Neutral Citation Number: [2023] EWHC 298 (Ch)

Case No: BR-2018-000493

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

IN THE MATTER OF SCHERZADE KHILJI (IN BANKRUPTCY)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 17 February 2023

Before :

DEPUTY ICC JUDGE CURL KC

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Between :

AMY MEHERS (TRUSTEE IN BANKRUPTCY OF SCHERZADE KHILJI)	**Applicant**
- and -	
(1) SCHERZADE KHILJI	**Respondents**
(2) DAVID GEORGE HARTWELL (PERSONAL REPRESENTATIVE OF ABDUR BASHEED TAJ KHILJI (DECEASED))	

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Paul French (instructed by **DAC Beachcroft LLP**) for the **Applicant**
Peter Wareing (instructed under the Public Access Scheme) for the **First Respondent**
Nicholas Evans (instructed by **Harrison Clark Rickerbys**) for the **Second Respondent**

Hearing dates: 8 December 2022

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JUDGMENT

Deputy ICC Judge Curl KC:

1. This case is about the statutory revesting provision in s.283A of the Insolvency Act 1986 ("IA 1986"), which is sometimes known as the *"use it or lose it"* provision. In summary terms, the section gives a trustee in bankruptcy three years to decide what, if anything, to do about an interest in a property which is the home of the bankrupt, the bankrupt's spouse or civil partner, or a former spouse or civil partner of the bankrupt. If the trustee does not take certain specified action within that three-year period, then the bankrupt's former interest ceases to be part of the bankrupt's estate and revests in the bankrupt. This judgment concerns, in particular, what it means for a bankrupt to *"inform"* their trustee in bankruptcy of such an interest in a property, or for that trustee otherwise to *"become… aware"* of one, within the meaning of s.283A(5) of the IA 1986.

Background

2. Although the underlying facts of this case are reasonably straightforward, it has a complex procedural history. I shall summarise both as concisely as possible, omitting mention of a number of previous applications and appeals where these have no direct bearing on the single issue before me.

3. The Applicant is the trustee in bankruptcy ("the Trustee") of Ms Scherzade Khilji ("Ms Khilji"). Ms Khilji is the first respondent to the Trustee's application. The second respondent is the personal representative of the estate of Ms Khilji's late husband ("the Administrator"). On the face of it, the Trustee's application seeks various declaratory and other relief in relation to a property at 49 Slough Lane, London NW9 8YB ("the Property"), including a declaration of the extent of the respective beneficial interests in it and an order for possession, as well as a declaration that the Property has not revested in Ms Khilji under s.283A(2) of the IA 1986. For reasons I shall come on to, most of that relief has been overtaken by developments in proceedings elsewhere.

4. Ms Khilji's husband ("the Deceased") died intestate on 23 August 2014. The Property was registered in his sole name at that time. On 15 October 2015, the Administrator was appointed by the Bristol District Registry as personal representative of the Deceased's estate and on 3 April 2017 the District Probate Registry at Oxford made a grant of letters of administration to him. It appears to be common ground that the sole significant asset in the Deceased's estate is the Property and that the estate is held on the statutory trusts arising on intestacy. Under those trusts, the estate will devolve in the following order: a statutory legacy to Ms Khilji of £250,000; a one-half interest in the remainder of the balance of the net estate to Ms Khilji absolutely; and the other one-half interest upon trust for the Deceased's children in equal shares.

5. A bankruptcy order was made against Ms Khilji on 2 July 2018 on a petition presented on 23 April 2018. The Trustee was appointed on 7 August 2018. It appears to be accepted on all sides that the bankruptcy estate included Ms Khilji's rights under the unadministered intestate estate of the Deceased. During the early stages of the bankruptcy, two letters were written by the Administrator's solicitors to the solicitors then acting for the Trustee, which were respectively dated 17 September and 27 September 2018. Both sides have sought to rely on those letters in their submissions to me.

6. On 28 September 2018, Ms Khilji attended an interview with an examiner for the official receiver ("OR"), as she was required to do under s.291 of the IA 1986. A statement was taken on that occasion in the usual way and signed by Ms Khilji ("the OR Statement").

7. Under cover of letters dated 13 January 2019, Ms Khilji returned to the Trustee a completed copy of the Trustee's standard bankruptcy questionnaire ("the Questionnaire") and to the OR a completed copy of the standard Preliminary Information Questionnaire in form PIQB ("the PIQB").

8. By a claim form issued on 12 April 2019, the Administrator commenced proceedings in the County Court at Willesden for possession of the Property against, among others, Ms Khilji and the Trustee ("the Possession Claim"). The Trustee supported the Possession Claim.

9. By a professionally drafted defence and counterclaim in the Possession Claim dated 6 September 2019 ("the Defence and Counterclaim"), Ms Khilji claimed a one-third beneficial interest in the Property arising under a common intention constructive trust. Ms Khilji subsequently sought permission from the court to continue with the Defence and Counterclaim, despite her bankruptcy. At a hearing of the Possession Claim on 10 December 2021, Ms Khilji applied to amend the Defence and Counterclaim to introduce a further line of defence, being an argument that the period of three years from the date of the bankruptcy order had expired and, accordingly, her beneficial interest in the Property had revested in her by operation of s.283A(2) of the IA 1986. The County Court at Willesden transferred the Possession Claim to the County Court at Central London in order that the revesting point might be determined by a specialist Chancery district judge.

