Neutral Citation Number: [2021] EWHC 3276 (Ch)

ON APPEAL FROM THE COUNTY COURT AT BRIGHTON

IN THE HIGH COURT OF JUSTICE **Case No. CH-2021-00009**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)
CHANCERY APPEALS

IN THE MATTER OF THE INSOLVENCY ACT 1986

RE: JAKIR HUSSAIN (IN BANKRUPTCY)

Before

Peter Knox Q.C.

(sitting as Deputy Judge of the High Court)

B E T W E E N:

(1) NEIL DAVID GOSTELOW
(2) DAVID JOHN STANDISH
(As joint trustees in bankruptcy of the estate of Jakir Hussain)
Appellants

And

(1) JAKIR HUSSAIN (IN BANKRUPTCY)
(2) SHAMIMA BEGUM SUMANA
(3) KEYAMA HUSSAIN
(4) JENNIFER HUSSAIN
Respondents

MS MAIRI INNES (instructed by Boyes Turner LLP) for the Appellants

The Respondents were represented by the First Respondent

Hearing date: 1 December 2021

Approved Judgment

Covid-19 Protocol: This judgment was circulated (subject to editorial corrections which are now incorporated herein) by the judge remotely to Ms Innes for the Claimant and Mr Jakir Hussain for the Respondents. The date and time for hand-down is deemed to be 11.45 am on Thursday 2 December 2021.

1. The Appellants are the First Respondent's joint trustees in bankruptcy. By this appeal, brought with the permission of Mr Justice Fancourt granted on 23 April 2021, they appeal against the order of Deputy District Judge Campbell made in the Brighton County Court on 4 January 2021, which dismissed their application for an order for the sale of the First and Second Respondents' home at 2 Tremola Avenue, Brighton, BN2 8AT ("the property"). The application was made under s.335A of the Insolvency Act 1986, which authorises the court to make such an order on an application by a trustee in bankruptcy. However, the judge dismissed it, on the footing that the application had been made by application notice issued under the Insolvency Rules 2016 ("the 2016 Rules"), when (he held) it should have been made by Part 8 Claim Form issued under the Civil Procedure Rules.

2. This error, he held, meant that he had no jurisdiction to make an order for sale, or indeed an order for possession pending sale. He did, however, on the same application, make a declaration that the property *"is"* vested in the trustees, on the footing that this part of the relief was properly sought by the application notice and was within his jurisdiction.

3. The Appellants appeal on two main bases:
   (1) There was nothing wrong with their application notice, because an application for an order for sale (and possession pending sale) by a trustee in bankruptcy can be, and indeed should be, brought by way of such notice under the 2016 rules.
   (2) Even if the application should have been brought by way of Part 8 Claim Form under the Civil Procedure Rules, this did not deprive the judge of jurisdiction, but was at most an irregularity which he should have allowed them to correct, as it had not caused any prejudice or injustice to the Respondents.

4. Further, the Appellants say that I should myself exercise the discretion given to the court under s.335A of the 1986 Act, and make an order for possession and sale, on the footing that there were and are no "exceptional circumstances" within the meaning of that section to justify making any other order. In particular, they say that I should not take the same approach as the judge, who had held that, if (contrary to his ruling) he did have jurisdiction, he would have deferred making an order for possession until the Appellants had found a purchaser and exchanged contracts with him.

5. The Respondents, who are litigants in person, resist the appeal, on the basis that the Judge's conclusions were correct, and further, it would be inhumane to evict them and their family from their home in current circumstances. Through a letter from their former solicitors delivered to the court on the evening before the hearing, they also take the points that the First Respondent (hereafter "Mr Hussain") has long since been discharged from his bankruptcy, and it is difficult to understand upon what basis the creditors could benefit from an order for sale.

6. Accordingly, there are five main issues to consider:
   (1) Was the judge right to hold that the application should have been brought by way of Part 8 Claim Form?
   (2) Even if he was right, did this mean that he lacked jurisdiction to make the orders sought; or should he have held that this was merely a procedural defect which he could and should have allowed to be cured?
   (3) Does the fact that Mr Hussain is now discharged from his bankruptcy mean that an order for sale cannot now be made, or at least should not now be made?
   (4) If the judge did make a relevant error, should I remit the matter to the Brighton County Court for it to exercise its discretion, or should I exercise that discretion myself?
   (5) If I exercise the discretion myself, what order should I make?

