Neutral Citation Number: [2016] EWHC 1688 (Ch)
Case No: HC13B02648

IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION

Rolls Building,
Fetter Lane, LONDON EC4A 1NL
22 July 2016

B e f o r e :

MR JEREMY COUSINS QC,
(SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION)

Between:

PATLEY WOOD FARM LLP	**Applicant**
- and -	
BRAKE AND OTHERS (trading as Stay in Style)	**Respondents**

Gideon Roseman (instructed by Moore Blatch, Southampton) for the Applicant partner.
The other partners in person.
Stuart Ritchie (instructed by Ritchie Phillips LLP) for an interested creditor.

HTML VERSION OF JUDGMENT

MR JEREMY COUSINS QC:

Background

1. On 10 May 2016 I handed down my ruling ("the earlier judgment") [2016] EWHC 1041 (Ch) on two points which were decided as preliminary matters arising upon two applications made by Mr and Mrs Brake (collectively "the respondents") in connection with an application, made by Patley Wood Farm LLP ("PWF") and issued on 11 December 2015, for an administration order ("the Administration Application", under number CR-2015-009490). The Administration Application stated that it was brought by PWF being "a creditor of the partnership, in reliance on paragraph 12(1) of [Schedule B1 to the Insolvency Act 1986], as modified by [the Insolvent Partnerships Order 1994] and being a member under section 9 of the [1986 Act] as modified by the [1994 Order]". The respondents' applications sought (1) an order for the appointment of a receiver and manager of West Axnoller Cottage ("the Cottage"), Beaminster, Dorset, and (2) an order to stay the Administration Application pursuant to section 9 of the Arbitration Act 1996. In my earlier judgment I held that the respondents, pursuant to their respective bankruptcies, lacked standing to make both applications and I dismissed them.

2. Following handing down of the earlier judgment, I proceeded to hear the Administration Application. On this occasion, as before, Mrs Brake represented herself and Mr Brake, but Mr Stuart Ritchie, of Ritchie Phillips LLP

("RP"), who sought to be heard on behalf of his firm as an interested creditor, also appeared and wished to make submissions. As a matter of convenience, because Mr Ritchie anticipated speaking only briefly, and needed to be elsewhere to deal with other matters, with the agreement of Mrs Brake and Mr Roseman, I directed that I would hear from Mr Ritchie after Mr Roseman had opened his case, before embarking on hearing Mrs Brake's substantive submissions, and that Mr Roseman could reply to Mr Ritchie's submissions before I heard such submissions from Mrs Brake. However, since Mrs Brake addressed matters at significantly greater length, and with more detail than Mr Ritchie with whose case there was much overlap, when describing the submissions made in opposition to the Administration Application below, I deal with her submissions first.

3. At the commencement of this further hearing Mr Roseman raised the issue, which in fairness to him I must say that he had raised previously, as to whether the respondents were entitled to appear and make representations upon the Administration Application. He acknowledged, of course, that Mrs Brake must at the least be entitled to make submissions as to whether she should be permitted to make submissions as to such entitlement. In these circumstances, I heard submissions from Mr Roseman and Mrs Brake on this point, which expanded into argument on a further issue as to whether the Administration Application was improperly constituted (because only PWF had made the application, rather than all members in the partnership to which the application relates). At the conclusion of those submissions on those matters, I decided that, rather than rule upon those matters alone at that stage, I would proceed to hear the balance of argument on the Administration Application, in effect, hearing from Mrs Brake on all remaining issues, de bene esse. The hearing proceeded on that basis.

4. In the course of the hearing on 10 May 2016, as I shall explain more fully below, it became apparent that PWF was not a creditor of the partnership. In light of this, and Mrs Brake's well-developed submissions as to PWF's entitlement to make the application on any other basis, Mr Roseman suggested that the application could, or should, be amended so as to add or substitute Mrs Lorraine Brehme as an applicant since she is a creditor of the partnership who had already provided evidence of her willingness to be so joined. This point arose well into the course of the hearing, and I suggested that the parties might wish to make further submissions on the matter, if I decided that this course was necessary or appropriate, before I made any order in that regard. Subsequent to the hearing, Mrs Brake intimated that she would wish to address this point specifically. It seemed to me convenient, and cost-effective, for the parties to make written submissions on the question of such potential joinder or substitution of Mrs Brehme, and I therefore invited the parties (and Mr Ritchie) to make any submissions in writing on the issue in accordance with directions which I gave in writing. In the event, each of Mr Roseman, Mr Ritchie, and Mrs Brake sent to me their additional written submissions, which I have taken into account, and for which I am grateful.

5. In this judgment, for convenience, I deal with the various submissions, whether as to entitlement to make representations and the proper constitution of the proceedings, or other substantive matters, in a continuous section of this judgment, though for the reasons explained above, they were actually presented in two distinct sections at the hearing on 10 May. First, however, for ease of comprehension, I repeat what I said in the earlier judgment [2016] EWHC 1041 at [3]-[9] (from which I shall adopt the terms used), as to the background circumstances:

> "3. On 19 February 2010, PWF entered into a partnership agreement with the respondents. The partnership [which traded as 'Stay in Style'] thereby established was in the business of providing luxury holiday accommodation, and hosting events, including weddings, in Dorset. The partnership business was to be carried out from West Axnoller Farm, Beaminster ('the Farm'). Adam & Co, bankers, held a charge over the Farm whereby substantial sums were secured. The Farm is a distinct property from the Cottage.
>
> "4. The partnership agreement contained, by clause 33, provision for arbitration in respect of any dispute arising out of, or in connection with, the partnership agreement. Pursuant to this provision, on 13 April 2012, PWF commenced an arbitration ('the Arbitration') against the respondents, alleging that the respondents were in breach of the partnership agreement. Mr Michael Lee, of counsel, was appointed to act as the arbitrator, and I shall hereafter refer to him as such. Both before and during the arbitration hearing the respondents sought to persuade the arbitrator that the hearing

should be adjourned; on 22 April 2012, in the course of the arbitration hearing, and upon the refusal of an application to adjourn, the respondents left the hearing. Although at an earlier time they had been represented by solicitors and counsel, they were not so represented at this stage, and therefore, they remained unrepresented for the remainder of the hearing.

"5. The arbitrator published his partial award ('the Award') on 21 June 2013. In a lengthy, and carefully reasoned, decision he explained his reasons for the Award which was that the respondents had been in persistent breach of the partnership agreement, and had conducted themselves in relation to the partnership business so that it was not reasonably practicable for PWF to carry on the business of the partnership with them. He held that it was just and equitable for the partnership to be wound up. He made a number of consequential orders and directions. Materially for the purposes of this present judgment, he ordered that: (i) the partnership be dissolved pursuant to section 35(d)(f) of the Partnership Act 1890 (53 & 54 Vict c 39), with the date of dissolution being the date of the Award; (ii) the partnership's affairs be wound up pursuant to clause 28.2 of the partnership agreement, and sections 39 and 44 of the 1890 Act; (iii) as part of the winding up there should be an orderly sale of the partnership's assets, including the partnership property, under his direction, at which both PWF and the respondents should be entitled to bid; (iv) the partnership business should be sold as a going concern if it was reasonably practicable to do so within a reasonable time.

"6. The arbitrator gave further directions, including as to the appointment of marketing agents, the appointment of an accountant to assist with drawing up dissolution accounts, for the parties (pending winding up) to abide by the terms of the partnership agreement, and for dealing with costs. At the same time, he made an interim costs order against the respondents. The arbitrator specifically directed that he retained jurisdiction to deal with the taking of the dissolution accounts, and the supervision of the winding up of the partnership, giving liberty to the parties to apply for further directions.

"7. Under claim number HC13B02648 ('the Arbitration Claim'), commenced in 2013, PWF sought injunctive relief against the respondents. Freezing orders against the respondents were granted by Newey J on 8 July 2013, and David Richards J on 15 July 2013. On 12 September 2013, Birss J ordered that the Award and related costs awards might be enforced in the same manner as a judgment or order of the court. He ordered the continuation (with variations) of the earlier freezing orders. On 19 December 2014, Sir William Blackburne, sitting as a judge of the High Court, found that the respondents were in contempt of court in breaching the order made by Birss J, ordering them to pay the costs of the committal proceedings.

"8. On 21 October 2014 Adam & Co, pursuant to their charge, appointed receivers ('the Bank's Receivers'), in respect of the Farm. In the Arbitration Claim, on 16 January 2015, Sir William Blackburne gave directions in relation to the sale of the Farm and the Cottage. The order required the respondents not enter into any binding agreement to purchase the Farm or Cottage without first having met certain conditions as to security. Amongst other things, it also provided that the respondents must agree to a sale of the Cottage with, or at the same time as, the Farm, if the Bank's Receivers so requested.

"9. In yet further proceedings which had been commenced by the respondents in 2012 (now proceeding under number HC-2015-001310-'the Declaratory Proceedings'), the respondents sought orders for the transfer to them of the Cottage, which is the home of the respondents and their family. There is an issue as to whether it is an asset of the partnership; PWF maintains that the Cottage was, and remains, partnership property. The respondents' case depends upon what Mrs Brake acknowledged, in her written submissions, was a disputed transfer of legal and beneficial ownership from the partnership to the respondents by PWF, and Mrs Lorraine Brehme (a member of PWF, and a supporting creditor in respect of the Administration Application) in 2011."