10. On 11 January 2022, the Trustee issued the application that is before the court today ("the Bankruptcy Application"), supported by a witness statement dated 28 February 2022. I summarised the relief sought in the Bankruptcy Application at §5 above. At a first hearing of the Bankruptcy Application before ICC Judge Jones on 18 March 2022, Ms Khilji was granted permission to put in evidence to support her contention that she had told the OR and/or the Trustee of any interest she might have in the Property. A witness statement addressing that point was filed by Ms Khilji dated 16 May 2022.

11. Meanwhile, the Possession Claim came before Deputy District Judge Lightman in the County Court at Central London on 27 May 2022. As a consequence of Ms Khilji's concession that she had no defence to the Administrator's claim to possession other than her revesting argument under s.283A, the deputy judge made an order for possession, but stayed enforcement of it pending determination of that argument by an ICC judge hearing the Bankruptcy Application. I am told that an application for permission to appeal the possession order was refused by HHJ Dight in early November 2022.

The hearing

12. Shortly before the hearing before me, the Trustee and the Administrator agreed between themselves that the extent of Ms Khilji's beneficial interest in the Property at the date of the bankruptcy order on 2 July 2018 was 5 per cent and that such interest vested in

the Trustee on her appointment on 7 August 2018 as part of Ms Khilji's estate under s.306 of the IA 1986.

13. As a consequence of the order made in the Possession Claim and the agreement between the Trustee and the Administrator as to the extent of the relevant interest in the Property, all that remains outstanding under the Bankruptcy Application is Ms Khilji's revesting argument under s.283A of the IA 1986. All parties confirmed that to be their understanding at the start of the hearing before me. The Trustee and the Administrator accept, however, that their bilateral agreement as to the extent of the relevant interest in the Property will not bind Ms Khilji in the event that the bankruptcy estate's interest has revested in her. If the revesting question is decided in favour of Ms Khilji, then the extent of her interest will remain outstanding after today.

14. Although at the outset of his submissions Mr Wareing briefly canvassed the possibility of seeking a direction for cross-examination of the Trustee, he ultimately did not pursue that suggestion.

Relevant statutory provisions

15. Section 306 of the IA 1986 provides for a bankrupt's estate to vest in their trustee in bankruptcy as follows:

> *"306 Vesting of bankrupt's estate in trustee*
>
> *(1) The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee.*
>
> *(2) Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee (whether under this section or under any other provision of this Part), it shall so vest without any conveyance, assignment or transfer."*

16. The definition of the bankrupt's estate in s.283, read together with the definition of *"property"* in s.436 of the IA 1986, is cast in wide terms. It is common ground between the parties that a beneficial interest arising under a common intention constructive trust held by a person made bankrupt will vest in their bankruptcy estate.

17. Section 283A was inserted into the IA 1986 by the Enterprise Act 2002. The problem at which it was directed was identified by Lawrence Collins J (as he then was) in *In re Byford, decd* [2003] EWHC 1267 (Ch), [2004] 1 P & CR 159, 163, subsequently cited with approval by the Court of Appeal in *Lewis v Metropolitan Properties Realisations Ltd* [2009] EWCA Civ 448, [2010] Ch 148, at [18] as follows:

> *"…it is undesirable for trustees to wait for many years before resolving their rights in respect of the home of the bankrupt or his spouse. This* [i.e. s.283A] *introduces a general rule that the trustee must take steps to realise his interest in the home of the bankrupt or his spouse within three years of the bankruptcy, subject to specified exceptions. If he fails to do so the property vests in the bankrupt and the creditors lose all rights to it…"*

18. The first two subsections of s.283A provide as follows:

"283A Bankrupt's home ceasing to form part of estate

(1) This section applies where property comprised in the bankrupt's estate consists of an interest in a dwelling-house which at the date of the bankruptcy was the sole or principal residence of –

(a) the bankrupt,

(b) the bankrupt's spouse or civil partner, or

(c) a former spouse or former civil partner of the bankrupt.

(2) At the end of the period of three years beginning with the date of the bankruptcy the interest mentioned in subsection (1) shall –

(a) cease to be comprised in the bankrupt's estate, and

(b) vest in the bankrupt (without conveyance, assignment or transfer)."

19. As to the kind of interest that will fall within s.283A(1), Lloyd LJ held in *Stonham v Ramrattan* [2011] 1 WLR 1617, at [51], that:

> *"In my judgment, the interest that section 283A(1) is concerned with is an interest which is part of the bankrupt's estate because it was vested in the bankrupt at the commencement of the bankruptcy…Correspondingly, in my judgment, the trustee in bankruptcy does not become aware of such an interest for the purposes of section 283A(5) unless the interest of which he becomes aware is an interest which is already vested in the bankrupt estate because it was vested in the bankrupt at the commencement of the bankruptcy."*

20. Subsection (3) provides for the revesting in subsection (2) not to apply where a trustee takes certain specified steps directed at realisation of the property during the three year period, including making an application for possession, which is one of the heads of relief sought in the Bankruptcy Application.

