Neutral Citation Number: **[2018] EWHC 3572 (Ch)**

Case Number BR 000528 of 2018

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

IN THE MATTER OF PAUL BAXENDALE WALKER (A BANKRUPT)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 20 December 2018

Before:

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE AGNELLO QC

- -

Between:

PAUL BAXENDALE-WALKER
(a Bankrupt)

Applicant

- and –

(1) IRWIN MITCHELL LLP
(2) JOHNSONS SOLICITORS LIMITED
(3) GRIFFIN LAW LIMITED
(4) MISCHON DE REYA LLP
(5) MICHAEL LEEDS AND KEVIN HELLARD
(as Trustees in Bankrupt of Paul Baxendale-Walker)
(6) HAWK CONSULTANCY LLC

Respondents

- -

Stephen Hackett (instructed by **Candey**) for the **Applicant**
No appearance by the **First** and **Second Respondents**
Alexander Cook for the **Third Respondent**
Charlotte Cooke for the **Fourth Respondent**
Donald Lilly (instructed by **Norton Rose Fulbright**) for the **Fifth Respondents**
James Couser (instructed by **Coffin Mew**) for the **Sixth Respondent**
Christopher Brockman (instructed by HMRC) for **HMRC** as **Creditor**

Hearing date: 27 November 2018

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APPROVED JUDGMENT

Introduction

1. This is the hearing of the application dated 24 August 2018 issued by the Applicant, Paul Baxendale-Walker ('the Bankrupt') seeking pursuant to section 303 of the Insolvency Act 1986 *'directions in respect of the Trustees in Bankruptcy's requests of Irwin Mitchell LLP, Johnson's Solicitors Limited, Griffin Law Limited and Mischon de Reya LLP for provision or inspection of the Bankrupt's solicitors-clients files'*. Mr Hackett, who appears on behalf of the Bankrupt, clarified the ground of his application being essentially an application pursuant to section 303 of the Insolvency Act 1986, challenging the requests made by the Fifth Respondents, being his trustees in bankruptcy, ('the Trustees') seeking documents from various firms of solicitors, being the First to the Fourth Respondents. These requests were made in letters dated 6 August 2018 addressed to the relevant Respondents.

2. The Sixth Respondent, Hawk Consultancy LLC, was joined to the application because it had asserted ownership over some of the documents which formed the subject matters of the requests. At the start of the hearing of the application before me, it was confirmed by Mr Couser, acting on behalf of the Sixth Respondent, that the assertion of ownership was no longer being made, at least at this stage. The Sixth Respondent thereafter took no further part in this application. In the course of his submissions, Mr Hackett sought to expand the application made by the Bankrupt to cover not just the making of the requests but continuing to seek documents, especially personal papers of the Bankrupt. I will deal with this below, but note that no application has been made to seek to amend the application notice in this regard.

3. Before me I had the benefit of detailed submissions (as well as detailed skeleton arguments) from Mr Hackett, counsel on behalf of the Bankrupt, and Mr

Lilly, Counsel on behalf of the Trustees. I am grateful to both of them for their helpful skeleton arguments and submission before me. In particular, I wish to extend my thanks to both of them for dealing with my questions during their submissions. This has helped me understand their respective cases. Also in court, was Ms Cooke, Counsel, on behalf of the Fourth Respondents and Mr Cook, Counsel, on behalf of the Third Respondents. Neither of them made any submissions as their instructions, clearly set out in their respective short filed skeletons, were that those Respondents were neutral as regards the application. I had a letter dated 21 November 2018 from Messrs Kennedys acting on behalf of the Second Respondent, Johnsons Solicitors explaining that they had delivered up the documents requested by the Trustees and remained neutral as to the outcome of the application. I had no letter or representation from Irwin Mitchell, the First Respondent, but their position can be seen from a reading of the emails which I will refer to below.