6. For the purposes of what I now have to decide, it is necessary to add that in the Declaratory Proceedings (in

which the respondents assert that they are acting for themselves and on behalf of the partnership), in addition to the claim raised in connection with the Cottage, the respondents have also made a claim for specific performance, alternatively for damages against Mrs Brehme and PWF on the basis of an alleged breach of agreement to make additional loans of £700,000 to the partnership, over and above the sum of £1·2m which was previously lent. On 28 January 2015, the respondents executed a declaration of trust relating to any damages or recoveries pursuant to their damages claim. This was in favour of certain of only various specified creditors of the respondents, including Michelmores, and Mishcon de Reya, solicitors who had previously acted for them, as well as Ritchie Phillips LLP. Mr Roseman has characterised the declaration of trust as an attempt to defraud the respondents' other creditors, as well as being a breach of the freezing orders mentioned above.

7. The respondents were ordered to pay to PWF costs of £518,539·93 in connection with the arbitration. When these were not paid, PWF sought and obtained a charging order upon any interest that the respondents might have in the Cottage. Subsequently, on 12 May 2015, the respondents were adjudged bankrupt, and on 29 July 2015, Messrs Duncan Swift and Jeremy Willmont of Moore Stephens LLP were appointed as trustees in bankruptcy.

8. On 23 July 2015, the Bank's Receivers sold the Farm to Sarafina Properties Ltd ("SPL").

Evidence

9. In support of the application there are witness statements from Mrs Brehme (two), Mr Swift, Mr Mark Osgood (a solicitor and partner in Moore Blatch) (two), together with formal statements from the proposed administrators. Mr and Mrs Brake rely upon three witness statements from Mrs Brake, although some of this evidence was directed to the applications which I considered previously, and a witness statement from Mr Peter Williams, a solicitor and partner in Michelmores, a firm which previously acted for the respondents. Mr Ritchie also provided a witness statement.

The submissions for PWF

10. Mr Roseman submitted that the respondents had no entitlement to appear on the Administration Application, that the application had been brought with the respondents' agreement, that the partnership was insolvent, that the proposed administration order would achieve a better result for the creditors than if the partnership were to be liquidated, that the proposed administrators were well-equipped and placed to carry out their functions, and that any suggested conflicts could be managed, and that in the circumstances the proposed administration order should be made.

The entitlement of the respondents to appear on the Administration Application

11. Mr Roseman submitted that the respondents had no right to appear or to be represented on the Administration Application because they did not fall within the any class of person permitted to do so under rule 2.12 of the Insolvency Rules 1986 (SI 1986/1925) (as substituted by rule 5 of and paragraph 9 of Schedule 1 to the Insolvency (Amendment) Rules 2005) (SI 2005/1730)), which apply to the Administration Application by virtue of article 18 of and Schedule 10 to the Insolvent Partnerships Order 1994, which also applies the Insolvency Act 1986, and the Insolvency Rules 1986, with necessary modifications, to proceedings such as these. Mr Roseman submitted that the combined effect of these provisions was that the only persons entitled to appear at the hearing were (i) PWF as applicant (rule 2.12(a)), (ii) the partnership (rule 2.12(b)), and (iii) with the permission of the court, any other person who appears to have an interest justifying his appearance: rule 2.12(k).

12. Mr Roseman's argument had several limbs to it.

(i) It was, he suggested, a logical extension of the principles that I had derived from the authorities mentioned in my earlier judgment, including Wilson v Greenwood (1818) 1 Swanst 471, Fraser v Kershaw (1856) 2 K & J 496, Official Receiver v Hollens (Paul) [2007] Bus LR 1402, Heath v Tang [1993] 1 WLR 1421 and In re GP Aviation Group International Ltd [2014] 1 WLR 166, which had led me to conclude that the respondents lacked standing to make their applications which I dismissed as mentioned above, that they should lack standing to

interfere with any application for the appointment of an administrator. (ii) Paragraph 12 of Schedule B1 to the 1986 Act, as inserted by section 248 of and Schedule 16 to the Enterprise Act 2002 and modified by paragraph 6 of Schedule 2 to the 1994 Order (as substituted by article 7 of and Schedule 1 to the Insolvent Partnerships (Amendment) Order 2005), permits an administration application to be made only by (a) the partners in a firm, (b) the firm's creditors, and (c) a combination of (a) and (b). Since, by virtue of section 38 of the Partnership Act 1890 the respondents are precluded from binding the firm, it follows that they cannot seek to put it into administration, and therefore they cannot resist an application that it be put into administration. (iii) The courts must be on guard against allowing an administration application to become "overpopulated" with disgruntled parties that will delay, and drive up the cost of, making administration orders: see In re Farnborough-Aircraft.com Ltd [2002] 2 BCLC 641, per Neuberger J. (iv) The respondents no longer have any "interest" in the partnership as their shares have vested in their respective trustees in bankruptcy, pursuant to section 306 of the 1986 Act.

The Administration Application was brought with the agreement of the respondents

13. Mr Roseman accepted that, contrary to what is stated in the Administration Application, PWF is not, and was not, a creditor of the partnership. However, he submitted that none the less the application was properly brought (though it would require amendment to reflect this point) under paragraph 12(1)(a) of Schedule B1 to the 1986 Act, as inserted and modified, because the respondents agreed to, and actively encouraged the Administration Application which they now resist. This point is relied upon positively by Mr Roseman, to demonstrate the strength of the case for the application, but also responsively in relation to Mrs Brake's submission that the application is fatally improperly constituted since the 1994 Order permits an application to be made by the members of the partnership acting in their capacity as such (see paragraph 12(1) of the modified provisions of Part II of the 1986 Act, and Schedule B1 to the 1986 Act, as applied by article 6 of and Schedule 2 to the 1994 Order, as subtituted), and not by a single member only.

14. Mr Roseman developed this submission by reference to the following material in the evidence before the court:

    (i) On 19 August 2015, Mrs Brake sent the following e-mails: (a) to Mr Swift, as her trustee in bankruptcy, inter alios, stating:

    > "Clearly the partnership is insolvent and should be in some form of insolvency procedure. It cannot pay its debts when they fall due and its assets are far less than its liabilities. Everyone involved has known this since West Axnoller Farm was sold. [The arbitrator] is not a licenced IP and cannot act as one. If I were not bankrupt I would have applied some time ago to put the partnership into a formal insolvency procedure."

    (b) To the arbitrator, inter alios, stating:

    > "We have said time and time again that the partnership is insolvent. There can therefore only be a distribution of the proceeds from sale of its assets by a court appointed insolvency practitioner."

    (ii) On 16 September 2015, Mr Swift, sent an e-mail to the arbitrator, inter alios, mentioning matters relied upon in the Administration Application, and proposing that joint administrators be appointed.

    (iii) On 17 September 2015, the arbitrator responded to Mr Swift, inter alios, stating:

    > "My initial reaction is that what you propose would be an efficient and probably more cost effective method of winding up the partnership.
    >
    > "As regards to the arbitration costs the position is that all the costs have so far been borne by PWF, the claimant in the arbitration, that is its share of the deposits and, pursuant to directions from the LCIA the deposits which should have been made by the Brakes."

(iv) On 24 September 2015, Mrs Brake, in e-mail correspondence on the subject of Mr Swift's suggestion of the appointment of an administrator (see her e-mail of 22 September 2015 to the arbitrator) sent an e-mail to the arbitrator, inter alios, stating:"For what it is worth, I think it is a very good suggestion put forward by Mr Swift."

(v) On 29 September 2015, Mrs Brehme, on behalf of PWF, sent an e-mail to Mr Lee, stating: "As everyone appears to be in agreement on the trustee's proposal, [PWF] will also agree to it."

(vi) On 30 September 2015, Mrs Brake sent an e-mail to the arbitrator, inter alios, stating:

> "Please would you direct that an administrator is appointed over the affairs of the partnership? It is quite wrong to allow matters to drift along. There are funds with which to pay the creditors of the partnership sitting with Opus LLP, which of course include clients who have paid damages and other deposits that have not had them returned as well as trade supplies etc."

(vii) On 5 October 2015, the arbitrator directed that:

> "Accordingly by this e-mail and with the consent of the parties I direct that the proceedings in LCIA case reference 122085 be stayed for a period of 12 months from today, that is until 4 October 2016, subject to either party's right to restore the proceedings on 14 days' notice to the other party and to myself and LCIA [the London Court of International Arbitration]."

15. Mr Roseman drew attention to the arbitrator's e-mail, dated 10 January 2016, to Mr Swift, copied to others, in which the arbitrator stated:

> "Thank you for your e-mail below … I note that your e-mail was not sent to the parties to the arbitration and for the sake of form I would be grateful if you could do this. I have sent a copy of your e-mail to the LCIA. As you know the arbitration has been stayed to allow the administration proposed by you to come into effect. Although I have not been informed of the events since the arbitration was stayed, on considering your e-mail and the attachments to it I do not see any reason to change the view that I expressed that the administration proposed by you would be an efficient and cost effective way of winding up the partnership."