21. Much of the argument before me concerned subsection 283A(5), which provides for the different ways in which a trustee may find out about the relevant interest:

> *"(5) If the bankrupt does not inform the trustee or the official receiver of his interest in a property before the end of the period of three months beginning with the date of the bankruptcy, the period of three years mentioned in subsection (2) –*
>
> *(a) shall not begin with the date of the bankruptcy, but*
>
> *(b) shall begin with the date on which the trustee or official receiver becomes aware of the bankrupt's interest."*

22. The statutory position under s.283A(5)(a) is that where a bankrupt *"inform*[s]*"* their trustee or the OR of their interest in a property to which the provision applies within three months of their bankruptcy, that property will ordinarily revest in the bankrupt on

the third anniversary of the bankruptcy. In the ordinary course of events, a trustee in bankruptcy will find out about a bankrupt's interest from the bankrupt themselves. In *Stonham v Ramrattan*, Lloyd LJ pointed out at [19]-[20] that a bankrupt is obliged by s.288(1) to submit a statement of affairs to the OR within 21 days, an obligation that is enforced in general terms by s.333, which requires the bankrupt to give the trustee such information as to his affairs as the trustee reasonably requires for carrying out their functions. As Lloyd LJ explained, the statement of affairs is the:

> *"normal means by which a bankrupt would, within three months of the commencement of the bankruptcy, inform the official receiver or the trustee in bankruptcy or both of his interest in a relevant property."*

23. Where the bankrupt does not *"inform"* their trustee or the OR of the interest within three months, s.283A(5)(b) provides that the three year period in s.283A(2) will start to run on the date that the trustee or OR *"becomes aware"* of it. The parties' submissions before me mainly concerned this aspect, i.e. whether the quality of information imparted by Ms Khilji to the Trustee or the OR, or the quality of knowledge held by the Trustee or the OR, was sufficient to start the three year period running.

24. Finally for present purposes, subsection (6) enables a longer period to be substituted for the period of three years in s.283A(2) in such circumstances *"as the court thinks appropriate"*. An order under this subsection was identified in the alternative in the Bankruptcy Application but was not pursued at the hearing before me.

The parties' positions

25. Mr French submitted on behalf of the Trustee, supported by Mr Evans on behalf of the Administrator, that the Bankruptcy Application was issued by the Trustee on 11 January 2022, which was a time within three years of the Trustee becoming aware of Ms Khilji's interest in the Property within the meaning of s.283A(5)(b) of the IA 1986. He submitted that it is not necessary to establish the exact date that the Trustee became aware of Ms Khilji's interest in the Property, so long as the application was issued within three years of the earliest date that the Trustee became aware of that interest, which Mr French submitted was what had happened.

26. In answer to that, Mr Wareing submitted on behalf of Ms Khilji that the Trustee was sufficiently *"on notice"* (as he put it) that Ms Khilji had an interest in the Property from 28 September 2018 at the latest (which was the date of her interview with the OR that led to the preparation of the OR Statement) for the three year period in s.283A to start to run. If Mr Wareing is right that Ms Khilji did enough to *"inform"* the OR of her interest on 28 September 2018, then as that was a date within three months beginning with the date of the bankruptcy on 2 July 2018, the three-year period expired on the third anniversary of the bankruptcy, i.e. 2 July 2021. That would mean that the Trustee was out of time when the Bankruptcy Application was issued on 11 January 2022, because the Trustee's interest in the Property had revested in Ms Khilji about six months earlier.

27. Mr Wareing submitted in his skeleton argument that it is *"manifestly clear that* [Ms Khilji] *provided notice to the Official Receiver of her interest in the Property"* on 28 September 2018. He contends that the information provided by the OR Statement was such that the Trustee should have appreciated that Ms Khilji had an interest of some

kind in the Property, in light of her obvious interest as the Deceased's spouse in his intestate estate and from the reference to her having made contributions to the mortgage. In her witness statement dated 16 May 2022, Ms Khilji says:

> *"When I told* [the OR] *that I made contributions to the mortgage, this means that I should have a higher claim to some more of the Property that is in addition to my Statutory Legacy.* [The OR] *and the* [Trustee] *should have known this.*
>
> *In my limited knowledge of legal terminology, I do not know what other notice the* [Trustee] *expected me to give her. I disclosed everything I know about my entitlements to* [the OR] *as early as I could."*

28. The OR Statement sets out what Ms Khilji told the OR on 28 September 2018. It includes the following:

> *"I have not been divorced in the past 5 years.*
>
> *My husband passed away 2014. He died without a will. I did not receive anything following my husbands death. Everything is in dispute and its not decided yet. My husbands estate was one house*
>
> *49 Slough Lane*
>
> *NW9 8YR*
>
> *It is in his sole name.*
>
> *Abdul Rashid Taj Khilji.*
>
> *There is a dispute regarding this property between his four sons.*
>
> *I was married to him for 28 years. The mortgage was in my husband's name.*
>
> *He purchased the property in 1989. I did contribute to the mortgage after he passed away*
>
> *I don't think I was ever joint owner of this property."*