4. Mr Hackett confirmed that although both the First and Second Respondents were joined to the application, he was not inviting me to make any actual order in relation to those two Respondents. Both had delivered up to the Trustees the documents requested. Irwin Mitchell has entered into correspondence (via email) with the Bankrupt's solicitors in relation to compliance with the request. As made clear in their email dated 28 August 2018 (referred to below), Messrs Irwin Mitchell had considered the position and had reached the view on the law that the Trustees were entitled to the documents despite the Bankrupt's protestations. Messrs Irwin Mitchell had sought from the Bankrupt an indemnity relating to a potential section 366 of the Insolvency Act 1986 as against Irwin Mitchell had Irwin Mitchell refused to hand over the documents. The Bankrupt did not proffer any such indemnity. Instead, according to Mr Hackett, this application was issued. It appears that the documents were disclosed by Irwin Mitchell prior to formal service upon them of the sealed application. No application was made seeking to restrain, on an interim basis, the disclosure of the documents.

5. The requests which are the subject matter of this application relate to events after the bankruptcy order was made, so I will deal very briefly with key dates prior thereto. A bankruptcy petition was presented against the Bankrupt on 29 March 2018. Interim Receivers were appointed on 4 April 2018. The bankruptcy order was made on 10 July 2018 and the Trustees were appointed by order of this Court on 1 August 2018.

The Requests dated 6 August 2018 and the relevant insolvency provisions

6. The requests which form the subject matter of the application were made to the Respondents in letters dated 6 August 2018. Mr Hackett took me to the letter dated 6 August 2018 addressed to Griffin Law (the Third Respondent) at B1-205. Mr Hackett informed me that identical letters (or almost identical letters) were sent to the other Respondents and he did not feel it was necessary to take me to the other letters. Mr Lilly did not object or question this and did not take me to any of the other letters and so I will treat the letter dated as being essentially in identical terms to the other Respondents.

7. It is important to set out certain passages of this letter:

> *' ..This letter is a formal request for the provision by you to our clients of documents and information relating to the Bankrupt's dealings, affairs and property, in particular:*
>
> 1) *Details of all matters upon which you have been engaged by the Bankrupt, being each and every file opened in the name of the Bankrupt;*
> 2) *A copy of your client ledger with the Bankrupt for the full length of your engagement with the Bankrupt;*
> 3) *Your working files on all engagements with the Bankrupt (electronic or hard copy) : and*
> 4) *any other information that you hold that may assist with our clients' understanding of the Bankrupt's asset position.*
>
> *...For the avoidance of doubt, our clients agree not to waive privilege in any of the documents provided to them without further reference to you and/or the Court.*
>
> *So there is no misunderstanding, the Trustees reserve the right to make further requests for documents and information and to interview you, if*

they take the view that the documents and information provided by you show that you are likely to have further documentation or information relating to the Bankrupt's dealings, affairs and property which you have not produced or disclosed. We hope that this will not be necessary because you have disclosed everything relating to the Bankrupt's dealings, affairs or property that you possess or control in response to this letter.'

8. It is this letter which forms the request (or accurately one of the requests) which is relied upon by the Bankrupt in his section 303 application. Accordingly, it appears that the request made by the Trustees relates to a combination of section 311 and 366 of the Insolvency Act 1986. The relevant provisions are set out below.

'311 Acquisition by trustee of control

(1) The trustee shall take possession of all books, papers and other records which relate to the bankrupt's estate or affairs and which belong to him or are in his possession or under his control (including any which would be privileged from disclosure in any proceedings).'

'366 Inquiry into bankrupt's dealings and property.

(1) At any time after a bankruptcy order has been made the court may, on the application of the official receiver or the trustee of the bankrupt's estate, summon to appear before it—

(a) the bankrupt or the bankrupt's spouse or former spouse or civil partner or former civil partner,

(b) any person known or believed to have any property comprised in the bankrupt's estate in his possession or to be indebted to the bankrupt,

(c) any person appearing to the court to be able to give information concerning the bankrupt or the bankrupt's dealings, affairs or property.

The court may require any such person as is mentioned in paragraph (b) or (c) to submit a witness statement verified by a statement of truth to the court containing an account of his dealings with the bankrupt or to produce any documents in his possession or under his control relating to the bankrupt or the bankrupt's dealings, affairs or property.

