

ENGLAND AND WALES / JUDGMENT

Pickard & Anor v Constable

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Neutral Citation Number: [2017] EWHC 2475 (Ch) IN THE HIGH COURT OF JUSTICE CHANCERY DIVISION COMPANIES COURT Case No: CH-2017-000084 Royal Courts of Justice Strand, London, WC2A 2LL Date: 06/10/2017 Before : MR JUSTICE WARREN

- ----- Between : MARTIN PICKARD & ANN NILSSON as Joint Trustees in Bankruptcy of Pauline Constable
- and - DEREK CONSTABLE Appellants Respondent
- -----
- ----- MR PEACHEY (instructed by FREETHS LLP) for the Appellants MS MATTSSON (instructed by MARTIN SEARLE SOLICITORS) for the Respondent Hearing dates: 3 OCTOBER
- -----

Judgment

Background

1. This appeal arises in the bankruptcy of Pauline Constable (“Mrs Constable”) who was adjudicated bankrupt on 2 October 2014. The appellants in the present appeal are the trustees in bankruptcy (“the Trustees”). Mrs Constable’s only significant asset now remaining is her 50% share in 11 Geering Park, Hailsham, East Sussex (“the Property”). That share is worth slightly over £71,000. The Property is the home of Mrs Constable and her husband, Derek (“Mr Constable”).
2. The Trustees applied for an order for possession of the Property by an application notice dated 29 February 2016, more than one year but less than three years after the bankruptcy order. Mr and Mrs Constable were respondents to that application.
3. The application came before District Judge Robinson (“the DJ”) in the Eastbourne County Court on 1 July 2016. Mr and Mrs Constable appeared in person. The DJ ordered that the Property be sold with the Trustees having conduct of the sale. He ordered possession to be given by 1 October 2016. Mr and Mr Robinson, having obtained some advice, wished to challenge the date for the giving of possession. On 23 September 2016, the matter came before the DJ who made directions. He stayed the paragraphs of his earlier order relating to

sale of the Property. Mr Constable was given permission to rely on further evidence to be filed and served by 4 November 2016. The purpose of this was to enable him to provide evidence of his health (to which I will come) and the availability of alternative accommodation, matters relevant to the proper exercise of the DJ's discretion in placing conditions on the order for sale and its implementation.

4. Pursuant to that permission, Mr Constable filed two witness statements, neither of which is dated. One was made by Mr Constable himself and the other was made by his carer, Kara Pickles. I will refer to those statements in due course.
5. On 1 March 2017, the matter came again before the DJ. Both parties were represented by counsel on that occasion. After the hearing, a transcript of which I have read, the DJ delivered a short judgment to which I will refer in some detail later. He made an order ("the March Order") by which, so far as material for present purposes, he ordered that the sale of the Property be postponed until the death of or earlier permanent vacation of the Property by Mr Constable, with a parallel postponement of the order for possession. He also ordered that any party could apply "in regard to the making of this order". I am not clear what was intended by that last order; neither party has referred to it nor relied on it. I say no more about it. He summarily assessed Mr Constable's costs which he ordered the Trustees to pay.
6. The Trustees now appeal, with the permission of Asplin J, from the orders postponing sale, possession and costs. The evidence
7. As I have said, Mr Constable filed two witness statements in support of his opposition to the Trustees' application for an order for sale and possession. There was no cross-examination of either Mr Constable or Ms Pickles. The Trustees did not themselves adduce any evidence in response. I can summarise the evidence as follows:
 - a. At the time of his witness statement he was 63, so he is now either 63 or 64.
 - b. He was diagnosed with myasthenia gravis in 2009. This is an autoimmune condition which affects his muscles causing him to be weak and tired and affects his breathing.
 - c. Since his diagnosis, he has had two prolonged hospital admissions in late 2009 and early 2010, as well as shorter admissions when his breathing became bad. On one occasion, he was visited by his gp who, as Mr Constable states "remarked that it was the worst case of myasthenia gravis that he had seen in 25 years". I note that there is no evidence from the gp himself; nor is there any evidence of what other cases the gp had ever come across.
 - d. He takes a number of medicines including prednisolone. The dosage has changed over time. At one time he was taking 100 mg per day but that was lowered to 15 mg at some stage. At the end of September 2016 it was increased by 5 mg every 2 weeks as his condition had worsened. There is no evidence about what the dosage now is. Nor is there any evidence about the nature of this drug or what its effects and side effects might be.