29. Mr Wareing also placed reliance on the letters from the Administrator's solicitors to the Trustee's solicitors dated 17 and 27 September 2018, which I mentioned at §5 above. The letter dated 17 September 2018 enclosed an official copy of the register for the Property, which showed that Ms Khilji had occupational rights, by virtue of her marriage to the Deceased, registered in her favour under s.31 of the Family Law Act 1996. Mr Wareing submitted in his skeleton argument that:

> *"At the very least, this ought to have triggered a thought as to the basis upon which* [Ms Khilji] *continues to occupy the Property…It is apparent that* [the Trustee] *failed to consider this."*

30. The letter dated 27 September 2018 stated that:

> *"We* [the Administrator's solicitors] *are able to confirm that we will make a payment to you* [the Trustee's solicitors] *of any sum that Ms Khilji is due under the rules of intestacy given that the deceased did not leave a will."*

31. In her witness statement of 16 May 2022, Ms Khilji says the following about that reference by the Administrator's solicitors to the statutory legacy:

> *"Literally, at the same time of me giving the same statement to* [the OR]*, the* [Trustee] *had been given independent confirmation of my interest in the Property and that my inheritance will be paid to her."*

32. Mr Wareing submitted that these statements provided sufficient information to the Trustee of Ms Khilji's interest in the Property. In his oral submissions, he submitted that Ms Khilji's:

> *"beneficial right arises automatically on the death of her husband under the laws of intestacy; she hasn't hidden or denied it. She has not positively asserted it, but in the interview with the Official Receiver, she sets out clearly that she was married to her husband, was not divorced, and so was going to get it by reason of the intestacy."*

The nature of the interest

33. It was submitted by Mr French on behalf of the Trustee that the particular nature of the interest asserted by Ms Khilji is not relevant for the purposes of today and all that matters is whether or not whatever interest Ms Khilji had has revested in her. I understand why Mr French took this position, because his client was content to proceed for the purposes of today on the basis most favourable to Ms Khilji, which was that she had an interest in the Property by way of a common intention constructive trust at the date of the bankruptcy order that was capable in principle of having revested by operation of s.283A(2) of the IA 1986, subject only to the dispute between the parties about when the three year period began to run.

34. In my view, however, it is necessary to have regard to the nature of the interest asserted by Ms Khilji for the purposes of dealing with the application. Section 283A of the IA 1986 is concerned with a particular kind of *"interest in a property"*, which is defined in s.283A(1): see §18 above. Section 283A(5) requires that the Trustee was informed, or otherwise became aware, that Ms Khilji had such an interest for the three year period to start running; when this requirement was satisfied is the principal issue before the court. Mr Wareing's written submissions and Ms Khilji's evidence suggested that a number of different interests were said to be relevant to this issue. As summarised above, reference was variously made to Ms Khilji's entitlement under the Deceased's intestacy, her registration of matrimonial home rights, contributions towards the mortgage following the Deceased's death, and the common intention constructive trust asserted in the Defence and Counterclaim. It appeared at the commencement of the hearing that Ms Khilji's position was that her entitlement under the intestacy and/or the registration of matrimonial home rights gave rise, of themselves, to interests falling within s.283A(1); or, even if they did not, an awareness of those features on the part of

the Trustee or the OR nonetheless ought to have implied the existence of some other interest falling within s.283A(1).

35. Mr Wareing did not concede at the hearing that Ms Khilji's interest in the interest in the intestacy and the matrimonial home rights were not interests within s.283A(1), although the main focus of his argument was that the Trustee's awareness of these interests, as well as Ms Khilji's reference to having contributed to the mortgage after the Deceased's death, should have alerted the Trustee to the fact that Ms Khilji must have had an interest falling within s.283A(1), as has now transpired to have been the case, i.e. the common intention constructive trust that the Trustee now concedes existed at the date of the bankruptcy. Mr Wareing suggested that the various interests added weight to one another in the exercise of determining what the Trustee knew. Mr Wareing suggested that:

> *"in the way of an onion, there are layers to this; the constructive trust point adds weight to the intestacy point."*

36. Accordingly, it is necessary to have regard to what it is that the Trustee or the OR is said on Ms Khilji's case to have known about and whether whatever that was can be said to be an interest within the meaning of s.283A(1) of the IA 1986.

37. In order to deal with these points, I will consider first the arguments I heard concerning the quality of knowledge required on the part of a trustee in bankruptcy or the OR within the terms of s.283A(5) of the IA 1986 for the three year period in s.283A(2) to start to run against a trustee. After that, I will consider the alternative ways that Ms Khilji contends that that requirement was satisfied in this case.

The quality of knowledge

38. The parties disagreed about the quality of information imparted by a bankrupt, or knowledge held by a trustee or the OR, that is required for it to be said that a trustee or the OR has been *"inform*[ed]*"* or has *"become… aware"* of an interest for the purposes of s.283A(5). Their respective opening positions on how the provision ought to be interpreted were polarised.