(2) Without prejudice to section 364, the following applies in a case where—

(a) a person without reasonable excuse fails to appear before the court when he is summoned to do so under this section, or

> *(b) there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding his appearance before the court under this section.*
>
> *(3) The court may, for the purpose of bringing that person and anything in his possession before the court, cause a warrant to be issued to a constable or prescribed officer of the court—*
>
> *(a) for the arrest of that person, and*
>
> *(b) for the seizure of any books, papers, records, money or goods in that person's possession.*
>
> *(4) The court may authorise a person arrested under such a warrant to be kept in custody, and anything seized under such a warrant to be held, in accordance with the rules, until that person is brought before the court under the warrant or until such other times as the court may order.*'

9. The wording used in the letters seeking *'the provision by you to our clients of documents and information relating to the Bankrupt's dealings, affairs and property'* refers to the wording set out in section 366, but section 311 makes it clear that the Trustees are obliged to take possession of *'all books, papers and other records which relate to the Bankrupt's estate or affairs and which belong to him or are in his possession or under his control*'. The letter also contemplates that if necessary, the Trustees would seek to apply to the Court and seek a costs order as against the solicitors.

10. As referred to in the introduction section of this judgment, two firms delivered up copies of the relevant papers whilst the Third and Fourth Respondents await the outcome of this application.

The section 303 application and relevant legal test

11. By his application, the Bankrupt seeks to challenge the requests made by the Trustees. Section 303 of the Insolvency Act 1986 states,

> ***'303 General control of trustee by the court.***
> *(1)If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt's estate, he may apply to the court; and on such an application the court may confirm,*

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

This section clearly provides the Bankrupt with standing to make an application complaining about the actions, decisions or omissions of the Trustees, but there are some well established principles which curtail the use by the Bankrupt of the provision. The applicable test is captured in the following words of *Osborn v Cole* [1999] BPIR 251 (Ch) at 255:

> *'... it can only be right for the court to interfere with the decision the official receiver has taken if it can be shown that he has acted in bad faith or so perversely that no trustee properly advised or properly instructing himself could so have acted, alternatively if he has acted fraudulently or in a manner so unreasonable and absurd that no reasonable person would have acted in that way.'*

12. This test, which provides a high burden for an applicant, as well as the wording used was expressly endorsed by the Court of Appeal in in *Bramston v Haut* [2012] EWCA Civ 1637, [2013] 1 WLR 1720 at [69]. Moreover, *Bramston v. Haut* explains the reason for this approach at paragraph 68, being,

> *'The court is properly reluctant to interfere with the day to day administration by a trustee of the bankruptcy estate because, as Harman J explained in In re A Debtor; Ex p The Debtor v Dodwell [1949] Ch 236, 241, administration would be impossible if the trustee had to answer at every step to the bankrupt for the exercise of his powers and discretions in the management of and realisation of the property. So also in Re Edennote Ltd [1996] 2 BCLC 389, 394, this court explained that, fraud and bad faith apart, the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it .'*

Mr Hackett agreed the test applied. Accordingly, Mr Hackett agreed that in order to succeed, he would need to satisfy me that the request itself was perverse. By this I mean that no trustee properly advised, or properly instructing himself, could have made the requests. Mr Hackett submits that this test is met because, in his submission, there is no entitlement for the Trustees to obtain documents which do not belong to the Bankrupt or are not under his possession or control, but belong to third parties.

Before dealing with this submission, I pause to note that the documents which were sought by the trustees in the letters were not confined to those which belonged to a third party. The documents requested clearly included documents, which belonged to the Bankrupt or were within his possession or control. Mr Hackett's submission was that the requests were perverse (in the sense set out above) because of their width and because they included a request to which the Trustees were, in his submission, not entitled. Mr Hackett therefore invited me to give directions to ensure documents to which the Trustee was not entitled, in his submission, did not have to be disclosed.

13. So I need to approach the Bankrupt's case on the basis that the Trustees were not entitled to seek, alongside those documents Mr Hackett accepts the Trustees were entitled to (whether under section 311 or as a precursor to a section 366 application), other documents which Mr Hackett asserts belong to third parties and are also not in the possession or control of the Bankrupt.