7. Before turning to these issues, I shall summarise the facts.

The facts

The background

8. Mr Hussain was declared bankrupt in the High Court on 21 November 2017 on a petition by HMRC based on failure to pay VAT. The bankruptcy was then transferred to Brighton County Court by order made on 15 January 2018. On 26 February 2018, the Appellants (hereafter "the trustees") were appointed the trustees in bankruptcy.

9. It appears to be common ground that on his bankruptcy the only substantial asset in Mr Hussain's estate, apart from a potential sum of £25,000 held by his then solicitors, was his half share in the property, which he and the Second Respondent (his wife) had bought in 2011. They owned this as joint tenants, subject to a mortgage in favour of the National Westminster Bank plc.

10. Shortly after the trustees were appointed, they wrote on 14 March 2018 to Mr Hussain and Mrs Sumana saying that they valued the property at £437,500, which meant that, after taking into account the then mortgage debt of £188,015, the net equity was £249,485: so Mr Hussain's half interest, which now belonged to the trustees, was £124,742.50. They suggested three options, namely (a) Mrs Sumana (or a third party) could buy out the trustees' interest for £124,742.50, (b) Mr Hussain and Mrs Sumana

could market the property themselves for sale, or (c) they could do nothing, but this could result the trustees applying for an order for possession and sale. On the following day, 15 March 2018, the trustees served formal notice of their interest in the property under s.283A(1) of the 1986 Act.

11. A similar message (i.e. that Mr Hussain and Mrs Sumana should consider buying out the trustees, or else they would have to consider a forced sale) was conveyed on behalf of the trustees on 10 April 2018, to a Mr Stephen Neiman, who had rung them up saying that he was a consultant acting for Mr Hussain.

12. By letters of 10 May 2018, the trustees again asked Mr Hussain and Mrs Sumana for their proposals, but now saying that their interest in the property was just £112,746 in the light of a recent independent valuation which reduced the estimated value of the property to £410,000. Despite chasing letters of 6 September 2018 and 25 March 2019 (the latter of which threatened proceedings), there was no reply, save a telephone complaint by Mr Neiman on 26 March 2019 to a colleague of the trustees, that Mr Hussain had now been discharged from bankruptcy (i.e. because more than one year had passed since the order), and that he did not believe that an application for possession and sale would be successful.

13. Letters seeking proposals were sent also to Messrs James & Co, the solicitors who had been acting for Mr Hussain at the time of his bankruptcy, on 20 December 2018 and 4 March 2019. However, on 11 March 2019, Messrs James & Co replied that they had no instructions.

14. Eventually, the trustees' solicitors, Boyes Turner LLP, sent letters before action on 30 September 2019, which offered Mr Hussain and Mrs Sumana *"a final opportunity to source funding from a third party to purchase our clients' interest in the property, or alternatively, to confirm your agreement that the Property can be put on the open market by our clients and that they will take conduct of the sale of the property"*. They asked for a reply by 28 October 2019, but still there was no response.

15. The trustees held off, and in March 2020, they decided to postpone issuing proceedings in the light of the Covid 19 outbreak. But on 6 August 2020, they wrote through their solicitors that they were now instructed to issue proceedings, but they gave one final opportunity to buy out their interest in the property, asking for a response by 20 August 2020. They valued this interest at £120,910.38, on the basis that the figure now needed to redeem the bank's mortgage was £168,179.24, so the equity in the property which fell to be divided in two (on the basis of the £410,000 valuation) was £241,820.76.

16. There was still no response, and on 22 October 2020 the trustees issued an application notice under rule 1.35 of the 2016 Rules, which said (in summary) that they intended to apply to a District Judge on 4 January 2021 at 10 am for (a) a declaration that Mr Hussain's 50% beneficial interest in the property was vested in them pursuant to s.306

of the 1986 Act, and they were entitled to 50% of the net proceeds of sale; and (b) an order that they be at liberty to sell the property as they saw fit, and that Mr Hussain, Mrs Sumana, and their elder daughter Keyama Hussain give up possession of the property and do all such things as might be necessary to enable a sale to take place.

