses be determined by the Court. On appeal, the trustee in bankruptcy argued that the bankrupt had no standing to apply under s.303(1): the applicant must show he has some substantial interest which has been adversely affected, and (praying in aid the *Dodwell* decision), a bankrupt only has such interest where it can be shown there will be a surplus. The bankrupt's wife intended simply to pay the outstanding debts and expenses in the bankruptcy, so there was no prospect of a surplus.

77. Ferris J dismissed the appeal and held that:

> "18. While this decision will obviously be applicable in the great majority of cases where a bankrupt seeks to interfere with the day-to-day administration of his estate in the course of the bankruptcy, I do not think [*Dodwell*] can be regarded as laying down a universal requirement that a bankrupt must show that there will or may be a surplus before he has a standing to apply under section 303. What he has to show is that he has "some substantial interest which has been adversely affected by whatever is complained of" (see *Port v Auger* at 874A).
>
> 19. Whether the bankrupt can do this must depend on the facts of the particular case. In the context of an application for annulment under s 282(1)(b) the amount of the trustee's remuneration and expenses may be a matter of considerable significance, because it affects the amount of money required to be paid in order to satisfy the court of the matters referred to in the subsection. In my view the bankrupt had a clear interest in this, for he will want the annulment to be obtained as cheaply as

> possible. This will clearly be the case where the bankrupt is persuading a third party to lend him the money or intends to enter into an obligation to indemnify a third party who puts up the necessary funds. I consider that it will also be so even where there is to be no formal obligation as between the bankrupt and the third party. The prospects of the third party making funds available are likely to be increased if the amount required is kept to a minimum. Further the bankrupt is likely to feel under a moral obligation to indemnify the third party even where he is under no legal obligation."

Conclusions

78. It seems to me that as Mr Davies accepted, there is an additional requirement before a bankrupt can seek relief against the trustee in bankruptcy under section 303(1). This is consistent with the approach in all of the cases to which I have referred and has been the case for a considerable time and was articulated in the *Dodwell* case in 1949. The very nature of the bankruptcy regime is such that the bankrupt having taken the benefit of being relieved of his debts, absent fraud, cannot have the standing to interfere with the day-to-day administration of the estate by the trustee on behalf of the creditors. He must be able to show that he has a substantial interest which has been affected by the conduct complained of and a direct interest in the relief sought. The potential existence of a surplus is one way of being able to demonstrate such a substantial interest but it seems to me that it is not the only one.

79. In my judgment, therefore, although the principles in the *Dodwell* and *Deloitte* cases apply in relation to applications under section 303(1) and 168(5), the judge was wrong to apply the *Deloitte* case narrowly and to concentrate solely on whether there is a surplus in this case. This analysis is consistent with all the cases to which I have referred save possibly for *Faryab v Smith* [2001] BPIR 246 in the Court of Appeal and *In re Hans Place Ltd (in liquidation)* [1993] BCLC 768, a case concerned with section 168(5).

80. The former was the decision of a two-man court in which questions of standing for the purposes of section 303(1) were not addressed. Although there was no surplus in the estate, Robert Walker LJ, with whom Judge LJ agreed, allowed the appeal and the trustee in bankruptcy was directed to assign a cause of action to the bankrupt. His decision-making process when accepting an offer for the assignment had been taken without legal advice and was flawed. It is not possible to infer what might have been decided in relation to standing from the judgment in relation to the substantive matter.

81. The latter was a case in which a landlord sought an order reversing the decision of a liquidator to disclaim an under-lease pursuant to section 178 Insolvency Act 1986. The question of standing was not addressed directly, perhaps because the argument on behalf of the applicant proceeded on the basis that the same approach which had been applied when it had been necessary to apply for leave to disclaim a lease should apply when determining the application under the new law, namely section 168(5) Insolvency Act 1986. It was submitted that under the new legislation the court's discretion came into play after the decision to disclaim had been made "on the application of the parties interested in the property being disclaimed and aggrieved by that decision, to the court under sec. 168(5)". See 744D. Evans-Lombe J, applying the *Dodwell* case, held that in the absence of a challenge to the bona fides of the liquidator or any suggestion that

his decision to disclaim could be categorised as perverse, the court should not interfere with his decision. See 746F – H.