- e. He uses a Bilevel positive airway pressure (BIPAP) ventilator (to which he is attached by a mask) during the night and for 3 to 4 hours during the day to assist with his breathing.
- f. He has to sleep sitting up as he is likely to choke if he lies down. He sleeps in an armchair in the living room of the Property, his sleep often being disturbed.
- g. He spends virtually all day in the armchair. When he stands up he is shaky and at risk of falling. Walking sets off breathing attacks. He uses a wheelchair and occasionally a Zimmer frame if moving around the house. If he leaves the house he requires a wheelchair and his carer to assist him with getting in and out of the wheelchair and to push him around.
- h. He uses a commode and a pot. Using the commode takes a long time because of muscle weakness and breathlessness. Accordingly, he always has a pot nearby which he uses more often. He drinks as little as possible because of his bladder problems.
- i. Because of his breathlessness, he changes his clothes only once a week. It takes him 25 minutes to do so. Completion of the installation of a wet room (with the aid of local authority grant) took place in 2016. However, he has not been able to use it because he is so uneasy on his feet. He cannot remember the last time he showered or bathed.
- j. He has a carer (Miss Pickles) who attends the Property 5 times a week spending about 12 hours per week. She divides her time between Mr Constable and his wife. She attends their daily needs.
- k. He has a poor appetite and eats child-sized portions which he is not always able to finish. He has to be careful swallowing since, if food goes down the wrong way, his throat can go into spasm and his condition then stops his breathing.
- l. His muscle weakness renders him unable to brush his teeth with a normal toothbrush or to lift a kettle. It affects his speech so that he is not able to talk very loudly or speak clearly as a result.
- m. His own perception is that his condition affects him in such a way “that even on ‘good’ days , I have no real quality of life”.
- n. He and his wife are dependant on income support from the State. They would be unable to afford deposits or agency fees in relation to private sector lettings.
- o. He has made enquiries of the local council to see what housing they might be able to offer. An officer visited the Property and said, as he puts it, that “the Council won’t rehouse me and Pauline because apparently we are deliberately homeless, although he said that if we were on the street then they would likely offer bed and breakfast accommodation”. He states that “Bed and breakfast accommodation would obviously not be suitable for me”.

- p. He explains that he and Mrs Constable would need somewhere on the ground floor or a property with wheelchair access and a stair lift if there are stairs. He states that he has not managed to find anything available in the private sector (although he does not give any evidence about what efforts he has made).
 - q. Mrs Constable is 76 years old. She has severe rheumatoid osteoarthritis and pigeon lung. She lives mostly upstairs while Mr Constable lives exclusively downstairs.
 - r. Ms Pickles says that there is “no way that [Mr Constable] would cope if he had to move. It would be absolutely devastating for him and Pauline. Neither of them can even walk out of the front door, let alone move any of their things or set up a new home...”. I note that assessment, but, as I will explain, little if any weight can be attached to it.
 - s. There was before the DJ an indication from Mr Constable’s neurologist that myasthenia gravis has a risk of entering a crisis state which would be life threatening and require hospitalisation.
 - t. There was also before the DJ an indication from Dr Khan that there is a potential, generally for adverse results arising from emotional stress, but no indication of how Mr Constable might be expected to react to such stress. The Law – insolvency provisions
8. The central statutory provision in applications of this nature is section 335A Insolvency Act 1986. Subsections (2) and (3) apply where an application is made by a trustee in bankruptcy under section 14 Trusts of Land and Appointments Act 1996 for an order under that section for the sale of land. They provide as follows: “(2) On such an application the court shall make such order as it thinks just and reasonable having regard to—
- (a) the interests of the bankrupt’s creditors;
 - (b) where the application is made in respect of land which includes a dwelling house which is or has been the home of the bankrupt or the bankrupt’s spouse or civil partner or former spouse or former civil partner -
 - (i) the conduct of the spouse, civil partner, former spouse or former civil partner, so far as contributing to the bankruptcy, (ii) the needs and financial resources of the spouse, civil partner, former spouse or former civil partner, and (iii) the needs of any children; and
 - (c) all the circumstances of the case other than the needs of the bankrupt.
- (3) Where such an application is made after the end of the period of one year beginning with the first vesting under Chapter IV of this Part of the bankrupt’s estate in a trustee, the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt’s creditors outweigh all other considerations.” 9. In the present case, paragraphs (b)(i) and (iii) of subsection (2) are irrelevant and can be ignored.