I should mention that Mr Swift's e-mail, to which the arbitrator was referring, was dated 9 January 2016, and mentioned Mr Swift's suggestion (which he described as his "proposal") for the partnership to be placed in administration. In his e-mail, Mr Swift had continued:

> "You kindly indicated your support of the proposal and put it to the partners, Mr and Mrs Brake and [PWF] all of whom indicated their support of it, as did Peter Williams of Michelmores LLP, solicitors formerly acting for … Mr and Mrs Brake personally, in my meetings with him of 18 September and 20 October 2015."

16. Mr Roseman relied also upon the minutes of a meeting of the respondents' creditors held on 20 October 2015, which was attended by Mr Williams, on behalf of Michelmores, as creditor in the respondents' bankruptcies. The meeting was also attended by Mr Swift and Dawn Sherrin, both of Moore Stephens. The minutes of the meeting recorded, inter alia, that no proxies had been received from any other creditors, and that the trustees in bankruptcy "were exploring the prospect of administration" for the partnership:

> "A partial overlap of appointees from Moore Stephens is proposed which recognises the key duty is to get in and realise assets by this process achieve perfect title for asset purchasers whilst managing any possible conflicts should there be any. As such Jeremy Willmont of Moore Stephens to represent TiBs and Steve Ramsbottom of Moore Stephens to represented the administrators with

> Taylor Wessing to provide legal representation for the TiBs and Moore Blatch for the administrators to manage any conflicts and if necessary the TiBs and administrators to ask the court for direction. [Peter Williams] confirmed that he was happy with that approach and the proposed appointment of Administrators to the partnership as outlined."

Mr Williams's capacity at that meeting, I emphasise, was that of creditor, and not the respondents' solicitor.

17. As a fallback position, Mr Roseman suggested that if PWF had not been entitled to make the application for the reasons advanced by Mrs Brake, and described below, then Mrs Brehme should be added, or substituted, as an applicant because she is undoubtedly a creditor of the partnership, and has by her evidence already expressed her willingness so to be added. He developed the case for the addition or substitution of Mrs Brehme as a party in his additional written submissions, arguing that the court had jurisdiction to take such a course pursuant to rule 7.51A(2) of the Insolvency Rules 1986 (SI 1986/1925) (as substituted by rule 2 of and paragraph 469 of Schedule 1 to the Insolvency (Amendment) Rules 2010 (SI 2010/686)) whereby the provisions of the CPR are applied to the application, and he relied, in particular, upon CPR r 19.2(2)-(4). He submitted that in considering the exercise of this power, I should be guided by the approach adopted by the Court of Appeal in Hounslow London Borough Council v Cumar [2013] HLR 17 which warned against adopting an unduly restrictive view of the use of the power to join parties, and emphasised the importance of seeking to achieve, prompt, efficient, and cost-effective resolution of disputes. In addition, Mr Roseman relied upon CPR r 3.1(2)(m) which permits the court to "take any other step or make any other order for the purpose of managing the case and furthering the overriding objective", and upon paragraph 13(1)(f) of Schedule B1 to the 1986 Act, as inserted by section 248 of and Schedule 16 to the Enterprise Act 2002, to "make any other order which the court thinks appropriate". The latter, he submitted, which coupled with rule 7.55 of the Insolvency Rules 1986, meant that if there is any defect or irregularity in relation to PWF's locus standi and/or the administration application generally, the court could cure the same. Mr Roseman's submission, on this aspect of the case, came to a simple, but attractive, point, namely, that if the court is satisfied of the inability of the partnership to pay its debts, and that administration is likely to achieve a better result for creditors, then if PWF lacks the necessary standing to make the application, but Mrs Brehme has such standing, and is willing to be a party, it would be absurd to dismiss the application because of what was a technicality, thereby necessitating the making of a further application.

The partnership's insolvency

18. The partnership, Mr Roseman submitted, is hopelessly insolvent, with assets of only £888,829, even treating the Cottage (valued at £570,000) as a partnership asset. The remaining assets consist of chattels (£41,051), cash (£187,778, being the surplus after the realisation of the Farm), entitlement to a VAT recovery (£40,000), and goodwill and intellectual property, valued at £40,000. Against this, Mr Roseman maintained, the partnership owes approximately £1·7m to unsecured creditors; for this figure he relies upon the statement of Mr Ritchie, the partnership's former accountant. This statement (dated 27 August 2014) was filed on behalf of the respondents in the Arbitration Claim in connection with PWF's application for the charging order over any beneficial interest that the respondents had in the Farm and the Cottage. Mr Ritchie stated, at para 9, that he had a "thorough and in depth knowledge of the business of [the partnership] as well as a full knowledge of the [respondents'] personal financial position". I would add that when Mr Ritchie made submissions in the course of the hearing before me, he did not suggest that the partnership was able to pay its debts. His submissions proceeded upon the premise that it was insolvent.

19. Mr Roseman pointed out that amongst the liabilities listed in Mr Ritchie's statement, at para 10, was a loan of £1·2m to Mrs Brehme, together with accrued interest; a loan also admitted by the respondents' in Mrs Brake's statement (in the Administration Application) dated 8 January 2016, at para 21. Mrs Brake also prepared other lists of partnership creditors, one in manuscript totalling £629,274, (omitting Mrs Brehme), and another typed, and including Mrs Brehme at £1·2m. The latter document suggested that total liabilities were £4·1m, but that was at a time when Adam & Co (the bankers who had a charge upon the Farm) were owed in excess of £2·1m. Mr Roseman relied also upon Mrs Brake's statement mentioned above, that the partnership was clearly insolvent, and upon her witness statement of 15 December 2015, in the Declaratory Proceedings, in which she said variously (at paras 44-45) that even if the Cottage were a partnership asset, this would still leave a significant

shortfall in relation to creditors, who were likely to be owed £2m, when Mrs Brehme's claim was included, and that the partnership's accountants (RP) had advised that the capital account deficit would be £866,000. (It came, therefore, as no surprise when Mr Ritchie's submissions approached the insolvency of the partnership as I have described.)

The suggested administration order would achieve a better result for creditors than if the partnership were to be liquidated

20. Mr Roseman relied on a schedule of "comparative estimated outcomes", and accompanying notes, provided by Moore Stephens, and exhibited to the statement of Mr Osgood. That suggests that liquidation of the partnership would produce a recovery of 19·9 pence in the pound for unsecured creditors, as against 27·4 pence in the pound in the case of an administration order. The realisable assets are expected to be about £125,000 more in the case of administration, including (i) VAT recovery, evidenced in the Bank's Receivers' account, on the sale of the Farm (£40,000), and (ii) goodwill and intellectual property (£50,000) as against nil in both cases upon liquidation, together with (iii) about an extra £35,000 for chattels. Similarly, the costs of administration are expected to be less, in that the ad valorem fees (£65,854) payable to the Secretary of State would be avoided. Factoring in these differences, the recoveries would be about £190,000 more upon administration. The surplus for distribution would be about £695,000, against about £505,000 upon liquidation, to be distributed amongst unsecured creditors of just over £2·53m.

21. This analysis, Mr Roseman maintained, pointed to the conclusion that for the purposes of paragraphs 11 and 3(1)(b) of Schedule B1 to the 1986 Act, an administration order was reasonably likely to achieve the purpose of administration, and would achieve a better result for the partnership's creditors as a whole than if the partnership were simply to be liquidated.

The identity of the administrators to be appointed

22. PWF's application is that Mr Swift (as mentioned above, an existing trustee in bankruptcy for both of the respondents) and Mr Stephen Ramsbottom, both of Moore Stephens, both licensed insolvency practitioners, be appointed as administrators of the partnership, to exercise their powers, jointly or individually. Mr Roseman submitted that such an appointment, where there is overlap with the trusteeship in the bankruptcies would confer practical benefits, not least because it would reduce the scope for partners, with what he suggested was the respondents' questionable integrity, to adopt an inconsistent approach as to the ownership of assets. Absent such an arrangement, Mr Roseman maintained, the respondents would be more easily able to play off a trustee against an administrator, by adopting, at different times, a different case as to whether an asset belonged to the partnership on the one hand, or to them personally on the other. The example he gave was as to what an officeholder might be told by the respondents when walking around the Farm. Such obfuscation could work to the prejudice of a particular group of creditors, personal or partnership. With some overlap of personnel as trustees and administrators, such risks would be minimised. For similar reasons, Mr Roseman suggested, the attribution of partnership liabilities to the correct creditors was likely to be more cost effectively resolved than if there were no such overlap.

23. In support of PWF's case on this point, Mr Roseman relied on what Blackburne J said in Official Receiver v Hollens (Paul) [2007] Bus LR 1402, para 27:

> "That leaves for decision what order the court should now make. Given the small sums involved, I do not propose to remit the matter to the district judge to consider afresh the official receiver's application. The appropriate course is to give the directions that the official receiver seeks so that the former partnership (P & J Catering Co) can be administered as if the debtors had presented a joint bankruptcy petition, direct that the provisions of article 11 of and Schedule 7 to the 1994 Order should apply to the administration of the three estates and direct that the proceedings be consolidated and their title amended as sought. Given the extreme simplicity of the estates and their very close identity-indeed the evidence suggests that the debtors did not clearly distinguish between the partnership's assets and liabilities and their own-this seems to me to be a paradigm case for the

exercise of the powers contained in section 303(2A) to (2C) . They provide a quick and cheap method of securing that the partnership's assets (essentially the mobile van) are applied, first, in payment of any debts and liabilities of the partnership and, subject thereto, in payment of the debts in the two individual bankruptcies."