17. The application, as required by the 2016 Rules, if they applied, was supported by a witness statement from the first appellant (Mr Gostelow), and identified Mr Hussain and Mrs Sumana, their elder daughter Keyama, and the bank, as the persons on whom it was intended to be served. It did not, however, identify their younger daughter Jennifer, although by now she was over eighteen.

18. Mr Gostelow's statement attached an "Estimated Outcome" prepared on 17 March 2020, which showed that as at 16 May 2020, the anticipated bankruptcy debts, costs and expenses (not taking into account a sale of the property) would stand at £234,673.94. In other words, a sum more than twice the estimated value of Mr Hussain's interest in the property.

19. No evidence was served in reply by Mr Hussain or Mrs Sumana.

The hearing before the Deputy District Judge

20. The matter came on for hearing before the judge at 13.27 on 4 January 2021. By now, the Respondents had obtained representation by a solicitors' agent instructed by Messrs James & Co, Ms Nicola Harvey, and the trustees were represented (as they were before me) by Ms Mairi Innes of counsel.

21. The judge said at the outset that although he had no problem with the application for a declaration, he was puzzled as to whether he had jurisdiction to make an order for sale in insolvency proceedings such as were now before him. He also pointed out that if the application was not properly issued, the trustees were out of time to apply for an order for sale.

22. This was because (although he did not spell this out) under s.283A(2) to (4) of the 1986 Act, a bankrupt's dwelling house ceases to be part of the trustee's estate after three years from the date of bankruptcy and revests in the bankrupt, unless, amongst other things, either (a) an order for sale or possession has been applied for in the meantime, or (b) the court disapplies this rule and applies a longer period (see s.283(6)). So, the question of whether proceedings for possession and sale had been begun properly and in the right form was a matter of real importance, because by 4 January 2021, more than three years had already elapsed since Mr Hussain's bankruptcy order.

23. In response, Ms Innes said that from her experience such applications were often brought under the 2016 Rules, and she asked for a short adjournment to allow her to

put in written submissions on the point. But the judge refused to grant any *"indulgence in cases where families are about to be thrown out in the middle of winter, in the middle of a pandemic"*. He went on to question why it was necessary to grant vacant possession even if a sale were to be made, as most homes were sold with the family still living in it; to which Ms Innes replied Mr Hussain and Mrs Sumana had been given ample time, and usually one gets a much higher price with vacant possession.

24. Ms Harvey for her part adopted the judge's point that it would be unjust to order a sale in the middle of the pandemic, where the equity released to the co-owner (i.e. Mrs Sumana) would not be sufficient to re-house the family. She suggested adjourning the matter to allow the value to increase so Mr Hussain might have a better opportunity of repaying his creditors.

The Deputy District Judge's judgment and order

The judgment

25. In his ex tempore judgment, the judge held that there was no problem with the application for a declaration that the property had vested in the trustees.

26. However, on whether an order for possession and sale should be made, he held that Ms Innes had been unable to show him any case or rule of court or statute that showed the application was properly made by way of an application in Mr Hussain's insolvency, and so he had to presume that it had not been properly made.

27. Further, even if he could order a sale, he said on the question of vacant possession, that:

> *"I expect that the interest of the creditors prevail but I don't feel it necessarily follows that this requires vacant possession to be given. We've got no evidence for that, got no evidence that there'll be a better price. I have no evidence that by continuing to live in the property, Shamima Begum Hussain and husband bankrupt will do anything to frustrate a sale. As against that, I'm conscious of children here … in the middle of winter and I am also taken [inaudible] it also belongs to Shamima Begum Hussain and ordinarily she would be entitled to live in it and I [inaudible] live in it without there being good reason. I don't think it's enough for someone to say [inaudible] I don't see a good reason [inaudible] case."*

28. He concluded:

> *"There's nothing unusual about property being sold with someone living in it. However, what I'd have given them if I had jurisdiction to make an order for sale at all, but my conclusion is that I don't have jurisdiction because I don't believe that orders can be under insolvency [inaudible]. My view, is that these orders can only be made following an application [inaudible] jurisdiction has not been done, so I dismiss this application"*.

29. The judge refused permission to appeal, saying that it may well be that with some research, Ms Innes would be able to produce binding authority to show that he was wrong: if so, that could be dealt with on the appeal.