14. I was taken by Mr Hackett to the exchange with Irwin Mitchell and the Bankrupt's solicitors at B3, pps 9 – 23. Mr Hackett sought to explain why the application was made by the Bankrupt. The email exchange demonstrates the legal view taken by the Bankrupt's solicitors and the legal view taken by Irwin Mitchell (taking their advice from their insolvency partner). In the email dated 29 August 2018 at 12.30, the Bankrupt's solicitors asserted effectively that none of the documents should be disclosed and set out five reasons. These are the reasons which were set out in the witness statement of Andrew Dunn dated 24 August 2018 filed in support of the current application. Of those five reasons, Mr Hackett helpfully condensed these five grounds into three, in his skeleton argument at paragraph 28. The remaining two out of the original five were essentially duplication. Of the three set out in paragraph 28, Mr Hackett informed me that he was not pursuing the assets/liabilities ground, being that the Trustee were not entitled to see papers in relation to files where the Bankrupt was a defendant. So Irwin Mitchell was aware of the grounds relied upon by the Bankrupt, albeit some of them were duplication and

one is no longer being pursued.

15. The reply from Irwin Mitchell dated 29 August 2018 at 13.08 states that Irwin Mitchel sought further details of the documents which fell into the various categories (the five grounds) as well as specifically seeking the authority relied upon by the Bankrupt's solicitors relating to number 4 (which was the assets/liabilities point not pursued before me). The view of Irwin Mitchell as set out in the email exchange, is that having had the matter considered by their insolvency partner, their view was that the Trustees were entitled to the disclosure they sought. As can be seen from Mr Lilly's skeleton as well as his submission, this is a view shared by the Trustees.

16. Mr Hackett also sought to rely as part of his case on what he called the maintaining of the requests, being the Trustees' pursuit of their requests. This is not what is set out in the application, nor in the witness statement dated 24 August 2018 in support of the application. He sought to rely on the fact that the requests were narrowed down and that in his submission there had been a shift in position on the part of the Trustee as in some way justifying the application made by the Bankrupt. In my judgement, the application challenging the making of the requests in August 2018 and a case challenging the Trustees' pursuit or their subsequent conduct on how they continued to maintain their requests despite any challenge to the same, are two different cases. I will deal with this further below.

The jurisdictional arguments of the Trustees

17. Mr Lilly resisted the application on the primary basis that there was no jurisdiction to have brought it in the first place. His argument was that s 303(1) of the Insolvency Act required an applicant to point to, relevantly, an "act" or "decision" of the trustee. Here, he said, there was no such act or decision. This is because s 311(1) is mandatory in its terms: the trustee "shall" take possession of various documents. This obligation on trustees accrues automatically upon a person being made bankrupt. Trustees in bankruptcy perform no act and make no decision when they fulfil their

s 311(1) obligation. Accordingly, the argument goes, s 303(1) cannot be engaged.

18. I am unpersuaded by this submission. It is true that s 311(1) is obligatory. However, trustees must perform acts and make decisions in the way they go about acquiring the material specified in the section. The references to "act[s]" and "decision[s]" in s 303(1) should be interpreted in a plain and common sense way. These are apt to include, for example, sending correspondence. They can also sensibly include making certain requests in furtherance of what the trustee perceives to be his or her statutory functions in the particular circumstances of each case.

19. For these reasons, the correspondence sent by the Trustees in this case was adequate to engage the jurisdiction of s 303(1) of the Insolvency Act.

20. Mr Lilly also argued that, properly analysed, the application really challenged the acts and decisions of the First and Second Respondents. This followed from Mr Hackett's submission that the application was triggered by those Respondents having disclosed their documents to the Trustees. This does not change the fact that the application has been brought as a direct challenge to how the Trustees went about performing their statutory functions. The fact that the motivation to bring that challenge only emerged after the First and Second Respondents made disclosure adds nothing to that point.