82. It seems to me that this decision is of no assistance to Mr Davies. First, the question of standing was not considered expressly and was assumed on the basis of the approach taken under the previous legislation. Secondly, the circumstances are remote from those under consideration here. The ability to disclaim onerous property under section 178 Insolvency Act 1986 is specific to a liquidator and arises in the liquidation. It is not surprising, therefore, that the decision to disclaim should be challenged in the liquidation itself. As Peter Gibson LJ put it in the *Mahomed* case, the landlord was directly affected by the exercise of a power granted to the liquidator which he would not have been able to challenge otherwise.

83. I also reject both Mr Davies' and Mr Sutcliffe's differing attempts to delimit the effects of the principles in the *Deloitte* case as further explained in *Edennote* and *Mahomed*. As Peter Gibson LJ pointed out at [26] of the *Mahomed* case, quite properly in my view, the courts have not attempted exhaustively to define the circumstances in which a bankrupt may have standing under section 303(1). Mr Davies sought to limit the principle in the *Deloitte* case to circumstances in which the applicant's interest is adverse to the estate. It will be apparent from what I have already said that although that may have been the case on the facts in *Deloitte* itself, the principles have been applied much more widely.

84. I also reject Mr Sutcliffe's attempt to delimit the principle by his contention that in order to have a legitimate interest in the relief claimed, it is necessary for the applicant to have a direct financial interest. It seems to me that such an approach is too restrictive. For example, a bankrupt affected by the fraud of the trustee in bankruptcy must be entitled to apply but may not necessarily satisfy Mr Sutcliffe's criterion. The same is true of his submission that in order to have standing, the applicant must have no other means of redress. This is based upon dicta of Peter Gibson LJ in the *Mahomed* case at [26] where he stated that he "would accept that someone, like the landlord in *Re Hans Place Ltd* … who is directly affected by the exercise of a power given specifically to liquidators, and who would not otherwise have any right to challenge the exercise of that power, can utilise section 168(5)". As I have already mentioned, I consider that the decision in *Re Hans Place Ltd* can be explained without recourse to such a restriction. The power to disclaim is peculiar to the insolvency practitioner. Furthermore, to construct an exclusionary rule based upon it, goes much too far.

85. It seems to me that in the light of the pleaded conduct, which for this purpose is assumed to be true, the Brakes in their capacity as bankrupts have a legitimate and substantial interest in the relief sought sufficient to give them standing to make an application under section 303(1). At the very least, their interests were substantially affected by the grant of the Licence, the consequences which flowed from it and Mr Swift's alleged unlawful acts. This is not a case such as *Dodwell*, in which the bankrupts seek merely to interfere in every day conduct of the bankrupt estate or in transactions effected by the trustee merely as a matter of commercial judgment. It seems to me that assuming the allegations to be true, it is not only perfectly arguable that at least some of the acts satisfy the substantive perversity test expounded in the *Edennote* and *Mahomed* cases but also that the Brakes have a direct interest in the relief sought. It also follows that when determining the preliminary question of standing, the judge was wrong to decide definitively that the acts complained of were not acts by Mr Swift in the bankruptcy.

86. In the circumstances, there is no need, therefore, for the Brakes to seek to rely upon fraud. In fact, Mr Davies accepted that they had not pleaded fraud but only fraud on a power in the equitable sense. As my Lord, Henderson LJ, pointed out during the hearing, that is not the same thing. The judge cannot be criticised, therefore, for having failed to take fraud into account.

87. For all the reasons set out above, therefore, I would allow the Brakes' appeal in relation to the Bankruptcy Judgment, in their capacity as former bankrupts. It seems to me that they have standing to make an application under section 303(1) in that capacity.

Liquidation Appeal

88. What of the Liquidation Application? It will be apparent from everything which I have already said in relation to the Bankruptcy Application under section 303(1) that I do not consider that the Brakes in their capacity as trustees of the Settlement have standing to bring the Liquidation Application. All of the matters which were relevant in relation to their application under section 303(1) apply equally here. As Nourse LJ stated in the *Edennote* case, in their capacity as bidders, the Brakes were outsiders to the liquidation. The Brakes as trustees were not contributories to the liquidation, no debt was owed to them in the liquidation and there was no evidence that they had any other interest in it. As the judge noted, it was a mere chance that they were trustees of the Settlement at all and in that capacity, they did not have a substantial interest in the relief sought in order to render them "aggrieved" for the purposes of section 168(5). Further, the court's inherent power to supervise the conduct of its officers cannot assist a mere bidder to establish standing for the purposes of section 168(5) any more than it can under section 303(1).