24. Mr Roseman, correctly anticipated that Mrs Brake would advance submissions as to how the arrangement that PWF proposes would lead to a conflict of interests, between the body of creditors of the respondents, and the interests of the body of creditors of the partnership, if there were to be an "overlapping" officeholder, as trustee and administrator, and both officeholders were to come from the same professional practice. Similar concerns were suggested by the evidence of Mr Williams, and in the submissions and evidence of Mr Ritchie. The conflict argument is based upon the dispute concerning the ownership of the Cottage (and whether it is an asset of the respondents' estates or the partnership), and the damages claim against PWF and Mrs Brehme pursued in the Declaratory Proceedings. He sought to address the conflict argument with the following points.

(1) As for the Cottage, PWF has a charging order, securing £518,000 and interest, on any beneficial interest that the respondents may have in it; though, if necessary, PWF would undertake not to rely on that charging order. The respondents' claim to the Cottage has vested in their respective trustees in bankruptcy. If those trustees were to succeed in claims in respect of the Cottage, this would have an effect which Mr Roseman described as "fuelling" the charging order, putting the Cottage, valued by the respondents at £300,000, into negative equity.

(2) The provisions of section 175A of the 1986 Act (introduced by article 8 and Schedule 4 to the 1994 Order), take effect such that there would be no real conflict of interests. To demonstrate his point, Mr Roseman relied on a passage in Lindley & Banks on Partnership, 19th ed (2010), para 27-106, which comments on the relevant provisions. I have set out the text slightly more fully than Mr Roseman did in his submissions:

> "In those cases in which insolvency orders are made against the firm and one or more partners on concurrent petitions or against all the partners on a joint bankruptcy petition or where the Insolvent Partnerships Order 1994 is applied by order of the court, the Insolvency Act 1986 in the first instance requires the joint estate to be applied in paying the joint debts and the separate estate of each partner to be applied in paying his separate debts. All the joint debts rank equally, other than preferential debts, those postponed under section 3 of the Partnership Act 1890 or under some other Act and, seemingly, those postponed with the agreement of the creditor in question. Interest on the non-postponed joint debts predictably ranks before the postponed joint debts. A similar order of priority applies in the insolvent partners' separate estates. Only the surplus joint estate remaining after payment of the joint debts will be available for transfer to the partners' respective separate estates. Where however, the joint estate is insufficient to pay any class of joint debts and/or interest in order of priority, the responsible insolvency practitioner (but not the joint creditors themselves) can prove for the aggregate amount of those debts/that interest in the separate estates of the insolvent partners and in direct competition with the equivalent class of separate creditors. This was an innovation first introduced by the Insolvent Partnerships Order 1994. Needless to say, there is no corresponding right for separate debts to be proved against the joint estate."

(3) Finally, Mr Roseman said that the proposed administrators would adopt a protocol ("the Protocol"), by way of what he described as "belt and braces" protection for the creditors, which could be made a provision within any order appointing administrators. The Protocol, is mentioned in Mrs Brehme's evidence, where she draws attention to the proposed administrators' acknowledgment (in a letter dated 20 October 2005, sent to PWF's solicitors) of a possible "commercial conflict between [the role of administrators] and the role of two of our partners Mr Swift and Mr Willmont as joint trustees-in-bankruptcy". The Protocol, it appears from the letter mentioned, was devised by Moore Stephens "to manage, mitigate and clearly dispel any question of commercial conflict that might be considered to arise". I gratefully adopt Mr Roseman's summary of the Protocol set out in his written submissions.

> "(i) Only one of the Brakes' trustees in bankruptcy, Mr Swift is one of the proposed administrators; the other insolvency practitioner is Stephen Ramsbottom who is not involved in any way whatsoever

with the Brakes' bankruptcies. (ii) The proposed administrators will have a team of staff undertaking the work, which is led by Jeremy Fricker, an associate director at Moore Stephens. The trustees in bankruptcy have a separate team led by another associate director at Moore Stephens. (iii) The proposed administrators and the trustees in bankruptcy have separate legal advisers. The following protocol will be followed in determining the ownership of the partnership's and the Brakes' respective assets: (a) reference will be made to the Brakes' personal records and that of the partnership; (b) Mr Willmont, the Brakes' other trustee in bankruptcy and Mr Ramsbottom as one of the proposed administrators will assess the matter; (c) if necessary, the proposed administrators and the trustee in bankruptcy's respective legal advisers, being Moore Blatch and Taylor Wessing, will carry out an assessment; (d) mediation; and (e) failing that, seeking the court's directions."

The submissions for the respondents

The entitlement of the respondents to appear on the Administration Application

25. Mrs Brake closely linked her submissions on this point with the next, namely, whether the proceedings were properly brought and constituted. She submitted that pursuant to rule 2.12 of the 1986 Rules, as applied to a partnership by the 1994 Order, articles 3 and 18, she had a right to appear at the hearing. This submission was supported by her reference to para 8.13 of Davis, Steiner & Cohen, Insolvent Partnerships (1996), and to note 4 to that text which expresses the view that partners and others who are members under the 1994 Order are "obviously in a different position from the members of a company, who will often not be heard by a court where the company is plainly insolvent". For this purpose, she submitted, the respondents' bankruptcies were irrelevant because for reasons considered in relation to the earlier judgment, a member does not cease to be a member of a partnership upon bankruptcy, despite the entitlement of the member's trustee in bankruptcy to that member's share as tenant in common with the solvent partner. The trustee does not step into the partner's shoes, and become a partner in his place; see Lindley & Banks on Partnership, para 27-67. This conclusion, she submitted, was consistent with, and reflective of, the requirement to which she came next, as to the members of the partnership (and not merely one of them) to make an administration application.

26. In light of the submission mentioned in the preceding paragraph, Mrs Brake argued that she was not forced to rely upon rule 2.12(k) of the 1986 Rules. Thus the respondents' lack of a financial interest in the outcome of the proceedings, by reason of bankruptcy and the operation of section 306 of the 1986 Act, was irrelevant to their right to appear as members of the partnership.

27. However, she submitted that in any event the respondents did indeed have a financial interest because of their claim for damages against Mrs Brehme (with PWF joined as a party on that issue, though not in relation to the Cottage) in the Declaratory Proceedings.

The Administration Application was brought without proper authority

28. Mrs Brake drew attention to the fact that the Administration Application was made by PWF, incorrectly stating that it was a creditor of the partnership. It was not even asserted by PWF that the application was made by the partnership's members; the members, she submitted had not made the application, and this was a fatal objection to it, because it is clear from the wording of paragraph 12 of Schedule B1 to the 1986 Act, as inserted and modified by the 1994 Order, that it must be "the members" of the insolvent partnership acting in their capacity as such who make the application. The partnership deed expressly provided by clause 15.6(r) that any decision to apply for an administration order under the 1986 Act required the unanimous approval of the partners, but such approval was absent she argued.

29. Mrs Brake also drew attention to section 31(1) of the 1890 Act which provides that an assignee of a partnership share, whether as a trustee in bankruptcy or otherwise, is not entitled to "to interfere in the management or administration of the partnership business or affairs". The right to appear on the application, and to participate in a decision as to putting the partnership into administration, were personal and non-assignable rights. The application was therefore defective for want of the respondents as applicants, and it must be dismissed, just as the Court of Appeal (Lord Hanworth MR, Warrington and Sargant LJJ) held in Public Trustee v Elder [1926] Ch

776 that for an account to be taken all partners must be parties in proceedings, and that an assignment of rights could not modify a partner's rights as partner. In that case the shares of German partners in an English firm were assigned to the Public Trustee pursuant to various enactments, including the Trading with the Enemy Amendment Act 1916, and subordinate legislation, which had made provision for such matters arising from the Great War. The absence of the German partners as parties to the claim for an account as claimed by the Public Trustee was held to render the action such that it could not be maintained.

30. In the absence of an agreement between the partners, Mrs Brake submitted, it was simply not competent for PWF or anyone else, to make the Administration Application. Mrs Brake relied on section 24(8) of the 1890 Act, which is in the following terms:

> "Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners."

She relied also upon section 44 (rules for distribution of assets on final settlement of accounts, subject to contrary agreement) of the 1890 Act. There was no consent or contrary agreement in this case, she contended. For her to make good this submission, she needed to address the case advanced by Mr Roseman that, on the contrary, the respondents had agreed to, and indeed, encouraged the course of appointing an administrator.

31. Mrs Brake made two points in seeking to answer the case that there had been agreement as to the appointment of an administrator. First, acknowledging that there had been a change of stance on her part, she attributed that change to having taken advice. Secondly, she suggested that Mr Brake had never been asked about administration; she did not elaborate further upon this. Mrs Brake referred me quite extensively to correspondence between the arbitrator and PWF's solicitors, and also to correspondence between Moore Blatch, solicitors acting for the proposed administrators, and herself. The latter correspondence began with an e-mail, dated 4 November 2015, from Moore Blatch sent to "Stay in Style", but addressed to both Mr and Mrs Brake. It set out what were suggested to be the benefits of administration, and described the suggested procedure to be followed to progress any application for administration. What was contemplated was a formal meeting of partners, with the passing of a resolution. Documents required to be executed for the implementation of the proposed course were enclosed. Mrs Brake responded to this on the same day, indicating that she and her husband would wish to take legal advice. Mrs Brake also took up the matter of obtaining legal advice with Mr Swift, in an e-mail sent on 9 November. For reasons which I shall explain below in expressing my conclusions on this aspect of the case, I found this correspondence to be significant in assisting Mrs Brake's position as to the absence of any firm agreement, on her part, to the making of the Administration Application.