21. Mr Lilly also raised certain procedural points:

a. He noted certain technical defects in the Bankrupt's application notice and evidence, although these were not pressed in the hearing.

b. He pointed out that express reference to the s 303 power only appeared late in the piece. No "act" or "decision" was specified in the application. No reference was made to s 363 until the hearing.

c. Mr Lilly argued that the evidence and submissions filed by the

> Bankrupt did little to advance matters. These, he said, did not adequately particularise the conduct of which complaint was made.

22. Mr Lilly did not suggest that any of the procedural defects was so grave that the Trustees had no realistic hope of knowing and meeting the case made by the Bankrupt. This makes it unnecessary to examine the alleged defects in any particular detail. Indeed, Mr Lilly's real point was that these defects demonstrated that the application is nothing more than an attempt to interfere with the Trustees' day-to-day administration of the bankruptcy. This point goes squarely to the application's merits rather than being some jurisdictional point. I turn now to how the Bankrupt seeks to make his case under section 303.

The grounds for the submission that the requests were 'perverse'

23. I have already set out above the reference to five grounds in the witness statement in support, sensibly, in my judgement, reduced by Mr Hackett to two. Mr Hackett set out his basis for his submissions that the requests made by the Trustees were perverse as follows:-

> (1) that the Trustees were not entitled to documents over which privilege was asserted by the Bankrupt and which were in the hands of third parties (solicitors in this case) and which were not owned by the Bankrupt or not in his possession or control;
>
> (2) that the Trustees were not entitled to personal papers of the Bankrupt as they are not part of the bankruptcy estate.

These grounds are set out at paragraph 28 of his skeleton.

24. I will deal with these issues in turn.

Privilege – ground (1)

25. Pursuant to section 311 (see above), the Trustees have an absolute entitlement and indeed an obligation to obtain the documents belonging to the Bankrupt or under

his possession or control which relate to the bankrupt's estate or affairs. In particular, as the wording of that provision expressly states, this entitlement includes '**any which would be privileged from disclosure in any proceedings'**. The recent Court of Appeal case of *Shlosberg v Avonwick Holdings Ltd* [2016] EWCA Civ 1138, [2017] Ch 251 as well as the subsequent first instance decision in *Leeds v. Lemos* [2018] Ch 81, state that the Bankrupt clearly has no entitlement to assert, as against his Trustee in bankruptcy, his privilege over any such documents or records belonging to him or under his possession or control which relate to his estate or affairs. In *Avonwick*, there was no argument relating to what different categories, if any the documents in the hands of the Trustees fell into. Some of the documents held may well have fallen into the category of solicitors' working papers, but the case proceeded on the basis that all documents fell into section 311.

26. I note from the contents of the letters in this case, the Trustees were clearly alive to the *Avonwick* case as the letter states clearly that the Trustees will not seek to waive privilege in relation to any documents over which the Bankrupt can legitimately assert privilege. That was the effect of the *Avonwick* case. Mr Hackett's submission was based upon the paramount importance of privilege and how it may not be overridden. However he accepted that section 311 expressly gave the Trustee an entitlement to have such documents delivered up to the Trustees. The issue in the two recent cases relating to what use if any a Trustee can make of such documents is of no concern in the current application because the complaint made by the Bankrupt in this application relates to the request made by the Trustees. It is that request which I need to be satisfied is perverse in the *Osborn v. Cole* sense.

27. Mr Hackett submits that certain of the documents, such as the solicitors' working papers do not belong to the Bankrupt and are not in his possession or control and therefore do not fall under the scope of section 311. Moreover, submits Mr Hackett, the Trustee would also not be entitled to such documents under any section

366 proceedings brought by them. This would mean that the Trustee would be unable to seek from solicitors who have working papers, delivery of those documents or copies thereof if the Bankrupt is asserting privilege over those documents. Clearly the only person who can assert such privilege is the Bankrupt.