10. So far as concerns subsection (3), it is accepted by the Trustees that the circumstances of the case are exceptional so that the court is not required to assume that the interests of Mrs Constable's creditors outweigh all other considerations. The result is that the court must exercise its powers in accordance with section 335A(2).
11. The courts have addressed in a number of cases the correct approach to the exercise of the discretion where exceptional circumstances are established. I refer to four of them below. Cases of this sort are, it must be remembered, heavily fact-dependant, and care must be taken in dealing with submissions which seek to support one side's case based on factual similarities between the case in hand and other reported cases. Nonetheless, it is possible to take from the authorities some general principles which are of assistance in determining the appropriate order to make in any particular case.
12. The first case to which I refer (although the last in time) is the decision of Henderson J in *Grant v Baker* [2016] EWHC 1782. In that case, the bankrupt's daughter suffered from developmental delays, mobility issues and obsessive-compulsive disorder. The District Judge in that case held that there were exceptional circumstances: an order for sale was made but was postponed "until such time as [the daughter] no longer resides at the property". That period might last for decades, the daughter being aged 30 and there was no evidence that her life-expectancy was lower than normal. Henderson J allowed the appeal of the trustees in bankruptcy substituting a period of 12 months postponement from his judgment, taking the period to the end of July 2017. He considered that the District Judge had erred in principle. The first error was that the District Judge failed to take into account, under section 335A(2)(c), the requirement to have regard to "all the circumstances of the case other than the needs of the bankrupt" because he had not taken proper account of the statutory scheme of the bankruptcy legislation. He said this at [44] and [45]: "44. The judge directed herself, in paragraphs 18 and 19 of her judgment, that she needed to weigh up the interests of the only creditors, HMRC, against the interests of Mrs Baker and Samantha. This was true as far as it went, but in my view paid insufficient attention to the requirement in section 335A(2)(c) to have regard to "all the circumstances of the case other than the needs of the bankrupt". The circumstances of the case include the statutory scheme of the bankruptcy legislation, at the heart of which is the vesting of the bankrupt's property in his trustee, with the object that the trustee should then realise the property and distribute the net proceeds among the unsecured creditors on a *pari passu* basis. Moreover, the clear effect of section 283A of the 1986 Act is that there is a limited period of three years within which the trustee must either take steps towards realisation of the bankrupt's interest in his home, or forfeit that interest as part of the bankrupt's estate. If, as in the present case, the trustee does take action within the requisite period, it seems to me that the court should then exercise its powers under section 335A with the object of enabling the bankrupt's interest in the property to be realised and made available for distribution among his creditors. Only in that way can the underlying purpose of the bankruptcy legislation be achieved.

45. Furthermore, since the vesting of the bankrupt's property in the trustee is central to the operation of the statutory scheme, and since the trustee's reasonable costs are payable in priority to any distribution to creditors, it must follow that the statutory scheme requires the property to be realised even if the proceeds may be swallowed up in meeting the trustee's reasonable costs, with nothing left for the unsecured creditors. This must, I think, be the explanation for the well-established principle that an order for sale should normally be made even if the whole of the net proceeds will be exhausted in paying the expenses of the bankruptcy. The judge clearly had this principle in mind when she said, in paragraph 18, that "even if there were no dividend to the creditors that would not necessarily mean that I should not make an order for sale". I respectfully consider, however, that she may have blunted the force of the principle by expressing it in these qualified and negative terms. More importantly, I think she also failed to give appropriate weight to the fundamental point that an indefinite suspension of the order for sale, for a period that could be measured in decades, is incompatible with the underlying purpose of the bankruptcy code. In all save the most truly exceptional circumstances, that purpose must require realisation within a much shorter time frame, normally to be measured in months rather than years.
13. I will return to that last sentence when considering Ms Mattsson's submissions on behalf of Mr Constable.
14. On the facts, the District Judge had thought it would unreasonable to order a sale while the daughter continued to live at the property. Henderson J consider that her reasoning was open to criticism on a number of grounds. The fourth of those grounds was this: "Fourthly, the judge was in my view wrong not to consider any alternative to indefinite postponement of the sale. As I have already explained, such a postponement, on the facts of the present case, cannot be reconciled with the statutory scheme and purpose of the bankruptcy legislation. The need for the Property to be sold within a reasonable period is therefore a nettle which has to be grasped, and since there is no evidence that Samantha's condition is likely to improve, her interests do not require a postponement for longer than it will take to find suitable alternative rented accommodation, and plan the move in a way which will cause her the least distress."
15. Having reached the conclusion that the District Judge had erred, Henderson J provided for a 12 month postponement as the longest that it could be reasonable to impose. This would allow ample time for a suitable replacement property to be found on the rental market and for the move to be prepared with the daughter's welfare and best interests at heart. He considered that this, albeit on one view a generous period, would strike an appropriate balance between the interests of the creditors and the reasonable needs of the daughter.
16. The three other cases to which I refer were all considered by Henderson J. I agree entirely with what he said and simply set out verbatim what he said in [26] to [29] of his

judgment:

“The principles which the court should follow when considering whether the circumstances of the case are exceptional were conveniently summarised by Lawrence Collins J (as he then was) in Dean v Stout [2005] EWHC 3315 (Ch),