An issue as to the partnership's insolvency

32. Despite Mrs Brake's previous insistence, in correspondence with Mr Swift and the arbitrator, that the partnership was insolvent, in these proceedings by both her written and oral submissions she challenged whether in fact the partnership was insolvent. She also maintained that the issue as to insolvency should be resolved by the arbitrator.

33. Mrs Brake referred to sections 222, 223, and 224 of the 1986 Act which deal with the circumstances in which an unregistered company is deemed unable to pay its debts, which can be summarised as any of the following: (i) the company's neglect to pay a creditor following demand, (ii) the company's failure to satisfy a debt after an action has been brought, (iii) if process is issued against the company on a judgment and is returned unsatisfied, (iv) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due, (v) if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account contingent and prospective liabilities. It has not been established, submitted Mrs Brake, that any of these provisions had been satisfied in relation to the partnership.

34. Mrs Brake accepted that she had previously expressed the view that the partnership was insolvent, but, she said, a number of significant events have occurred which have changed the position. First, tax liabilities were, she

suggested, previously over-estimated. She said that HMRC liabilities are not approximately £350,000 as previously believed, but only £10,427 according to HMRC; she relied on a letter from HMRC dated 12 January ,. Secondly, following the sale of the Farm, there is a cash surplus of around £180,000 after paying off Adam & Co. Thirdly, customer deposits for holidays, some £87,057·50, had not, after all, been claimed, as the new owner had facilitated stays at the Farm, and fourthly some trade creditors had issued credit notes. Taking all this into account, Mrs Brake suggested that Mr Swift's figures in his schedule for comparative estimated outcomes, which was based upon Mrs Brake's own manuscript list of creditors (£629,274 excluding Mrs Brehme), overstated liabilities by about £492,000. Her recalculated figure of partnership liabilities is just £136,815·42 and that figure includes a liability to Ritchie Phillips for £87,431, which Mrs Brake suggests should be deducted as well because on PWF's case that liability is in issue. If Mrs Brake's analysis is entirely correct, this reduces the level of trade creditors down to £49,384·42, which would be eliminated by the surplus mentioned. Thus, she submitted, since pursuant to paragraph 11 of Schedule B1 to the 1986 Act (as modified by article 6 of and Schedule 2 to the 1994 Order, as amended pursuant to article 7 of and Schedule 1 to the Insolvent Partnerships (Amendment) Order 2005, the jurisdictional focus is upon the whether "the partnership is unable to pay its debts" (unlike in the case of a company where the issue is whether "the company is or is likely to become unable to pay its debts"), the current ability of the partnership to meet its current obligations is a complete answer to the case for the appointment of administrators.

35. As for the £1·2m debt (not taken into the reckoning on her analysis thus far) said to be due to Mrs Brehme, despite the written records that suggest that there is such a liability to Mrs Brehme, Mrs Brake submitted that it is a disputed debt, more than outweighed by the damages claim which is the subject of the Declaratory Proceedings. Mrs Brake, therefore, disputes that Mrs Brehme has the status of a creditor in relation to the partnership, and therefore could not be added or substituted as an applicant (as suggested by Mr Roseman as a fallback position).

36. Mrs Brake also placed reliance upon a draft dissolution account prepared by Saffery Champness which dealt with the net asset position of the partnership at 21 June 2013 (the date of dissolution). This, she pointed out, showed in the balance sheet a positive capital account of £2,909,684. I observe, however, that this figure was reached after taking the fixed assets of the partnership as being £6,560,999, being their net book value at the relevant date. The largest single item among such assets was the Farm (£6,464,972) subject to the charge in favour of Adam & Co. However, when the Farm was sold in July 2015, as is apparent from a draft completion statement exhibited to Mrs Brehme's statement of 3 December 2015, the price achieved was less than £2·5m, and after various expenses were deducted, the surplus was just under £200,000. Similarly, Mrs Brake relied upon the draft balance sheet prepared by Ritchie Phillips, for 5 April 2014, which showed a positive capital balance of £3,109,225. That too, however, was based upon fixed assets having a much higher value (nearly £6·7m) than was in fact realised. In her written submissions, Mrs Brake acknowledged that assets have been sold "which have altered the balance sheet of the partnership", but she went on to say that it was not accepted that the assets were less than the liabilities, as the position was not even close to crystallising, and that it is necessary to resolve the issues subject to the Declaratory Proceedings (the Cottage and the damages claim against Mrs Brehme), before "the position finally crystallises". In short, Mrs Brake's submission was that the inability of the partnership to pay its debts had not been demonstrated.

No better result for creditors than upon liquidation

37. Mrs Brake emphasised that even on PWF's case, the only statutory purpose that was potentially relevant was achieving a better result for the partnership's creditors as a whole than would be likely if the partnership were simply liquidated, and that I could only make an administration order if there is a real prospect of that purpose being achieved. (I have paraphrased Mrs Brake's submissions a little because they were formulated by reference to the earlier administration order regime which preceded what is now Schedule B1 to the 1986 Act. I think this was because she had relied on Davis, Steiner & Cohen which was written at a time when the new regime had not been devised. I have taken this into account as necessary.) She challenged the case that an administration order would achieve such a better result.

38. In particular Mrs Brake took issue with the suggested level of fees for the proposed administrators and their

lawyers (£180,000), suggesting that this was far too high a figure, and that such a level of costs could not be in the interests of creditors, and would outweigh any saving in respect of ad valorem fees. By contrast, she suggested that professional fees should be no more than £20,000, mentioning an estimate from a firm of accountants. She challenged the estimated level of trades debts (especially by reference to HMRC's position), pointed out that the administrators do not have an established right to sell the Cottage, and challenged the suggested potential recoveries for chattels (£41,051, as opposed to £6,831, actually offered by SPL on liquidation) and goodwill (£50,000). As for goodwill, she maintained, in essence, that there was none to sell particularly so long after the sale of the Farm and the cessation of the business. She also disputed that administrators would be able to achieve a VAT outcome more beneficial than would otherwise be the case. In short, Mrs Brake's argument was that the proposed administrators took an unduly rosy view of what might be achieved upon an administration as against liquidation, yet they proposed to run up a disproportionate level of cost in the process.

The suggested conflict affecting the proposed administrators

39. Mrs Brake, both in her written and oral submissions, developed the respondents' case as to why there would be what she described as an insurmountable conflict which rendered it impossible for the same person (Mr Swift), already a trustee in bankruptcy of the respondents, or the same firm of which Mr Swift is a partner (Moore Stephens), to act as administrators of the partnership. In summary, her objections were that:

    (i) Mr Swift had negatively advised the respondents in relation to possible individual voluntary arrangements, but later became Mrs Brehme's favoured candidate as a trustee in bankruptcy, which had been contentious. Michelmores had supported the appointment of KPMG, but Mrs Brehme's choice prevailed. The solicitors who have acted for Mrs Brehme and PWF, Moore Blatch are proposed to be legal advisers to the proposed administrators under the Protocol, but they have already entered into contentious correspondence (on 22 February 2016) with Michelmores suggesting that that firm has assisted the respondents in breaching the freezing order, and in breaching fiduciary duties in connection with the declaration of trust. This background, in which the respondents and Mrs Brehme have a very bad relationship, makes it undesirable for the Proposed Administrators to be those suggested.

    (ii) Mrs Brehme already faces conflict between her position as a disputed creditor of the partnership, and her position as a member thereof with responsibilities to creditors. She is competing with the creditors of the partnership in respect of payment. By deed in May 2015 ("the May 2015 Charge"), PWF charged the judgment debt of £518,539 against the respondents, and the equitable charge pursuant to the charging order in favour of Mrs Brehme to secure debts due from it to her.

    (iii) There already exists a dispute between the respondents' personal creditors, in particular Michelmores and Mishcon de Reya, and the trustees in bankruptcy, as to whether a claim should be pursued in respect of the Cottage.

    (iv) There is a clear conflict between the interests of partnership creditors, and personal creditors of the respondents, as to the ownership of the Cottage, and the same persons cannot properly serve the interests of those competing groups acting both as administrators in respect of the partnership, and trustees in bankruptcy. As a trustee in bankruptcy, Mr Swift should be seeking to challenge the validity of the May 2015 Charge as a preference, but as an administrator he should be seeking to preserve the Cottage in the partnership's estate.

    (v) Mrs Brake made reference to section 214A of the 1986 Act, inserted by the Limited Liability Partnership Regulations 2001 (SI 2001/1090), which provides that withdrawals made by members of an LLP during the two-year period prior to the commencement of winding up will be subject to claw back if it is proved that at the time of withdrawal the member knew or had reasonable grounds to believe that the LLP was, or would be made, insolvent. Mrs Brake submitted that if the partnership was insolvent, then so too was PWF. Mr Swift could therefore find himself in the

position, if an administrator of the partnership, in which he should apply to wind up PWF for the benefit of the partnership's creditors, and then challenge the May 2015 Charge. This would involve his pursuing Mrs Brehme, who had proposed him both as a trustee in bankruptcy, and as an administrator. However, Mrs Brake submitted that Mr Williams's evidence, suggests that Mr Swift will not address the question of making an attack on the validity of the May 2015 Charge, despite requests from a majority of the respondents' creditors.