28. Upon being asked by me, Mr Hackett could produce no authority which supported his legal submission in this respect. He accepted that there was no clear authority for his submission. He referred me to paragraph 50 of *Avonwick* which states,

> *'50 It should be noted before proceeding further that there is no evidence as to the extent to which (i) documents may have been electronically created and copied directly onto the CDs or (ii) Fladgate, as distinct from their former clients, may have a claim to ownership of some of the documents (at least qua pieces of paper). Both counsel addressed me upon the assumptions that (a) all of the documents had been printed or written on paper prior to the bankruptcy and (b) Mr Shlosberg owned all of the pieces of paper prior to the bankruptcy (even though it is quite possible that Fladgate owned some of them: see* Halsbury's Laws of England *, 5th ed, vol 66 (2015), para 583 and the authorities cited). I shall do likewise'*

This passage provides in my judgement no support for the legal submission which is being made by Mr Hackett. It merely makes it clear, as I have already stated above, that the assumption in *Avonwick* was that all the papers effectively fell under section 311.

29. Mr Hackett relied upon his legal submission relating to the nature and ambit of section 311 and section 366 as enabling me to hold that the requests made by the Trustees were perverse. As appears from what I have set out above, the requests were made by solicitors acting on behalf of the Trustees and therefore Mr Hackett's case is that the Trustees' action in making these request was perverse because no trustee properly advised could have made these requests. It is in my judgement difficult to imagine that the actions of a Trustee in making a request by relying on a differing

view of a legal point as yet determined properly and comprehensively by the Court can found the basis of a challenge under the *Osborn v. Cole* test. I will expand on this further below. However this is why I asked Mr Hackett to produce to me any clear legal authority upon which he relied in making his legal submission relating to the ambit of section 311 and section 366.

30. In his submissions, Mr Lilly urged me to hold, in so far as I was minded to deal with this legal point, that in fact this point had been decided against the Bankrupt in the case of *Re Murjani (A Bankrupt) [1996] 1 WLR 1498 (Ch)*. As Mr Lilly explains, the crucial assumption made in *Murjani* is that the Bankrupt cannot assert privilege against his or her trustee in Bankruptcy. This enabled the Trustee to call for documents which, had those documents been in the hands of the Trustee, would have provided no defence to the Bankrupt as against the his Trustee. The passage at 1505A is relevant here,

> *'The solicitors' affidavits claim that privilege extends to all information and documents confided to them or coming into their possession as the clients' solicitors. This claim in the context of an application for an order under section 366 against the solicitors is far too wide. It is plain that any information or document, which if possessed by the clients would be disclosable by the clients under a section 366 order, is likewise disclosable by the solicitors if possessed by the solicitors. If the clients have no privilege against disclosure of documents or information possessed by themselves, they can be entitled to no legal professional privilege protecting from disclosure the same documents or information if in the possession of the solicitors. The availability of legal professional privilege in case of an order against a solicitor in respect of matters properly within the ambit of a section 366 order is accordingly circumscribed: it cannot extend to anything which the client can himself lawfully be required to reveal. The fortuitous fact that possession of confidential documents or information may be in the hands of the solicitor instead of the client cannot affect the trustee's substantive entitlement: consider Morris v Director of the Serious Fraud Office [1993] Ch 372. It is not necessary that an order for examination or production of documents be first obtained against the client. Any other result would place a premium on the client evading an order against himself for examination or production of documents (as have the clients in this case).'*

31. Mr Hackett does not accept that this passage or the case of *Murjani* itself provide the support that Mr Lilly submits. However this demonstrates that in order for the Bankrupt to stand any prospect of success, Mr Hackett needs to persuade me to determine the legal issue. Mr Hackett did not shy away from this conclusion and invited me to determine the point relying not only upon section 303 but also upon section 363 of the Insolvency Act 1986. He submitted that if I determined the point in his favour, then the requests made by the Trustees back in August 2018 were perverse. Before dealing with this submission, it is worthwhile setting out section 363(1), which states, *'Every bankruptcy is under the general control of the court and, subject to the provisions in this Group of Parts, the court had full power to decide all questions of priorities and all other questions, whether of law or fact arising in any bankruptcy*.' I accept that this provision gives the Court jurisdiction to determine questions of law, such as this one. However, as I observed during the hearing, it is not in my judgement to be used as some way of circumventing the test applicable to section 303.