39. For the Trustee, Mr French referred to *The Right Honourable Rhodri Viscount St Davids v Lewis* [2015] EWHC 2826 (Ch), [2015] BPIR 1471. This was a case about the after-acquired property regime in the IA 1986. Section 307 of the IA 1986 provides for a trustee in bankruptcy to serve a notice on a bankrupt vesting property in the estate that has been acquired by or has devolved upon the bankrupt since the commencement of the bankruptcy. Section 309(1)(a) sets a time limit for the trustee to serve such a notice of 42 days *"beginning with the day on which it first came to the knowledge of the trustee that the property in question had been acquired by, or had devolved upon, the bankrupt"*. Section 333(2) imposes a duty on the bankrupt to *"give the trustee notice of"* such property as falls within s.307 of the IA 1986. Rule 10.125(1) of the Insolvency (England and Wales) Rules 2016 provides that the bankrupt must provide such notice to the trustee within 21 days of becoming aware of the relevant facts (this requirement was found at r.6.200(1) of the Insolvency Rules 1986 at the time that *St Davids v Lewis* was decided).

40. In the *St Davids v Lewis* case, the bankrupt had failed to give notice to his trustee of some property he had acquired post-bankruptcy. The bankrupt nonetheless argued that the trustee was out of time to claim it for the estate on the ground that the trustee had known for an extended period that the bankrupt had acquired the property, even though the bankrupt had himself been ignorant of this, with the bankrupt only finding out about the property at a much later stage. Henderson J (as he then was) upheld the decision of Registrar Barber that the bankrupt had failed to prove that the trustee in bankruptcy had had the necessary knowledge more than 42 days before the notice was served. His Lordship held:

> *"…where the bankrupt has failed to co-operate with his trustee and has failed to disclose the existence of relevant after-acquired property to his trustee, I consider that the court should be slow to accede to a self-serving claim by the bankrupt that his trustee first obtained knowledge at a significantly earlier date of the acquisition by the bankrupt of the property, with the convenient result (if the claim is upheld) that the s 307 notice served by the trustee would be out of time. In practical terms, it seems to me that in such cases a trustee should normally be held to have first obtained the relevant knowledge for the purposes of s 309(1) only when it has become clear to him, on cogent evidence verified to his reasonable satisfaction, that the property in question (a) was acquired by the bankrupt, and (b) was acquired by him after the commencement of the bankruptcy. If it is objected that this test may set the bar too high, the answer is in my judgment obvious. In a situation where the bankrupt has failed to comply with his statutory duty, in relation to a matter within his personal knowledge, it is entirely reasonable that the standard of knowledge required from his trustee for the purposes of s 309(1) should be set at a fairly high level of certainty.*
>
> *A further factor which appears to me to strengthen this conclusion is the effect of service of a notice under s 307(1). By virtue of s 307(3), the property in question vests automatically in the trustee as part of the bankrupt's estate, subject only to the limited protection for third parties conferred by s 307(4). Proprietary consequences of this significance should not be triggered, in my judgment, in a case where the bankrupt himself has not informed his trustee of his acquisition of the property, unless the trustee's knowledge that the property is indeed after-acquired property is firmly based."*

41. Having cited this passage, Mr French suggested in his skeleton argument that what is required is that:

> *"…the Official Receiver or the Trustee must have had actual knowledge (themselves or imputed from their agent) of the fact that the Bankrupt had an actual interest in the Property; assertions or claims that she might have an interest would not suffice."*

42. In answer, Mr Wareing suggested that much less is required in order for a trustee to be informed or to become aware of a bankrupt's interest. He submitted in his skeleton argument that in informing the OR that she had made contributions to the mortgage for the Property, Ms Khilji *"put the Official Receiver on notice of a <u>potential</u> claim for an interest in the Property over and above that which is created by* [the intestacy regime]*"* (emphasis in original). Mr Wareing made other references in his skeleton argument to

the Trustee being *"on notice"* of the possibility of a claim on the part of Ms Khilji. In oral submissions, Mr Wareing advanced his *"onion-layers"* argument, by which he suggested that the Trustee knew enough from the various matters to which Ms Khilji had referred, including the intestacy, to infer that there must be an interest of some kind arising under s.283A(1).

43. In my judgment, both sides' opening positions on the quality of knowledge required on the part of the Trustee were too extreme. Taking first Ms Khilji's submissions, there is no support on the face of s.283A for the view that *"notice"* to the trustee or the OR of a *"potential claim"* is sufficient. Rather, the Trustee must either be *"inform*[ed]*"* by the bankrupt of an interest in a property, or otherwise must *"become… aware"* of one. It is plain from the drafting that both these concepts require knowledge on the part of the Trustee. Notice is not the same as knowledge: see, for example, *In re Montagu's Settlement Trusts* [1987] 1 Ch 264. In my judgment, there is no support in the wording of the statute to support the submission that notice is a sufficient trigger for time to run for the purposes of s.283A(2) of the IA 1986.

44. Turning to the Trustee's submissions, I agree with Mr French that Henderson J's discussion of the position where a bankrupt does not themselves inform their trustee of after-acquired property set out at §40 above is apt to apply to the revesting regime under s.283A. In particular, it is both pragmatically desirable and plainly just that a bankrupt who fails to comply with their duty to notify their trustee either of after-acquired property or of an interest in a property within the meaning of s.283A(1) will face an uphill struggle in persuading a court that the trustee was nonetheless aware of that interest such that the property is no longer available to the estate.