The joinder of Mrs Brehme

40. Mrs Brake objected to Mr Roseman's application for the addition or substitution of Mrs Brehme as a party. These objections were developed by her fully in her written submissions sent to me following the hearing. Her submissions on this point were essentially based upon the reasons that she had advanced in relation to the issue of the partnership's insolvency; she maintained that Mrs Brehme had not demonstrated her position as a creditor, and therefore that she lacked locus. She maintained that a full trial of the Declaratory Proceedings would be required in order for there to be a proper determination of whether Mrs Brehme was indeed a creditor. She objected that it would not be fair to the respondents for Mrs Brehme to be treated as a creditor without giving the respondents the opportunity to challenge that status with new evidence.

Mr Ritchie's submissions

41. Mr Ritchie helpfully prepared a written submission. He suggested that RP was the largest uncontested creditor of the partnership. Neither Mr Roseman nor Mrs Brake objected to Mr Phillips appearing or making submissions in respect of the Administration Application.

42. Mr Ritchie maintained that RP had been the accountants to the original sole trader practice that had been established by Mrs Brake in 2005, and that RP subsequently became accountants to the partnership when it was established, and it had retained that position after PWF joined the partnership in 2010. RP, he said, is owed around £90,000, plus interest, for work that it has undertaken for the partnership; he produced copies of invoices that supported this suggestion. These invoices had not been exhibited to his witness statement (a point taken by Mr Osgood in his second witness statement), but they were delivered with his submissions. He explained that he understood that PWF disputed RP's invoices. I should add that it was not suggested (in my view correctly) by anyone at the hearing, by which time the invoices were available, that RP did not have at least an arguable claim for payment in the sums intimated by Mr Ritchie.

43. Mr Ritchie submitted that the Administration Application should be dismissed and that two members of KPMG (Messrs John Millson and David Standish), chartered accountants, should be appointed as liquidators of the partnership. As with Mrs Brake's submissions, his analysis of statutory purposes seemed to be based upon the regime that preceded what is now Schedule B1 to the 1986 Act. He challenged the suggestion that administration would afford a better outcome for creditors than liquidation; he suggested that the better outcome would be for the arbitrator to continue with his work, but he did not offer any solution to the problem in respect of payment of the arbitrator.

44. Mr Ritchie challenged the suggestion that ad valorem fees would be saved if administration were the course adopted, rather than liquidation, because he considered that liquidation would be an inevitable outcome in this case.

45. Further, submitted Mr Ritchie, there were serious issues of conflict which affected both Moore Stephens and Mr Swift. Mr Ritchie identified points which were substantially the same as those advanced by Mrs Brake in relation to (i) the Cottage (whether it is a partnership asset, or a personal asset of the respondents, with consequential implications for different groups of creditors, and the suggested related need for Mr Swift to mount a challenge to the charge over it), and (ii) the damages claim against Mrs Brehme and PWF maintained in the Declaratory Proceedings (especially in relation to the declaration of trust in respect of the proceeds of the damages claim, where it was suggested that it would be in everyone's interests, other than Mrs Brehme's and PWF's, that the case against them be adopted). The connection between Mrs Brehme and PWF as proposers of Mr Swift as trustee in bankruptcy, and now as administrator, were suggested as heightening concerns as to

conflict.

46. Still further, Mr Ritchie objected that Mr Swift's indications as to the likely costs of administration (£180,000 on his figures) would work against the interests of creditors. He suggested that KPMG would represent much better value, and referred to a letter to him from KPMG dated 2 May 2016 (exhibited to Mr Ritchie's witness statement), suggesting that anticipated fees for office holders from that firm (as administrators, liquidators or receivers) would be between £70,000 and £90,000 plus VAT and disbursements. It has to be noted, however, as Mr Roseman did in reply, that this indication was heavily qualified, with the author expressly stating that it was very difficult to assess the level of fees as much would depend on the nature of the appointment, and the extent to which it was necessary to become involved in court proceedings.

47. In reply to Mr Ritchie's submissions, Mr Roseman suggested that if there were a problem as to Mr Swift's identity, and any suggested conflict in relation to his position, then another Moore Stephens partner, Mr David Elliott, was willing to take on the role of administrator along with Mr Ramsbottom.

48. In response to my invitation, following the hearing, for further written submissions on the question of whether Mrs Brehme should be added or substituted as a party, Mr Ritchie reiterated his observations that the partnership should be placed in some form of insolvency procedure and that a firm of insolvency practitioners independent of Mrs Brehme and PWF should be appointed. He did not advance a case to the effect that Mrs Brehme was not a creditor, or that for any other reason she lacked locus to be so joined.

Discussion

The respondents' entitlement to appear on the Administration Application

49. Despite the force in Mr Roseman's submission that the respondents lack standing because of their lack of interest, for the reasons explained in my earlier judgment, and whilst I recognise the importance of not allowing applications such as these to become overpopulated with disgruntled parties, for the reasons given by Neuberger J in the Farnborough-Aircraft case [2002] 2 BCLC 641, I consider that the respondents did have a recognisable interest at least for the purpose of submitting as Mrs Brake did, that this was not an application brought by the members of the partnership, or with the agreement of all of them. For reasons explained above, as the application developed, it became clear that PWF's case could only be presented on the basis that it was one brought by the members of the partnership, and that this was so because all of them had agreed to such a course. It cannot be a correct interpretation of the 1986 Rules that they operate so as to preclude a person from informing the court, by evidence or submission, that an application brought in his or her name, is not, in truth, an application to which their name was never lent. I conclude, therefore, that I must take into account the respondents' case, as advanced by Mrs Brake, on the question of whether the respondents did agree to the making of the Administration Application, and whether it was brought with proper authority. I add that whether or not the respondents had raised the question of whether PWF was able properly to make the Administration Application, the court itself would have had to consider the question.

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50. As for the other issues upon the application, save in relation to whether the partnership is insolvent, to which Mrs Brake devoted considerable attention, the other matters are ones which overlapped very substantially with the case advanced by Mr Ritchie. The overlapping points raised in Mrs Brake's submissions, in relation to whether administration would produce a better result for creditors, conflict and cost, are, therefore, ones which I have to consider in any event. As for the issue of the partnership's insolvency, whether it was raised by the respondents or not, it, like the issue of PWF's entitlement to make the application, was something upon which I would have had to test PWF's case so as to be satisfied that I could properly make an order as sought by PWF upon the application, whether or not I had heard from Mrs Brake on the point. In the event, even though I have considered the respondents' case on that issue, I have come to the conclusion, for reasons given below, that the partnership is insolvent. If therefore, for the reasons given by Mr Roseman as to the respondents' lack of standing, I should not have taken into account any of the material deployed by Mrs Brake, or any of her submissions, my doing so has not affected the outcome of this application.

Authority to bring the Administration Application, and whether the respondents agreed to it

51. There is no direct authority on the issue of whether all members of a partnership must join in the making of an application for an administration order, or whether a bare majority of them will suffice. As a matter of principle it would seem surprising that when the partnership deed specifically requires unanimity of members for the making of an administration application, and section 24(8) of the 1890 Act requires a majority as to ordinary matters, and unanimity in the case of a change in the nature of the partnership business, that one partner might make an administration application acting alone.

52. In my judgment, helpful guidance on the point can be derived from authority in relation to the provisions of section 124(1) of the 1986 Act which provides that an application for a winding up order should be by petition presented, by amongst other, "the directors" of a company. In In re Instrumentation Electrical Services Ltd (1988) 4 BCC 301, Mervyn Davies J held that a petition could be presented only by all of the directors. He contrasted provisions with those applicable to "a creditor" or "a contributory", in which case anyone within such categories was entitled to petition. By extension, such reasoning might have applied to the original section 9(1) of the 1986 Act dealing with administration orders, so that only all directors could validly have petitioned for such relief. Since In re Instrumentation Electrical Services Ltd was decided, the position as to administration applications in relation to companies has now been put beyond in Schedule B1, because paragraph 105 simply requires that the directors act by a majority. In my judgment it cannot be the case that whereas, in the case of a company, a majority of directors must agree to the making of an administration application, in the case of a partnership, a single non-majority member, can apply for an administration order, especially where the partnership deed provides to the contrary. In my judgment it is relevant that Parliament has chosen to make express provision for majority action by directors, but that no such provision has been made in the case of partnership members. This supports the view that something short of unanimity will not suffice. It is not necessary for me to express any view as to what the position would be in a case where the partnership deed expressly permitted a majority of members to make an administration application.