The order

30. The Judge accordingly made a declaration that Mr Hussain's 50% share of the property was vested in the trustees pursuant to s.306 of the 1986 Act (which provides for a bankrupt's estate to vest in his trustees), and further, that the net sale proceeds were to be dealt with in accordance with the declaration, with liberty to apply. But otherwise, he dismissed the trustees' application and ordered them to pay the Respondents' costs summarily assessed in the sum of £120.

31. I observe in passing that this appears to be a paradoxical order, because if the application for an order for possession and sale had not been properly made within three years of the bankruptcy (as the judge had held), it followed, as I have said above, that under s.283A(2) to (4) of the 1986 Act the trustees' interest in the property revested in Mr Hussein, unless the court disapplied this period under s.283A(6). But nothing in the judge's judgment said that he any intention of disapplying it.

The joinder of Jennifer Hussein

32. After the hearing, the trustees realised that they should have joined Jennifer Hussein as a further respondent to the proceedings, because by October 2020 she was over the age of 18. On their application supported by a further witness statement from Mr Gostelow, Mr Justice Fancourt added her as a further respondent to the proceedings when giving permission to appeal on 23 April 2021.

The first issue: how should an application under s.335A be brought?

33. S.335A of the 1986 Act was introduced, by way of amendment to the 1986 Act, by s.25 and Schedule 3 of the Trustees of Land and Appointment of Trustees Act 1996 ("the Trustees of Land Act 1996").

34. It provides:

> "(1) Any application by a trustee of a bankrupt's estate under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 (powers of court in relation to trusts of land) for an order under that section for the sale of land shall be made to the court having jurisdiction in relation to the bankruptcy.
>
> (2) On such an application the court shall make such order as it thinks just and reasonable having regard to –

(a) The interests of the bankrupt's creditors,
(b) Where the application is made in respect of land which includes a dwelling house which is or has been the home of the bankrupt or the bankrupt's spouse or civil partner or former civil partner –
(i) The conduct of the spouse, civil partner, former spouse or former civil partner so far as contributing to the bankruptcy,
(ii) The needs and financial resources of the spouse, civil partner, former spouse or former civil partner, and
(iii) The needs of any children; and
(c) All the circumstances of the case other than the needs of the bankrupt.

(3) Where such an application is made after the end of the period of one year beginning with the first vesting under Chapter IV of this Part of the bankrupt's estate in a trustee, the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations.

(4) The powers conferred on the court by this section are exercisable on an application whether it is made before or after the commencement of this section."

35. The material part of s.14 of the Trustees of Land Act 1996 provides:

"(1) Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section.

(2) On an application for an order under this section the court may make any such order –
(a) relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or
(b) declaring the nature or extent of a person's interest in property subject to the trust,
as the court thinks fit."

36. By virtue of s.6 of the Trustees of Land Act 1996, the trustees of land have all the powers of an absolute owner, and so, subject to the Act, they have the power to sell and obtain vacant possession of it, and to obtain an order for possession and sale under s.14 for this purpose.

37. The word "application" is not defined in the Trustees of Land Act, and so, save where the law provides to the contrary, an application under s.14 of that Act is to be made in the usual way by claim form under the Civil Procedure Rules.

38. The question is, does the 1986 Act provide that an "application" under s.335A is to be made instead under the procedures set out in the 2016 Rules? In my judgment, it plainly does.

39. This is because s.412 of the 1986 Act provides that the Lord Chancellor, *"may .... in the case of rules that affect procedure, with the concurrence of the Lord Chief Justice, make rules for the purpose of giving effect to Parts 7A to 11 of the 1986 Act"*. S.335A of the 1986 Act is in Part 9 of the 1986 Act, and therefore the rules made by the Lord Chancellor with the Lord Chief Justice's concurrence are evidently intended to apply to s.335A. Those rules were initially the Insolvency Rules 1986, and they are now the 2016 Rules, as made clear in their preamble (*"... the Lord Chancellor makes the following rules in exercise of the powers conferred by sections 411 and 412 of the Act ..."*).