The Unsecured Creditors

89. It seems to me that the Unsecured Creditors' appeal can be dealt with relatively shortly. Their appeal was limited to two grounds. First, the judge having held that the Unsecured Creditors were advancing the Brakes' case and that the Brakes lacked standing to bring the Liquidation Application, and, accordingly, that the Unsecured Creditors did not have a legitimate interest in the relief sought, if the Brakes as trustees of the Settlement were held on appeal to have standing, the ruling in relation to the Unsecured Creditors should be reversed.

90. The second ground is that the judge was wrong to find that the question of whether the Brakes were funding the Unsecured Creditors and instructing their counsel was determinative of whether they had a legitimate interest in the relief sought. He gave no, or alternatively, insufficient weight to the fact that they are undisputed, bona fide creditors in the liquidation. He ought to have held that the relief sought was in the interests of the unsecured creditors and not adverse to it and that they had standing for the purposes of section 168(5).

91. In her supplemental skeleton and in oral submissions, Miss Lintner also contended that the Unsecured Creditors had standing purely as unsecured creditors and relied upon the decision in the *Fakhry* case.

92. Miss Lintner accepted that the first ground of appeal was parasitic on that of the Brakes in their capacity as trustees of the Settlement. I have already decided that the Brakes

qua trustees do not have standing in relation to the Liquidation Application and, therefore, the Unsecured Creditors' first ground must fail and there is no need to mention it further.

93. What of the second ground of appeal? Miss Lintner on behalf of the Unsecured Creditors submits, in effect, that the judge allowed his reasoning to become clouded by the fact that he found on the basis of unchallenged evidence that the Unsecured Creditors were being funded by the Brakes and were advancing their case, and failed to take separate account of their capacity as unsecured creditors in the liquidation. She relies upon the dicta in the *Edennote* case at 393f where Nourse LJ stated that even if the applicants in that case were strangers to the liquidation in their capacity as persons who had not been given an opportunity to bid for an asset, they still would have been able to apply in their dual capacity as creditors.

94. Miss Lintner's new argument, advanced in her supplemental skeleton argument and in her oral submissions, is that just as in the *Fakhry* case, the Unsecured Creditors have standing because they are included within the terms of section 168(5) itself. Although not expressly identified in the statute (unlike in *Fakhry* where members are expressly mentioned in section 1029(1) Companies Act 2006), Miss Lintner draws attention to the fact that it is accepted that "any person aggrieved" in section 168(5) is shorthand for "any creditor, debtor or other person aggrieved". See the *Edennote* case per Nourse LJ at 393h-i. She says, therefore, that the Unsecured Creditors have standing in that capacity alone and without more.

95. In addition, if it is necessary to show a legitimate interest in the liquidation, she also says that if the acceptance of the Chedington bid is set aside, the Brakes have intimated that they will bid £570,000 for the Cottage and that therefore, the reversal of the assignment is inevitably in the interests of the insolvent estate because an additional £70,000 will be forthcoming. She says, therefore, that the interests of the Unsecured Creditors are not adverse to creditors in the liquidation as they were in *Walker Morris v Khalastchi* and in *Re Fairfield*.

96. Lastly, in reliance on the *Fakhry* case once again, Miss Lintner submits that the judge was wrong to take account of the evidence that the Unsecured Creditors were being funded by the Brakes and had lent their names for the purposes of the application. She says that this has nothing to do with standing and if it is relevant at all would be considered at a substantive hearing. She relies upon [57] of the judgment of David Richards LJ in this regard. Having held at [44] and [46] that a former member had standing for the purposes of an application to restore the company to the register pursuant to section 1029 Companies Act 2006, David Richards LJ went on to consider whether the purpose of the application affected the applicant's standing in the following terms:

> "57. Mr Sutcliffe's fallback submission was that a member or former liquidator does not have standing to apply to vary or set aside orders restoring a company to the register and appointing new liquidators, if their purpose is to prevent investigations into their conduct or proceedings against them. This appears to me to confuse standing with the submissions which the court will permit a person to advance."

97. She submits, therefore, that the Unsecured Creditors were just that and that the judge failed to take account of their dual capacity and that he wrongly took account of the unchallenged evidence about the funding of their case by the Brakes when considering standing. Although those matters may be relevant at the substantive hearing, Miss Lintner says that they cannot colour the preliminary question.