53. I do not consider that Mr Roseman's attempt, though attractively advanced and powerfully developed, to circumvent this difficulty by suggesting that all partners agreed to the making of the Administration Application can succeed. In my view, the correspondence does demonstrate that Mrs Brake (and I find Mr Brake) were as a matter of principle in favour of proceeding with the making of an administration application. This was very clear from the request to the arbitrator, made by Mrs Brake, on 30 September, that he direct that an Administrator be appointed. This was made in full knowledge of the nature of the proposal advanced by Mr Swift. I have had the advantage, over two days, of seeing the manner in which Mrs Brake has conducted the handling of the application on behalf of herself and Mr Brake, as well as considering the considerable quantity of evidence and correspondence. It is, when all of these matters are viewed as a whole, perfectly clear that she has always acted on behalf of herself and Mr Brake, and that he has been very willing to permit her to do so. When, therefore, she said, on 22 September 2015, in an e-mail to the arbitrator, that she thought that Mr Swift's suggestion was a very good one, I have no doubt that she spoke also with the authority of Mr Brake; similarly, when she invited the arbitrator to make a direction for the appointment of an administrator.

54. The difficulty in the way of Mr Roseman's submission as to the making of the actual application is that the 1986 Rules require, by rules 2.2-2.4 evidence to be filed in support of the application, and for the person making the requisite statement to state that the application is made on behalf of the members. The application must be supported by evidence dealing with the partnership's financial position, and the other matters specified in the 1986 Rules. This evidence must be attached to the application. In my judgment, against this background of the Rules, an application cannot be said to be an application made by the members unless the members have approved of the actual application which is to be filed with the court, which will include the evidence which must be attached to the application. There is good reason for this. If it were not the case it would mean that material might be placed before the court on behalf of all members, when it had not been endorsed by them all.

55. The respondents most certainly did not consent to the actual application which was made. As I have explained above, the application was made by PWF on the erroneous basis that it was a creditor of the partnership. It was not stated to be an application by the members, so there was, at the relevant time, not even a suggestion that

PWF had relied upon any authority supposedly conferred by the respondents. Originally, Mr Swift's proposal of 16 September 2015 had contemplated an application by the trustees in bankruptcy of the respondents and PWF. At a later stage, however, PWF and the proposed administrators did not contemplate that there would be an application by the members, without all the members quite literally signing up to it. This is demonstrated by the correspondence that ensued in November 2015. Moore Blatch, by e-mail of 4 November , to the respondents, explained the appropriate procedure which envisaged the calling of a meeting of partners to approve the choice of administrators, and the execution of paperwork, to be followed by the filing of the application at court. The respondents' approval to attached paperwork was sought, and comments were invited. Further correspondence ensued, but the respondents did not accede to the proposal formally made. Mrs Brake, by e-mail of 9 November, indicated that "We need to take independent legal advice on this".

56. The position, therefore, was that PWF's solicitors correctly approached the method of making an application by seeking to regularise the matter in the manner described in their e-mail correspondence in November 2015. When that attempt failed, no doubt frustratingly, given the previously encouraging remarks made by Mrs Brake, the application now before the court was issued.

57. For reasons that I have set out above, I do not consider that the exchanges with Mrs Brake during August and September created a situation in which the application later made could be said to be by the members of the partnership. They did not agree to the actual application made. They did not agree to its acting as members "in their capacity as such" in the wording of paragraph 12 of Schedule B1 to the 1986 Act, as inserted by article 6 of Schedule 2 to the 1994 Order. They did no more than give indications in principle as to their attitude to an application.

58. The application, therefore, has not been made by the members of the partnership in their capacity as such, nor has it been made by one or more creditors of the partnership. In these circumstances, it follows that the application must fail unless I am persuaded that it should be amended, and a creditor of the partnership added as a party, or substituted for PWF, as Mr Roseman suggested would be an appropriate course in the event that I reached the conclusion expressed in the first sentence of this paragraph. Mrs Brehme, by her witness statement of January 2016, had volunteered that she not only supported the Administration Application, but that she was willing to be joined as an applicant if so required. It goes without saying that any amendment short of the addition of another creditor cannot cure the defects in the present application. Before deciding on whether I should take the course suggested by Mr Roseman, in the eventuality that has arisen of my not being satisfied that the application in its present form can succeed, I will consider the other issues which go to the merits of the application, because if those are lacking, there is no point in considering the addition or substitution of parties.

The issue of insolvency

59. Despite Mrs Brake's valiant attempts to demonstrate the contrary, I have no hesitation in concluding that the partnership is insolvent and unable to pay its debts. The evidence pointing to that conclusion is overwhelming, and it coincides with Mrs Brake's own assessment, expressed on many occasions, that the partnership was clearly insolvent. This, without doubt, was also the view of Mr Ritchie, with his in depth knowledge of the affairs of the partnership. Quite independently of these expressions of opinion, the facts speak for themselves. The assets of the partnership, even if the Cottage is included, are less than £900,000, whereas, on any view, the liabilities are vastly greater. Mrs Brake's list of creditors, excluding Mrs Brehme, and sums due to them, suggested that over £600,000 was due to them, and in addition Mrs Brehme made a loan to the partnership of £1·2m.

60. As to the sum loaned by Mrs Brehme, although Mrs Brake has submitted that it is not clear that Mrs Brehme is a creditor of the partnership whether in her personal capacity or at all, I remind myself of Mrs Brake's own evidence in her witness statement of 8th January 2016, where she said, at paras 20-21, that Mrs Brehme agreed, in her personal capacity, to lend to the partnership £1·9m, and that she did forward £1·2m of that sum. It is, to say the least, given this evidence, and the other evidence relating to Mrs Brehme's lending, clear that she has a good arguable case that such a debt is due to her, and such is sufficient to make her a creditor for the purposes of having standing for the purposes of making an administration application should she be added or substituted as an applicant; see the decision of Warren J in Hammonds v Pro-Fit USA Ltd [2008] 2 BCLC 159, followed by

Judge Behrens, sitting as a judge of the Chancery Division, in Corbett v Nysir (UK) Ltd [2008] EWHC 2670 (Ch). In the latter case, Judge Behrens observed that proof of such a status did "not necessarily mean that that same evidence is sufficient to persuade the court that his purported debt should be taken into account in assessing solvency". It still has to be proved that the partnership is unable to pay its debts, and where the debt is subject to a cross-claim, the court has a discretion as to whether it should require that debt to be established before it makes an order upon an administration application: see paras 12-13 in Corbett's case. I consider that it would be wrong in this case to require the disputed claim raised in the Declaratory Proceedings to be determined before deciding whether to make an administration order. On the material before me there is no proper basis for concluding that there is a realistic case that the cross-claims might eliminate the debt of £1·2m loaned by Mrs Brehme. There is an allegation in the Declaratory Proceedings that under various loan agreements there was a failure by Mrs Brehme to pay a total of £700,000 under various loan agreements, and that as a result, the partnership suffered damage, but it is not quantified, nor is it supported by credible evidence that the suggested damage could eliminate the amount of the debt due. As in Corbett's case, at para 34, it would take a considerable time for the suggested claims to materialise, and it is plain that the partnership cannot pay its debts. Moreover, even on Mrs Brake's figures, there are other creditors besides Mrs Brehme, whose debts have not been paid. In these circumstances, I do not find it necessary to reach any conclusion on a point raised by Mr Roseman in his written submissions forwarded after the hearing (directed at the joinder of Mrs Brehme) as to whether, given the terms of the partnership deed (at clause 13.1(c)(d), which require written consent of the other partners before one partner may take certain steps), the respondents could validly, without PWF's consent, have commenced the Declaratory Proceedings.

61. Mrs Brake's reliance on the Saffery Champness draft dissolution account of June 2013, and Mr Ritchie's draft balance sheet prepared in April 2014 was misplaced. Those computations assumed that the fixed assets of the partnership were in excess of £6·5m, but as events unfolded that proved not to be the case, the Farm itself not even realising £2·5m. When Mrs Brake conceded in her written submissions that the asset sales had "altered" the balance sheet of the partnership, this was a considerable understatement. The balance sheet had been adversely transformed.

Does administration offer a better result for creditors than liquidation?

62. Pursuant to paragraph 11 of Schedule B1, as modified by the 1994 Order, the court may make an administration order in relation to a partnership only if satisfied (a) that the partnership is unable to pay its debts (as to which I have expressed my satisfaction above), and (b) that the administration order is reasonably likely to achieve the purpose of administration. Pursuant to paragraph 111(1) of Schedule B1, this means an objective specified in paragraph 3 of that Schedule; in this case the only relevant purpose under paragraph 3(1)(b) of Schedule B1 is "achieving a better result for [the partnership's] creditors as a whole than would be likely if [the partnership]" were simply to be liquidated. For the court to be satisfied that the administration order is reasonably likely to achieve the purpose of administration, for the purposes of this case, there has to be "a real prospect of achieving a better result through an administration than would be likely" upon liquidation: see In re AA Mutual International Insurance Co Ltd [2005] 2 BCLC 8, Lewison J. The focus is upon a better result; that might not be as good a result as that to which an applicant for an order, or an intended administrator, would aspire. It is not necessary that the prospect of a better result is a probability, but that it is real.

63. Even adopting considerable scepticism with regard to the realisable value of (i) goodwill and intellectual property, and (ii) chattels, these items together accounting for over £90,000 in Moore Stephens' schedule of "comparative estimated outcomes" (with accompanying notes), in my judgment there is a clear advantage to proceedings by way of administration rather than by liquidation. The VAT recovery, and savings in ad valorem fees, alone should exceed £100,000, and it seems to me that the only real prospect of achieving anything more than very low figures, or nothing, for goodwill, intellectual property, and chattels, is if they can be sold in connection with an existing business. The schedule describes what is comprised within the goodwill and intellectual property as extending to the booking records for Stay in Style, the website, marketing literature, images and e-mail facilities which were used prior to the sale of the Farm, and which are still in use in a similar business conducted from the Farm. The schedule suggests a value of £50,000 for them reflecting the replacement costs for the assets being used by the business now run from the Farm. It seems to me that these assets are likely

to have some value, even if it is not as great as the £50,000 mentioned.