40. Amongst those rules is Rule 1.35, which provides, under the cross-heading "Standard Content and Authentication of Applications to the Court under Parts 1 to 11 of the Act":

> "(1) This rule applies to applications to court under Parts 1 to 11 of the Act (other than an application for an administration order, a winding up petition or a bankruptcy petition).
> (2) The application must state –
> (a) That the application is made under the Act or these Rules (as applicable);
> (b) The section of the Act or paragraph of a Schedule to the Act or the number of the rule under which it is made;
> (c) The names of the parties;
> (d) The name of the bankrupt, debtor or company which is the subject of the insolvency proceedings to which the application relates;
> (e) The court (and where applicable, the division or district registry of that court) or hearing centre in which the application is made;
> (f) Where the court has previously allocated a number to the insolvency proceedings within which the application is made, that number;
> (g) The nature of the remedy or order applied for or the directions sought from the court;
> (h) The names and addresses of the person on whom it is intended to serve the application or that no person is intended to be served;
> (i) Where the Act or Rules require that notice of the application is to be delivered to specified persons, the names and addresses of all those persons (so far as known to the applicant); and
> (j) The applicant's address for service.
> (3) The application must be authenticated by or on behalf of the applicant or the applicant's solicitor."

41. In summary, it is plain from all this that (a) the purpose of the 2016 Rules is to *"give effect"* to Parts 7A to 11 of the 1986 Act by providing rules of procedure for those Parts;

(b) amongst those rules of procedure is rule 1.35, which explains how to bring an "application" under those Parts (subject only to the express exceptions mentioned); and therefore (c) rule 1.35 explains how one is to bring an application under s.335A of the 1986 Act.

42. Further, I am fortified in this conclusion by the following considerations.
    (a) This is the natural reading of the material wording itself of s.335A, i.e. *"Any application ..... shall be made to the court having jurisdiction in relation to the bankruptcy"*. Theoretically, one could read this as saying no more than that if (for example) the bankruptcy has been transferred to Brighton County Court, then the application must be made to that court, albeit by way of claim form under the CPR, but it is difficult to see why the statute should have intended such a curious reading.
    (b) It makes good sense that the court's attention should be drawn at the point of issuing the proceedings under s.335A to the fact that the application is one against a bankrupt, as provided for by the specific rules in rule 1.35 (see in particular subparagraphs (d) (e) and (f)), so that the court can immediately identify that the claim relates to a bankrupt, and so that it can be added to the court file relating to him to ensure that all questions relating to the bankruptcy are contained and can be found in one court file, rather than in a number of different ones.
    (c) If the judge's conclusion were correct, then it would appear to follow that applications under the analogous provisions in s.336 and 337 of the 1986 Act (which provide for making orders under s.33 of the Family Law Act 1996 where non-bankrupt spouses or members of the bankrupt's family are in occupation) should be made not by way of application under the 2016 Rules, but under the procedures appropriate for one under s.33 of the Family Law Act. However, there is no authority to this effect, and it is difficult to see why this should have been intended.
    (d) Last but not least, both Mr Justice Warren, in *Pickard and another v. Constable* [2018] BPIR 149 (at paragraph 2), and Lord Justice Nugee in *Bell v. Ide* [2021] 1 W.L.R. 1078 (at paragraph 37) appear to have taken it as read that an application under s.335A is to be made by way of application under the 2016 Rules. It is implausible that two such experienced judges would have done so if there were any doubt as to the correctness of this proposition.

43. Accordingly, the trustees' appeal against the judge's order must succeed on this ground alone.

The second issue: what if the application was made in the wrong form?

44. In the light of my ruling on the first issue, the second issue does not arise, but as the point was argued by Ms Innes, I should briefly add that even if, contrary to my view, the application under s.335A should have been issued under the CPR, this would not have deprived the judge of jurisdiction to deal with the matter. He was on any view sitting in Brighton County Court at the time and had the matter before him, and as such

he had power under CPR rule 3.10 to correct *"an error of procedure such as a failure to comply with a rule or practice direction"* by ordering that the proceedings, albeit initiated in the wrong form, should continue subject to its being corrected. See, for example, the judgment of Mark Cawson Q.C. in the matter of *Taunton Logs Limited (in administration)* [2020] EWHC 3480 at paragraphs 32 to 43.

45. Whether he should have exercised his discretion so as to remedy the error is a more difficult question, because by doing so he would, on the face of it, be depriving the Respondents of an accrued limitation defence under s.283A (i.e. because more than three years had already lapsed since the bankruptcy), unless he was prepared to extend time under s.283A(6), and I express no view on the point.