Conclusion

98. First, I agree with Mr Sutcliffe that Miss Lintner's argument that standing as unsecured creditors is enough without more, is not open to her given the grounds on which permission to appeal was granted to the Unsecured Creditors. Even if it were, it is quite clear that it is necessary that an applicant is "aggrieved" for the purposes of section 168(5). See the *Edennote* case at 393 e-f. The wording of section 168(5) is materially different from that under consideration in the *Fakhry* case.

99. In any event, Miss Lintner appeared to accept impliedly that more was needed by her submissions in relation to the potential difference to the estate if the acceptance of the Chedington bid were reversed. It seems to me that David Richards LJ's approach to standing for the purposes of section 1029 Companies Act 2006 is of no more assistance to the Unsecured Creditors than it was to the Brakes in the Bankruptcy Appeal. As I have already mentioned, the circumstances with which section 1029 is concerned are entirely different from those to which section 168(5) applies and it is inevitable that in addition to being expressly named in the provision, a former member will have a real and direct interest in the question of whether a company should be restored to the register. Accordingly, that case is of no real assistance to the Unsecured Creditors here.

100. Do the Unsecured Creditors, nevertheless, have a legitimate interest in the relief sought in the Liquidation Application? It seems to me that that is very doubtful. The relief sought is that, amongst other things, the joint liquidators accept the Brakes' bid for the Cottage in the sum of £476,000, made in their capacity as trustees of the Settlement. That must be adverse to the interests of the liquidation estate and the unsecured creditors as a whole in just the same way as the position of the creditors in the *Walker Morris* and *Re Fairfield* cases. Furthermore, Mr Sutcliffe says that even if the Brakes were given an opportunity to bid £570,000 for the Cottage (which is pleaded), it is common ground that the £70,000 in excess of the Chedington bid would be soaked up by expenses.

101. The position is similar to that in the *Walker Morris* case described by Nicholas Strauss QC at 9B. That case was concerned with an application by the former solicitors of a company in liquidation (who were still acting for its holding company and two of its former directors). The applicants sought directions from the court as to whether they needed to provide purportedly privileged documents regarding the company's tax affairs to the liquidator, and (if they did) sought a direction that the liquidator could not disclose those documents to the Inland Revenue which considered it had a claim for unpaid tax against the company without a court order.

102. The deputy judge noted that the applicants were creditors of the company, but that it was "difficult to take seriously" the contention that the applicants were motivated by the possible dilution of their claim for £237. Instead, he found the applicants' only real concern was to frustrate the Inland Revenue's claim for the benefit of their existing clients, rather than to advance any legitimate interest as creditors. See 7F-G. In fact,

creditors of the company stood to gain from the Inland Revenue's claim, which could result in a dividend being returned to the company and distributed to its creditors. The deputy judge concluded at 9A that:

> "It is true that the applicants are creditors, and would have locus standi if acting as such; but this is irrelevant, since they are in fact seeking to advance the interests of possible debtors, which are adverse to those to those of the creditors."

103. In this case, it seems to me that even if the Unsecured Creditors' application is not adverse to the liquidation and might increase the sums available to unsecured creditors, the judge was entitled to adopt the same approach as Nicholas Strauss QC. Although they are creditors, it seems to me that the judge was right to take account of the unchallenged evidence to the effect that the Unsecured Creditors were seeking to advance the interests of the bankrupts rather than their own. Theirs was not a dual capacity because they only sought to advance the Brakes' case.

104. It seems to me that in taking account of the unchallenged evidence, the judge was not confusing motive with standing. He was entitled to take it into account at the preliminary stage. There was no purpose in allowing the matter to proceed to a substantive hearing of the application and to determine the question of whether the Unsecured Creditors were acting merely as the Brakes' nominees at that stage. The position might well have been different had the evidence before the judge been challenged. As it was, the judge was right to grasp the nettle and deal with the issue there and then.

105. In summary, therefore, I would dismiss the Liquidation Appeal. The judge was right to hold that neither the Brakes in their capacity as trustees of the Settlement nor the Unsecured Creditors have standing for the purposes of section 168(5) Insolvency Act 1986. As I have already mentioned, I would also dismiss the Bankruptcy Appeal in so far as it is pursued by the Brakes as trustees of the Settlement but allow the appeal in their capacity as former bankrupts. In that regard, the judge was wrong to find that they lacked standing.

Lord Justice Henderson:

106. I agree.

Lord Justice Floyd:

107. I also agree.