32. It is for the Bankrupt to establish that the requests made 'were so perverse that no trustee properly advised or properly instructing himself could so have acted'. In my judgement, the Bankrupt has clearly failed to establish that the actions of the Trustees in making the requests are capable of meeting that test. What Mr Hackett is relying upon as being the grounds for meeting the test is a legal submission in relation to a legal point where there is no clear authority in support of his legal submission. There is, according to Mr Lilly, support for saying that the legal point is incorrect. However in my judgement this is not a point which I need to determine in order to deal with the Bankrupt's application.

33. In my judgement, the Bankrupt has failed to satisfy the *Osborn v Cole* test. The Trustees sent their requests based on their or their advisor's interpretation of the law.

The letter referred in oblique terms to an application being made to the Court if the requests were not complied with. There is no clear authority which categorically states that their approach to the issue of law is emphatically and clearly incorrect. This is admitted by Mr Hackett. In my judgement, making requests based upon a view of the law cannot be perverse in those circumstances. This is what is encompassed by the words 'properly advised' and/or 'properly instructing' himself.

34. In my judgement, the application fails on this ground because for the reasons set out, the requests made did not meet the *Osborn v. Cole* test. It is a high hurdle for the reasons already given in the passage quoted above from *Bramston v. Haut*. The Trustees are entitled to make the requests they did in circumstances where the Bankrupt is not able to satisfy me that the requests were clearly wrong in law, or even partially wrong in law at the time they were made. There is at its highest, although Mr Lilly would disagree, an undecided legal point. Taking one view of the law rather than another is not in my judgement capable of being 'perverse'.

35. I gave as a rather obvious example during the hearing a scenario where a trustee wrote demanding documents and positively asserted that the Trustee would waive privilege in those documents delivered up. *Avonwick* is clear and explicit authority which states that a trustee is not entitled to waive privilege. So a trustee who sets out in a letter his intention to waive privilege would be capable of being held to account pursuant to section 303. That is not the case here.

36. This leaves me to consider Mr Hackett's submission that I should determine the legal issue and then, if he is successful, the section 303 application would succeed. In my judgement that submission is hopeless. There is a clear temporal objection. Even if I was minded to determine the legal issue now, that determination would be now and not in August 2018. This court would not determine that an act or decision taken by a trustee in August 2018 is now to be held to be perverse by reason of a

determination of a legal issue in December 2018. The request of course was made in August 2018 and no clear legal authority would have existed then which would have entitled me to consider whether the Trustee's act was perverse. The availability of section 363 does not detract from the points I have made above. Section 363 provides the Court with a jurisdiction but does not defeat or in some way prevent the temporal issues from arising.

37. Mr Hackett invited me to deal with events which took place after the application was issued, namely that the Trustees had been maintaining their requests and in some way had been compelled to narrow the ambit of the requests. In fact, what I observed from the correspondence was the trustees seeking to reach an accommodation so as to enable them to obtain documents, leaving to one side any arguments to a moment when it may or may not be necessary to deal with those objections. However, if even I was minded to allow this expansion of the ambit of the application, it still fails for the reasons already given. The requests or maintaining of requests based upon a view of the law where there is no clear authority establishing that the view taken is incorrect, fails for not meeting the test.

Personal papers – ground 2

38. The second ground relied upon by Mr Hackett related to personal papers. Mr Hackett asserted in his skeleton that (28.3) the Trustees are not entitled to see papers relating to matters which are personal to the Bankrupt and therefore not part of his bankruptcy estate. Therefore, according to Mr Hackett, the Trustees acted perversely because their requests sought documentation that was purely personal to the Bankrupt and therefore bore no relationship to the Trustees' statutory functions. Mr Hackett did accept in the course of his submissions that it was theoretically possible that documents relevant to the Trustees' statutory function may exist within the personal files (this was in the context of a discussion relating to the defamation and

harassment files by way of example) . Nonetheless, he maintained, on the authority of *Haig v Aitken [2001] Ch 110* that the requests fell under the scope of section 303.

39. It is noteworthy that the requests which are the subject matter of this application did specifically state that the trustees sought, *'documents and information relating to the Bankrupt's dealings, affairs and property*.' So documents which did not fall under that description did not form part of the Trustees' requests. Section 311 states that the documents sought must 'relate to the bankrupt's estate or affairs'. This of course is different from restricting the ambit of section 311 to documents which are not personal.