45. As to the Trustee's proposed characterisation of the test set out at §41 above, however, in my view this is likely to be unnecessarily rigid and would appear to go further than Henderson J did in *St Davids v Lewis*. Subsequent passages in Henderson J's judgment show that his Lordship favoured a fact-sensitive approach: at [34], Henderson J observed that *"the quality and cogency of the evidence needed to establish actual knowledge for the purposes of s 309(1) will vary according to the circumstances of the particular case"*; later, at [68], Henderson J made clear that the particular approach in that case was driven, at least in part, by the *"history of non-co-operation and obfuscation"* by the bankrupt.

46. Further, I note that the statutory language for the after-acquired property regime and the revesting regime under s.283A is in significantly different terms: compare s.309(1)(a) and s.333(2) with s.283A(5). There are also particular considerations that arise in the context of domestic properties that may not be to the fore in matters of after-acquired property. It seems to me that the insistence in the Trustee's submissions on *"actual knowledge…of the fact that the Bankrupt had an actual interest in the Property; assertions or claims that she might have an interest would not suffice"* may be insufficiently sensitive to the realities of beneficial interests in domestic properties arising by way of a common intention constructive trust, or to the way that such interests are encountered in practice. These will often be advanced by way of assertion, which is unsurprising given that the interests in question are, by definition, not legal interests and are frequently undocumented.

47. I raised with Mr French whether the Trustee's opening characterisation of the knowledge requirement would be capable of capturing an unregistered and as yet

unlitigated claim to a beneficial interest arising by way of a constructive trust on the part of a bankrupt, even where the bankrupt had made an assertion to their trustee near the beginning of the bankruptcy that the bankrupt considered themselves to have to such an interest at the date of their bankruptcy. Such an interest would seem to fall on the *"assertions or claims"* side of the line and may fall short of qualifying as the *"fact of an actual interest"* if one adopts the Trustee's proposed test. Mr French's final position in oral submissions was that a clear assertion by a bankrupt to their trustee of an undocumented beneficial interest in a property would be sufficient to *"inform"* their trustee of an *"interest"* for the purposes of s.283A(5), although he made clear that this fell to be contrasted this with disclosure of three or four factual matters that might be consistent with an interest or might lead to a train of inquiry on the part of a trustee, requiring a granular investigation into exactly what has been said, which would not be sufficient. In my view, the Trustee's final position is more realistic than the opening position.

48. For the reasons identified by Henderson J in the context of after-acquired property, it is likely that if a bankrupt does not tell their trustee in clear terms that they consider themselves to have an interest in a property falling within s.283A(1) then the court is likely to be slow to find that the trustee has nonetheless been informed or has become aware of such an interest by means of a process of inference from equivocal facts. This view is supported by the following observations of Lloyd LJ in *Stonham v Ramrattan*, at [48], in relation to cases where the bankrupt does not provide their trustee with information about the relevant interest at the commencement of the bankruptcy and the trustee is said to have *"become… aware"* subsequently:

> *"…the position in which the trustee in bankruptcy becomes aware of the interest must be equivalent of that in which he would be having received information from the bankrupt that he does have an interest in the property, from whatever source he may gain this knowledge. If becoming aware means anything less than that, then it does not put the trustee in bankruptcy into an equivalent position as regards knowledge as he would be in if the bankrupt had provided the information in the first place. It seems to me that there is no sufficient reason to suppose that the legislature intended the trustee in bankruptcy to be put on the spot, so to speak, with the limited time provided for under 283A in which to take steps with a view to the realisation in one way or another for the benefit of creditors of the interest of the bankrupt, unless he knows of an interest which is already vested in the bankrupt's estate."*

49. I turn now to consider when the Trustee or the OR was informed or otherwise became aware of an interest in the Property falling within the meaning of s.283A(1).

Interests that do not fall within s.283A(1)

50. I unable to accept Mr Wareing's submissions in so far as they suggest that Ms Khilji's interest in the Deceased's intestacy or registered matrimonial home rights were, of themselves, interests in the Property within the meaning of s.283A(1).

51. Taking first Ms Khilji's entitlement to a statutory legacy under the Deceased's intestacy, it is well-settled that a beneficiary's interest in an unadministered estate does not give rise to any legal or beneficial interest in any of the assets comprised in that estate. In *In re Hemming, deceased* [2009] Ch 313, Mr Richard Snowden QC (sitting,

as he then was, as a deputy High Court judge) considered the position of a bankruptcy estate where, at the date of the bankruptcy order, the bankrupt had been the residuary legatee of a deceased estate. I extract the following two points of principle of particular relevance to the case before me from that decision. Firstly, at the date of the bankruptcy order, a residuary legatee has an entitlement to have the deceased's estate administered in accordance with the law. That right is a *"thing in action"* and hence *"property"* within the meaning of s.436. Where the residuary legatee is made bankrupt, it will vest in the trustee in bankruptcy under s.306 of the IA 1986. Secondly, however, a residuary legatee's entitlement does not confer any present legal or beneficial property interest in any of the individual assets forming the estate while it is being administered. It is sufficient for present purposes to refer to the following extract from *Marshall v Kerr* [1995] 1 AC 148, which was one of the high authorities reviewed in *In re Hemming*, where Lord Browne-Wilkinson expressed the following view:

