

2023 DEVELOPMENTS



IN THE COURT'S CONTROL OF OFFICE-HOLDERS

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This year has seen a development in insolvency law that will be welcome to every insolvency practitioner (IP): a further tightening of the already restrictive circumstances in which the court will intervene under the Insolvency Act 1986 (IA 1986) to control the decisions of office-holders.¹ Two landmark decisions were decided, both arising out of the bankruptcies of a Mr and Mrs Brake: *Patley Wood Farm LLP v Kicks*² in the Court of Appeal (Patley Wood) and *Brake v Chedington Court Estate Ltd*³ in the Supreme Court (Chedington).

Any impression that the courts might be willing to consider a slightly more relaxed interpretation of these provisions⁴ has been decisively rejected by these two decisions.

The court's express power to intervene to control office-holders is contained in various provisions of IA 1986, depending on the type of insolvency process.

Thus, in bankruptcy, upon the application of the bankrupt, any of the bankrupt's creditors or any other person who is dissatisfied with any act, omission or decision of the trustee, the court is empowered to review any such act, omission or decision and may confirm, reverse or modify it or give directions to the trustee or make any other order it considers fit.⁵

Equivalent provisions apply to controlling the supervisor of a voluntary arrangement, whether individual (IVA)⁶ or company (CVA),⁷ and the liquidator of a company in compulsory liquidation.⁸ A similar provision applies in relation to administrators.⁹

¹ For a discussion of the position as it was down to March 2022, see Watson & Baister *Bankruptcy: Law and Practice* (2023), at 9.042-9.051.

² [2023] EWCA Civ 901.

³ [2023] UKSC 29.

⁴ E.g. *Brake v Lowes*; *Brake v Swift* [2020] EWCA Civ 1491, [2021] BPIR 1.

⁵ IA 1986, s 303(1).

⁶ IA 1986, s 263(3); the parallel between this provision and s 303(1) was explicitly drawn in *Linfoot v Adamson* [2012] BPIR 1033.

⁷ IA 1986, s 7(3). See *Nero Holdings Ltd v Young* [2021] EWHC 1453 (Ch), [2021] BPIR 1324; and *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2019] EWHC 2441 (Ch), [2020] BCC 9.

⁸ IA 1986, s 168(5).

⁹ IA 1986, Sch. B1, para 74. See *Lehman Brothers Australia Ltd v MacNamara* [2020] EWCA Civ 321, [2021] Ch 1, [2020] BPIR 550.



The wording of these provisions is intentionally broad, but the courts have consistently interpreted them narrowly, evidencing a great reluctance to interfere with the office-holder's performance of their duties so as to allow IPs to carry out their duties efficiently without having constantly to look over their shoulders.

The consensus is that something exceptional is required, bordering on perversity, before the court would be willing to interfere.¹⁰

Thus in *Patley Wood*,¹¹ the criticism by a creditor of the refusal by the trustees to get involved in litigation against the bankrupts regarding a property within the estate was regarded as misplaced in circumstances where there would be little gain for the estate that would remain deeply in deficit and where the indemnity of the trustees' "reasonable" costs by the creditor was inadequate. The Court of Appeal found the judge's reasoning flawed and allowed the trustees' appeal.

In particular, the courts have limited the ambit of these provisions by carefully policing the question of the applicant's standing. Although the statutory wording is seemingly wide, the courts have traditionally applied a restrictive interpretation that has been reinforced by these recent decisions.



Generally, creditors will have standing, but only where the application concerns their interests as creditors. Thus, in *Re Edengate Homes (Butley Hall) Ltd*,¹² the applicant complained that she had not been offered the opportunity by the liquidator to bid for an assignment of a cause of action against her: the application was rejected on the grounds that such a complaint did not relate to her interests as a creditor. The additional test, mooted in that case, for the need for the applicant's interests not to be adverse to the liquidation (or bankruptcy) and those of the creditors as a whole has now been rejected in *Chedington*.¹³

In bankruptcy, the bankrupt (even after discharge,¹⁴ or in the context of an application to annul¹⁵) will have standing if they can show there is or is likely to be a surplus, or would be one had the impugned decision or action not been made. That is not the only way a bankrupt can show standing, but where there is no prospect of a surplus, the circumstances would have to be very special indeed.¹⁶ A similar hurdle applies to contributories in a liquidation.

Otherwise, the residuary category of persons dissatisfied (or aggrieved)¹⁷ is much narrower than its wording would suggest.

It is now clearer than ever that the applicant will only have standing if they can show that their rights or interests have been directly affected by an act, omission or decision of the office-holder arising out of the exercise of their statutory duties.¹⁸

Such instances will be rare indeed.¹⁹



10 *Chedington* [2023] UKSC 29 at [7]; *Patley Wood* [2023] EWCA Civ 901, at [40]. Historically, see *Re a Debtor; ex parte the Debtor v Dodwell* [1949] Ch 236, at 241; *Re Edenote Ltd* [1996] 2 BCLC 389, at 394; *Osborne v Cole* [1999] BPIR 251, at 255; *Bramston v Haut* [2012] EWCA Civ 1637, [2013] BPIR 25, at [68]-[69].

11 [2023] EWCA Civ 901, at [72]-[79].

12 [2022] EWCA Civ 626, [2022] 2 BCLC 1.

13 [2023] UKSC 29, at [97].

14 *Brake v Lowes*; *Brake v Swift* [2020] EWCA Civ 1491, [2021] BPIR 1, not criticised by the Supreme Court on this point.

15 *Engel v Peri* [2002] EWHC 799 (Ch), [2002] BPIR 961.

16 As in *Engel v Peri* (above), approved by the Supreme Court in *Chedington*.

17 *Chedington* [2023] UKSC 29 at [6] confirmed that the difference between "dissatisfied" in s 303(1) and "aggrieved" in s 168(5) is of no significance.

18 *Chedington* [2023] UKSC 29, at [99].

19 In *Chedington*, the examples of *Re Hans Place Ltd* [1992] BCC 737, *Mohamed v Morris* [2000] 2 BCLC 536 and *Woodbridge v Smith* [2004] BPIR 247 were cited with approval.