40. Rattee J commented on these words in *Haig v Aitken* at 119 as follows:

> *'In my judgment the reference to the bankrupt's affairs in section 311(1) of the 1986 Act is a reference to his financial affairs or other affairs which may be relevant to the carrying out of the trustee's duties under the Act, or possibly even affairs relevant to the official receiver's independent duties under the Act. I reject entirely the proposition that the reference to affairs in section 311 can extend to all affairs concerning the bankrupt's conduct, even in relation to his own professional or other activities, except to the extent that that conduct may be relevant to the duties of the trustee, or possibly the official receiver, under the Act.'*

41. Nonetheless, the trustee's purview under section 311(1) is wide. In *Haig v Aitken*, Rattee J also said at 118–119 that section 311(1):

> *'... entitles the trustee to possession of documents relating to the bankrupt's estate, even though such documents are not themselves comprised in the estate. Indeed, the very terms of section 311 to my mind contemplate the possibility that there may be documents, belonging to the bankrupt, which are not part of his estate and for which, therefore, express provision has to be made by section 311(1).'*

42. And at 120 (emphasis added):

> *'It seems to me that, as I have already said, correspondence properly called "personal correspondence", whatever its subject matter, does not form part of the bankrupt's estate within the*

> *definitions in the Act. While some of it may relate to other assets within the bankrupt's estate or to his affairs properly regarded as limited to affairs relevant to the administration of the bankrupt's estate, that does not bring it within the definition of "estate". It does give the trustee a power to see such documents under section 311(1).'*

43. Similarly, the Court of Appeal in *Avonwick* said this at [70]:

> *'The express terms of section 311(1) describe the duty of the trustee to take possession of the documents mentioned there. ... It is necessarily implicit in section 311(1) ... that the trustee is to take possession of the documents for the overriding function of getting in, realising and distributing the bankrupt's estate. It follows that the trustee must, at the least, be entitled to look at the documents to obtain information relevant to those matters.'*

44. In my judgement, requesting the documents with the restriction set out in the letter is not perverse. Personal papers can and must be disclosed if they relate to bankrupt's estate or affairs even if they are personal. Equally, using the language in section 366, the Trustee can under that provision seek to persuade the court that documents are needed because they relate to the bankrupt's dealings and affairs and property. A section 366 order involves the exercise of a discretion and the carrying out of a balancing act taking into account all the circumstances of the case as set out in well established principles. This application is not a section 366 but simply a challenge to the requests made by the Trustees. The case law recognises that the Trustees are entitled to see a range of documents, with the restrictions as I have set out above. I am not persuaded that the categories of documents, with the relevant restriction set out in the letter, are outside of the Trustees' statutory functions or that they have acted perversely in seeking them. Moreover, I asked Mr Hackett if he has a list of those files which he could assert were being sought and that those files contained no documents which could fall under the description of what was being sought by the Trustees . He did not have such a list. His complaint was that the Trustee may by reason of their request be passed files which contained matters which were purely personal and that therefore the request could not be made. This therefore

appears to boil down to who could inspect to see if the documents were indeed relating to the affairs of bankrupt or not. The type of argument does not make in my judgement the requests perverse. By giving the Trustees the ability to call upon documents, the provisions of the Insolvency Act 1986 clearly envisage that there may well be documents which are viewed by the Trustee which are simply not relevant. Privilege and/or confidentiality in such documents is not lost by the Trustee seeing such documents even when he or she concludes they are not relevant and sends them back. This ground therefore also fails.

45. Mr Hackett sought to persuade me to determine the application in the Bankrupt's favour by submitting that the Bankrupt must be able to have some way of protecting himself. A bankrupt does have an important statutory protection in section 303, but this is clearly limited by a long line of well established authorities. In fact, as the email exchange with Irwin Mitchell demonstrates, the Bankrupt in this case also had the option of providing Irwin Mitchell with an indemnity and allowing a section 366 to proceed. The case I have to deal with arises under section 303 and in my judgement the Bankrupt has failed for the reasons set out above.

Dated