64. As for Mrs Brake's submissions, and those of Mr Ritchie, as to Moore Stephens' suggested costs of administration, by whichever route is adopted to deal with the partnership's insolvency, administration or liquidation, there are going to be substantial costs to be paid to insolvency practitioners. It is only if the other advantages of proceeding by way of administration, as against liquidation, would be outweighed by any increased costs of administration as against liquidation, that levels of costs would tell against the former. The evidence in this case does not suggest that this would be so. Indeed, Mr Ritchie's evidence supported by the letter from KPMG which I have mentioned, suggests otherwise. KPMG has not suggested that there would be any significant difference in fee levels for administration as against liquidation, although the bracket of fees (£70,000 to £90,000) might be intended to make some allowance in that regard, the extent of the bracket is in a much lower amount than the suggested financial advantage of proceeding by way of administration.

65. In my judgment, the analysis of "comparative estimated outcomes" and accompanying notes, demonstrates that there is a real prospect of a better outcome for the partnership's creditors as a whole if an administration order were made than if the partnership were to be liquidated. There is a better (and real) chance of achieving a higher price for assets that can be sold off, and the likelihood of VAT recovery, and saving of ad valorem fees.

Joinder of Mrs Brehme

66. At this point, and before considering the terms that might be applicable to the appointment of any administrators, it is convenient to consider the issue of whether the Administration Application should be amended, and Mrs Brehme joined or substituted as an applicant. For reasons explained above, in paras 57-58, unless I take that course, the Administration Application must be dismissed.

67. The 1986 Rules make no specific provision concerning the joinder of parties; however, by rule 7.51A(2), subject to paragraph (3) of that rule and other provisions which are not relevant for present purposes, the CPR apply to proceedings under the 1986 Act and the 1986 Rules. The court's power to add or substitute a party is to be found in CPR r 19.2(2)-(4):

> "(2) The court may order a person to be added as a new party if- (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.
>
> "(3) The court may order any person to cease to be a party if it is not desirable for that person to be a party to the proceedings.
>
> "(4) The court may order a new party to be substituted for an existing one if- (a) the existing party's interest or liability has passed to the new party; and (b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings."

In the Hounslow case [2013] HLR 17, para 11, Treacy J warned against adopting a narrow construction of the provisions of the rule whose effect

> "would be to limit the circumstances which amount to substitution of one party by another in a way which would unduly restrict the court's powers of action in avoiding unnecessary and empty technicality and in seeking to achieve the prompt, efficient and cost-effective resolution of disputes."

Both other members of the court, Lord Dyson MR and Davis LJ, agreed with his judgment. I consider that it is desirable that Mrs Brehme should now be added as a party, so that the court can resolve all matters in dispute in these proceedings. Mrs Brehme's position as a creditor has been closely examined at every stage in these proceedings, the fact of her loan to the partnership comes as no surprise to anyone, and her willingness to become a party was disclosed long ago. The policy considerations that informed the Court of Appeal's interpretation of CPR r 19.2 in the Hounslow case are in play in this case. It is desirable to avoid unnecessary

and empty technicality, and to achieve, prompt, efficient and cost-effective resolution of the matters that have already taken up two days of court time in relation to this Administration Application. If I were to refuse to add Mrs Brehme as a party, she could commence her own application, and the issues argued before me at length would all require to be reconsidered. This would achieve no purpose, but would serve to delay and run up costs wholly unnecessarily. Further, in my view it would be in the interests of creditors generally that an administration order be made, and the sooner that it is so made, the better. Creditors other than Mrs Brehme would be adversely affected if this application were to be refused, and fresh proceedings had to be commenced.

68. I do not consider that there is any unfairness to the respondents in allowing Mrs Brehme to be joined as a party. Her status as a suggested creditor of the partnership was something which they have long known about, and her willingness to be "named as a joint applicant … if so required" was expressed in Mrs Brehme's witness statement of January 2016. The respondents have had ample opportunity to advance any case that they wish to put before the court as to whether Mrs Brehme is in her personal capacity a creditor of the partnership. Mrs Brake's filed evidence specifically acknowledged that Mrs Brehme had made an advance of £1·2m to the partnership in a personal capacity.

69. I shall allow the addition of Mrs Brehme as a party, but not order that PWF cease to be a party, as there may be costs issues affecting it that are required to be considered. Having considered the provisions of CPR Pt 19 dealing with the procedure for adding or substituting parties, it seems to me that no further formal steps are required to be taken, since an application of the kind made by Mr Roseman orally may be made without notice, and his application was supported by evidence already before the court as to Mrs Brehme's position as a creditor, and her willingness to become a party. An amended application will need to be filed and served on the respondents, but that can be done subsequent to the handing down of this judgment, though a draft should be available for consideration when judgment is handed down.

Conclusions as to whether an administration order should be made

70. For the reasons set out above, I have concluded that: (i) PWF was not entitled to make the Administration Application, but that Mrs Brehme is a creditor of the partnership who should be added as an applicant. (ii) The partnership is unable to pay its debts. (iii) An administration order would achieve a better result for creditors as a whole than if the partnership were to be liquidated.

71. In these circumstances, I consider that it is appropriate that an administration order should be made. There remains the issue as to whether the administrators should be those proposed in the application. In this regard it is necessary to consider issues as to conflict, and cost, which have been raised.

(i) Conflict

72. In my judgment there is quite clearly a conflict between the creditors of the respondents personally, and the creditors of the partnership, at least in respect of the ownership of the Cottage, and in relation to the May 2015 Charge. I do not consider that Mr Swift could satisfactorily act as an administrator of the partnership where he would necessarily find himself in conflict with his position as the respondents' trustee in bankruptcy. Any suggested advantage said to derive from such an arrangement, such as the lessening of the respondents' ability to adopt inconsistent stances when communicating with insolvency practitioners serving different interests, it seems to me, are clearly outweighed by the disadvantages inherent in setting up Mr Swift in a position where he faces inevitable conflict to the point that he and his colleagues and advisers appreciate that a protocol is required to address the concerns. The particular problem of inconsistent stances is something capable of being addressed by liaison between the trustees in bankruptcy and any administrators, something which might be facilitated if they were from the same practice.

73. For these reasons, I do not consider that Mr Swift would be a suitable person to be appointed as an administrator. I do not consider that such concerns affect Messrs Ramsbottom or Elliott, the latter of whom is apparently prepared to act as an administrator. Messrs Elliott and Ramsbottom, following appointment, will be office-holders appointed by the court, and will have duties to perform their functions as such. I see no reason to doubt that they would perform those duties properly. Moreover, they are the practitioners who are preferred by

the majority creditor. Despite Mr Ritchie's clearly expressed reservations, and his preference for KPMG to be appointed, subject to the next point, I consider that Messrs Elliott and Ramsbottom should be appointed administrators.

(ii) Cost of the administration

74. Not only Mrs Brake, but Mr Ritchie as well, rightly expressed concern about the intimated levels of costs that Moore Stephens anticipate incurring in the proposed administration. However, the best material that I have for evaluating the Moore Stephens' indication is that provided by KPMG. The Moore Stephens figure for office-holders is £120,000 and is described as pessimistic. It is informed by the fact that there is a background of much litigation; this is why they also allow for £60,000 in legal costs. KPMG's figure of £70,000 to £90,000 does not include disbursements. It is, as Mr Roseman suggested, very highly qualified in terms of the difficulty in making an assessment, the amount of work required, and the extent to which there will need to be involvement in court proceedings. In these circumstances, in my view, there is no basis for supposing that if KPMG had taken an equally pessimistic approach (by which I understand Moore Stephens to mean cautious in light of the history), their figures would be significantly different from those of Moore Stephens.

75. In any event, with regard to remuneration concerns, I mention that Chapter 11 of Part 2 of the 1986 Rules makes provision for the control of an administrator's remuneration.

76. Still further, on this point, though this is an additional matter, and not one that I have found it necessary to rely upon, it seems to me that the respondents do lack standing to make an objection on cost grounds, since it is not they who would benefit from any costs saving by using one form of insolvency process rather than another, or one firm of insolvency practitioners, rather than another.

Disposal

77. For the reasons set out fully above, I shall direct that Mrs Brehme is added as an applicant to the Administration Application, and I shall make an administration order in respect of the partnership. Subject to the observance of the necessary formalities in the case of Mr Elliott, he and Mr Ramsbottom will be appointed as administrators.

78. Whilst an undertaking as to non-reliance upon the charging order was offered on behalf of PWF, I do not consider that it would be appropriate to require such an undertaking to be given, especially since, in the event, it is an application by Mrs Brehme, rather than by PWF, which will lead to the making of the order mentioned, and because I am satisfied, in any event, and irrespective of the offered undertaking, of the appropriateness of the order to be made.

79. I express my thanks to Mr Roseman, Mrs Brake, and Mr Ritchie, for their submissions which were presented with admirable clarity, and in accordance with the timetable which I laid down, following discussion, early in the course of the hearing.

Application granted.