46. Finally, I should mention one other point, namely, the judge's refusal to grant Ms Innes an adjournment to deal with the jurisdiction point, which forms another of her grounds of appeal. Given that she had had no notice of it beforehand, and given that even the judge himself was not aware of any case in support of his view of the matter, in my view he erred in refusing to grant her a short adjournment, whether a brief one so she could return at the end of the day, or a longer one so that the case could be re-listed in the near future. The consequence was that an appeal has had to be made, which has resulted in extra cost and a further delay of 10 months or so.

The third issue: the effect of the discharge from bankruptcy

47. As I have said, Mr Hussain was released from his bankruptcy on 21 November 2018, one year after the order. Notwithstanding the letter written on his behalf the day before the hearing, it is plain that this did not oust the trustees' powers under s.335A of the 1986 Act, nor indeed was this point ever taken in correspondence after 21 November 2018, or at the hearing below.

48. S.281(1) of the 1986 Act provides:

> "**Effect of discharge**
> Subject as follows, where a bankrupt is discharged, the discharge releases him from all the bankruptcy debts, but has no effect –
> (a) on the functions (so far as they remain to be carried out) of the trustee of his estate, or
> (b) on the operation, for the purposes of the carrying out of those functions, of the provisions of this Part;
>
> And in particular, discharge does not affect the right of any creditor of the bankrupt to prove in the bankruptcy for any debt from which the bankrupt is released."

49. S.281, like s.335A, is in Part 9 of the 1986 Act, and therefore Mr Hussain's discharge in November 2018 did not have any effect on the operation of s.335A for the purpose

of carrying out the trustees' functions, which include their functions under s.335A. Any other construction would be absurd, because the premise of s.335A(3), which provides for the interests of the bankrupt's creditors to outweigh all other considerations absent *"exceptional circumstances"*, is that the trustee can wait for more than a year after a bankruptcy before bringing an application under this section in order to obtain the benefit of this provision.

The fourth issue: should the matter be remitted to the Brighton County Court?

50. In my judgment, it would be inappropriate to remit the matter to the County Court. There has already been substantial delay because of the appeal, and to remit the matter would only result in further delay, to the unjustifiable prejudice of the trustees. Further, all the evidence, such as it is, is now before me, and I am in as good a position as a judge would be on remission to form a view on the appropriate order to make.

The fifth issue: what order, if any, should now be made?

51. As the trustees' application was made more than one year after the first vesting in them of Mr Hussain's estate, the court under s.335A(3) *"shall assume, unless the circumstances of the care are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations"*.

52. The first question is whether I should make any order at all, on the basis that there are such exceptional circumstances.

53. As I have said, Mr Hussain says that it would be inhumane to make an order. Although he did not put in any witness statement below or seek to do so on this appeal (he has been unable to pay for proper legal assistance), he outlined to the court yesterday the circumstances on which he relies. In summary, shortly before the bankruptcy order, he had to sell his take-away business, since when he has worked as a taxi driver and, for one day a week, as a reserve officer in the British Army, from which he receives a modest income. In the covid pandemic, his earnings as a taxi driver dropped, but they are beginning now to come up again. In the meantime, he has been paying the National Westminster Bank mortgage, which has now reduced to about £158,000 (down from the figure of £168,000 odd in July 2020).

54. As for Mrs Sumana, Mr Hussain and Jennifer informed me that she is a housewife with no income, she has been very stressed by the proceedings, and her health has deteriorated, so much so that she has bee in hospital many times in the last two years.

55. As for the three children, they all still live at the property. Further, Jennifer, who is now 19, is still at secondary school (she will be retaking her A levels in the forthcoming academic year), as is their son Aahil, who is now 11 years old.

56. Further, Mr Hussain questions what real benefit an order for possession and sale would bring to the creditors. In his estimation, the property is worth only £320,000 odd, so, after taking into account the National Westminster debt of £158,000 odd, the equity is only £162,000, so only £81,000 would fall to be distributed to the creditors. And the £81,000 or so that would be left for Mrs Sumana would be insufficient to buy the family a replacement home.