> *"In English law the rights of a testamentary legatee in the unadministered estate of a testator are well settled: see* Lord Sudeley v Attorney General *[1897] AC 11 and* Comr of Stamp Duties (Queensland) v Livingston *[1965] AC 694…A legatee's right is to have the estate duly administered by the personal representatives in accordance with law. But during the period of administration the legatee has no legal or equitable interest in the assets comprised in the estate."*

52. The two authorities cited by Lord Browne-Wilkinson in the foregoing extract were decided respectively by the House of Lords and Privy Council. It was not suggested during the hearing by any party that, for the purposes of the two points of principle identified above, the position of a beneficiary under the statutory trusts on intestacy (such as Ms Khilji) should be different from the positions of the legatees in those authorities. In my judgment, the approach taken in the authorities applies to Ms Khilji's interest in the Deceased's estate. This appears to present an insurmountable obstacle to any attempt by Ms Khilji to rely on her entitlement to share in the Deceased's estate, of itself, in order to establish an *"interest in a property"* within the meaning of s.283A(1) of the IA 1986.

53. Similar considerations apply to Ms Khilji's having registered matrimonial home rights against the title to the Property. Matrimonial home rights do not give rise to a beneficial interest in the Property capable of vesting in the bankruptcy estate at the commencement of the bankruptcy and are not an interest within s.283A(1). Such rights are a charge on the interest of another, not an interest in the property in and of themselves. Indeed, Mr French suggested that the registration of matrimonial home rights points away from a proprietary interest in the Property on the part of Ms Khilji, in that there would have been no need to register a right to occupy the Property had Ms Khilji had a proprietary right in it.

54. I should add for completeness that although there was no reference to proprietary estoppel in any of the Defence and Counterclaim, Mr Wareing's skeleton argument, or the evidence filed by Ms Khilji, it was suggested in oral submissions that Ms Khilji might also have an interest in the Property on that basis. Mr French and Mr Evans both made the point that an unlitigated claim on the part of Ms Khilji arising from proprietary estoppel in relation to the Property would not equate to an *"interest in a property"* within s.283A(1) and capable of vesting in the bankruptcy estate at the commencement of the bankruptcy. If such a claim were litigated to judgment, it is

possible, although not inevitable, that the court would award a proprietary interest in the Property: see *Guest v Guest* [2022] UKSC 27, [2022] 3 WLR 911, [74]-[75]. But no such proprietary interest in the Property capable of vesting in the estate would have existed at the commencement of the bankruptcy, which is fatal to any suggestion that the interest was one within s.283A(1): see *Stonham v Ramrattan*, [51].

The interest falling within s.283A(1)

55. Both Mr French and Mr Evans submitted that the only kind of interest advanced on the part of Ms Khilji capable of falling within s.283A(1) is the one under a common intention constructive trust. For the reasons I have given, I accept those submissions. I turn now to consider when the Trustee or the OR was informed or become aware of that interest.

56. I am unable to accept Mr Wareing's onion-layers argument (see §35 and §42 above), by which it was submitted that the existence of interests such as the intestacy or the matrimonial home rights ought to have alerted the Trustee to the fact that Ms Khilji had an interest in the Property under a common intention constructive trust that fell within s.283A(1).

57. In my judgment, the interest in the intestacy does not imply an interest by way of a common intention constructive trust. The latter is not a logical consequence of the former; they are different kinds of interest. It is a matter of chance that in the instant case the party claiming a beneficial interest by way of constructive trust happens also to be the principal beneficiary under the statutory trusts on intestacy. If those interests were held by different people, then the interests would be adverse and the holders would be in competition for the same asset. Even where those interests are held by the same person, a spouse motivated to maximise their overall entitlement would rationally wish to enlarge their interest under the constructive trust at the expense of the intestate estate. Taking things at their most favourable from Ms Khilji's point of view, knowledge on the part of the Trustee of Ms Khilji's interest in the Deceased's intestate estate is irrelevant to the inquiry into what the Trustee knew in relation to any interest in the Property falling within s.283A(1).

58. Similar considerations apply to the matrimonial home rights. Such rights are not an interest in the Property within s.283A(1) and do not imply the existence of one. Again, the most favourable complexion that can be put on this evidence from Ms Khilji's point of view is that her registration of matrimonial home rights against the title to the Property is irrelevant to the Trustee's state of knowledge in relation to an interest of Ms Khilji's in the Property within the meaning of s.283A(1).