57. In my judgment, these matters do not, even taken in combination, amount to an exceptional circumstance for the purposes of s.335A. I accept that eviction from the house will be disruptive and distressing for all the members of Mr Hussain's family. However, these are the usual consequences of any order, and there is a consistent line of authority to the effect that such are not sufficient to amount to "exceptional" circumstances. In particular, although the categories of exceptional circumstances are not closed, it is clear that they must be outside the usual *"melancholy consequences of debt and improvidence"* as put by Nourse LJ in *Re Citro (Domenico) (A Bankrupt)* [1991] Ch. 142 at p157C-D, or there must be *"compelling reasons not found in the ordinary run of cases"* (as put by Bingham LJ at p161E-F in the same case). In particular, it is not enough that the realisation of the spouse's beneficial interest will not produce enough to buy a comparable home in the same neighbourhood or indeed elsewhere (see per Lawrence Collins J in *Dean v. Stout (The Trustee in Bankruptcy of Dean)* [2005] BPIR 1113 at paragraph 10).

58. Accordingly, it would be appropriate to make an order for sale.

59. The next question is, on what terms? As said above, the judge himself would have been prepared to make an order for sale and possession if he had thought he had jurisdiction, but he would have delayed the granting of possession until the trustees had exchanged contracts with a purchaser. Ms Innes accepts that in principle I can take into account how the judge says he would have exercised his discretion, and in my view, if I thought there was no material error in it and the same considerations still applied, the proper course would be to exercise it in the same way. However, the judge's reasoning was flawed, because, as can be seen from extracts from his judgment set out above, he appears to have proceeded upon the premise that the burden of proof was on the trustees to show that they needed vacant possession in order to effect a sale, and that as they had not adduced evidence specifically directed to this point, possession should be delayed until exchange. By doing so, he overlooked that the interests of the creditors *"outweigh all other considerations"*, which made it inappropriate to impose an enforced delay until exchange whenever it might be, because such delay could well be seriously prejudicial to them.

60. For example, it might be the case that a potential purchaser, before exchange, indicates that he is willing to exchange with only a short period for completion: if that were the case, it would be very risky for the trustees to enter into a contract, because they might

be unable to deliver up vacant possession on the (early) completion. Therefore, to avoid that risk they might well be forced to give up the benefit of a very good offer.

61. I accordingly decline to adopt the same approach in relation to the grant of possession. The question then arises, when should the Respondents be ordered to give vacant possession?

62. Ms Innes accepts that the trustees have no particular need or desire to obtain possession immediately, and that indeed it is normally better for a house to be occupied than unoccupied when one is trying to sell it, but her concern is that there is no guarantee that the Respondents will co-operate in the marketing. Therefore, she submits that possession should be granted in just 28 days, or at least not much more than that, so that the trustees have sufficient flexibility to remove the Respondents in case difficulties arise. She also points out, not unreasonably, that there has already been a very substantial delay resulting from the appeal process, in which time the Respondents have continued to be able to live in the property as before.

63. Her skeleton argument, however, did not draw my attention to the authorities on the point, and the Respondents represent themselves in person, so the oral submissions at the hearing were not as fully focussed as they would otherwise have been on this question. Accordingly, after the hearing, at my invitation, she helpfully submitted three cases on the point (*Re Lowrie* [1981] 3 All ER 353, *Harrington v. Bennet* [2000] BPIR 630, and *Re Mushtaq* [2004] EWHC 3315 Ch), and I myself have had time to do some research on the issue, in the course of which I have considered the commentary on s.335A in Sealy & Milman: Annotated Guide to the Insolvency Legislation 24th ed 2021, and the case of *Donohoe v. Ingram* [2006] BPIR 417, a not dissimilar case involving children, in which a delay of three months was ordered as a matter of common humanity.

64. Suffice to say, although I shall hear further submissions on handing down this judgment this morning in the light of the authorities Ms Innes has supplied to me, and those which appear in Sealy and Milman, my provisional view is that possession should be delayed for a little more than three months, until the end of the next school term, so as to reduce the very considerable disruption to Jennifer and to Aahil which would otherwise occur were possession to be ordered during term time. Further, Mr Hussain has been continuing to pay the mortgage instalments, and there is no reason to suppose he will cease to do so; and it would seem unlikely that material progress will be made in the marketing until at least mid January 2022, and contracts are not likely to be exchanged until at least March 2022.

65. Accordingly, for these reasons, I shall allow the appeal, and make an order that the property is to be sold, with submissions to be made today on the precise form of order.

Peter Knox Q.C.

2 December 2021