59. Once those aspects are removed from the equation, all that is really left is the reference in the OR Statement to Ms Khilji having contributed to the mortgage after the death of the Deceased. Ultimately, this is a submission that the Trustee or the OR should have inferred from the reference to contributions to the mortgage after the Deceased's death that Ms Khilji might have been able to formulate a claim under a common intention constructive trust capable of being caught by s.283A(1). I reject this submission. In my judgment, contributions to the mortgage are not an interest in the Property within the meaning of s.283A(1) and are consistent both with setting up a claim to a beneficial interest under a common intention constructive trust and not doing so. Accordingly, in informing the OR that she had made such contributions after the death of the Deceased,

Ms Khilji did not inform either the Trustee or the OR of an interest in the Property within the meaning of s.283A(1) and nor did the Trustee or the OR otherwise become aware of such an interest as a consequence.

60. The information about the mortgage payments must also be seen in context. At the same time as referring to the mortgage contributions in the OR Statement, Ms Khilji positively stated that she did not think that she had ever been a joint owner of the Property: see §28 above. A subjective belief on Mrs Khilji's part that she did not have such an interest is on its face inconsistent with her having shared in a common intention with the Deceased, prior to his death, that she should have an interest in the Property. While such a disavowal of an interest would not, of itself, preclude Ms Khilji from seeking to assert an interest at a later stage (although it is possible that a previous disavowal might be materially relevant evidence as to whether or not the subsequent assertion was borne out), it cannot support a contention that the three year time period started running against the Trustee.

61. Mr Wareing valiantly sought to contend that Ms Khilji's disavowal of ownership referred only to the legal ownership and was not a positive denial of a beneficial interest, on which Ms Khilji had remained silent. Even taken at its highest, that submission cannot assist Ms Khilji, for the obvious reason that in remaining silent about something a person cannot be said to have informed another of its existence, or otherwise caused such other to have become aware of it.

62. Mr Wareing submitted that Ms Khilji should not be criticised for being insufficiently specific in her answers. He submitted that Ms Khilji was not required to say *"I have a beneficial interest"* and that she had stated to the OR, at the earliest opportunity on 28 September 2018, *"the fullest extent of what she understood her interest was in the Property…She did not know what she was entitled to. But, she expected something…full information was provided and that is sufficient for either the Official Receiver or* [the Trustee] *to take up any further enquiry as necessary in the discharge of their professional duties."* I reject this submission. If Ms Khilji told the OR everything she knew and did not tell the OR about an interest in the Property, then that does not provide support for any suggestion that she informed the Trustee or the OR of one. What Ms Khilji actually told the OR was that she did not think she was ever a joint owner of the Property. In my judgment, there was no reason on basis of the totality of the facts then known to them for the Trustee or the OR to do anything other than take what Ms Khilji told them at face value.

63. The parties also made reference in their skeleton arguments and oral submissions to Ms Khilji's answers in the Questionnaire and the PIQB. There is no need to spend much time on the arguments around these documents, as they are both dated 13 January 2018, which is more than three months after the date of the bankruptcy and less than three years prior to the issue of the Bankruptcy Application on 11 January 2021. Accordingly, if these documents had been the means by which the OR or the Trustee had become aware of Ms Khilji's interest in the Property, then the three year period would not have expired when the Bankruptcy Application was issued. I should make clear for the avoidance of any doubt, however, that neither document contains any suggestion that Ms Khilji had an interest in the Property within s.283A(1). If anything, the documents point away from that view. In the Questionnaire, in answer to the question *"Do you own or rent this property?"* (which in context is a reference to the Property), Ms Khilji has crossed through both the *"Own"* and *"Rent"* pre-printed

answers, suggesting to anyone considering the form that she neither owned nor rented the Property at the date of her bankruptcy. In the PIQB, Ms Khilji did not include any property assets in the space provided for that information at question 7.1, which required her to list all properties that she currently or in the last five years had owned, rented, leased, *"or otherwise [had] an interest in"*. Mr Wareing again made the point for Ms Khilji that nothing in these documents could be seen as a positive or specific repudiation of an interest in the Property and added that Ms Khilji's answers (or absence of answers) were *"not an assertion of anything one way or the other."* Even if one accepts that submission, it does nothing to undermine the Trustee's case that she was neither informed nor otherwise became aware of Ms Khilji's interest in the Property more than three years prior to the issue of the Bankruptcy Application.

Conclusion

64. In my judgment, neither the Trustee nor the OR was informed or otherwise became aware that Ms Khilji had, at the date of her bankruptcy, an interest in the Property falling within the meaning of s.283A(1) of the IA 1986 any earlier than service on the Trustee of the Defence and Counterclaim dated 6 September 2019. I reach this conclusion because, for the reasons I have given, none of the earlier pieces of evidence relied on by Ms Khilji came close to informing the Trustee or the OR of any such interest or was otherwise capable of causing them to become aware of one. I add that, had I accepted Mr Wareing's submission that notice of a potential claim to an interest was sufficient for time to start running, I would have concluded that neither the Trustee nor the OR had such notice any earlier than 6 September 2019 because none of the earlier pieces of evidence was sufficient to put the Trustee on notice.

65. I find that time started to run under s.283A(2) no earlier than 6 September 2019 and accordingly in causing the Bankruptcy Application to be issued on 11 January 2022 the Trustee acted within time.

66. This judgment will be handed down remotely without the need for attendance. I invite the parties to agree an order giving effect to the conclusion reached in this judgment.