- [2005] BPIR 1113, at [6] to [11]: “6. The principles which can be derived from the authorities may be summarised as follows. First, the presence of exceptional circumstances is a necessary condition to displace the presumption that the interests of the creditors outweigh all other considerations, but the presence of exceptional circumstances does not debar the court from making an order for sale.
7. Secondly, typically the exceptional circumstances in the modern cases relate to the personal circumstances of one of the joint owners, such as a medical or mental condition.
 8. Thirdly, the categories of exceptional circumstances are not to be categorised or defined and the court makes a value judgment after looking at all the circumstances.
 9. Fourthly, the circumstances must be exceptional and this expression was intended to apply the same test as the pre-Insolvency Act 1986 decisions on bankruptcy (see *In re Citro (Domenico)* (a bankrupt) [1991] (Ch) 142, [1991] 1 FLR 71 at 159/160 and 84 respectively), that is to say exceptional or special circumstances which are outside the usual “melancholy consequences of debt and improvidence” (in the words of Nourse LJ) or (in the words of Bingham LJ) “compelling reasons not found in the ordinary run of cases”.
 10. Fifthly, it is not uncommon for a wife with children to be faced with eviction in circumstances where the realisation of her beneficial interest will not produce enough to buy a comparable home in the same neighbour or, indeed, elsewhere. Such circumstances, while engendering a natural sympathy, cannot be described as exceptional, and it was in that context that Nourse LJ referred to the “melancholy consequences of debt and improvidence” with which every civilised society has been familiar (see 157 and 82 respectively).
 11. Sixthly, for the purposes of weighing the interests of the creditors, the creditors have an interest in the order for sale being made, even if the whole of the net proceeds will go towards the expenses of the bankruptcy, and the fact that they will be swallowed up in paying those expenses is not an exceptional circumstance justifying the displacement of the presumption that the interests of the creditors outweigh all other considerations.”
 27. In *Claughton v Charalambous* [1998] BPIR 558, Jonathan Parker J said at 562H: “What is required of the court in applying s335A(3) is, in effect, a value judgment. The court must look at all the circumstances and conclude whether or not they are exceptional. That process leaves, it seems to me, very little scope for the interference by an appellate court. No doubt there may be cases where an appellate court can and should interfere. For example, where there is an error of law appearing on the face of the judgment, or where the conclusion which the court below has reached is so plainly wrong as to raise the inference

that in reaching that conclusion the court somehow misdirected itself in law.”

28. The facts of *Claughton v Charalambous* show that, in an appropriate case, the exceptional circumstances may be such as to justify a postponement of any order for sale until the bankrupt's spouse either dies or vacates the property. In that case, however, Mrs Charalambous (the bankrupt's wife) had a 50% beneficial interest in the property, and the medical evidence established that she was in very poor health, suffering from chronic renal failure and chronic osteoarthritis. She could walk only with great difficulty and with the aid of a Zimmer frame, and she needed a wheelchair. She was about 60 years old, and evidently had a reduced life expectancy, although how reduced does not appear from the judgment: see 562A-D.
29. *Re Bremner* [1999] BPIR 185 is another case where an indefinite suspension of an order for sale was directed, but the circumstances were such that the postponement was likely to be measured in months rather than years. The bankrupt, Mr Bremner, was aged 79, and had recently been diagnosed with an inoperable cancer. His life expectancy was probably no more than six months, he was housebound, and his wife (aged 74) was his only carer. She had no beneficial interest in the property, but had a right of occupation while the marriage subsisted. The bankruptcy dated back to 1991, and the evidence was that on an immediate sale of the property there should be enough money to pay all the creditors in full, with some (but not all) of the statutory interest to which they were entitled. Mr Jonathan Sumption QC (as he then was), sitting as a deputy judge of the High Court, held that the circumstances of the case were exceptional, and that the needs of Mrs Bremner (as distinct from those of Mr Bremner, which had to be disregarded) should be recognised by deferring a sale of the property until three months after her husband's impending death. The judge added, at 188E: “I should make it clear that I would not necessarily have reached the same decision if Mr Bremner had been younger or less ill, or if his life expectancy had been longer than, in fact, it appears to be.” The Law - appeals
17. The law in this area is well established. In this context, Henderson J referred, in *Grant v Baker* at [43], to *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1991] 1 WLR 1507, the conventional approach being described in the following way: “Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale.”
18. In relation to the exercise of a discretion, an appellate court should only interfere with the decision of the judge if he or she has acted wrongly in law or contrary to principle. The position was summarised by Brooke LJ in *Tanfern Ltd v Cameron-MacDonal* (Practice Note) [2000] 1 WLR 1311, CA at [32] endorsing what Lord Fraser of Tullybelton had said in *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647: “Certainly it would not be useful to inquire whether different shades of meaning are intended to be conveyed by words such as ‘blatant error’ used by the President in the present case, and words such as ‘clearly wrong,’ ‘plainly

wrong,’ or simply ‘wrong’ used by other judges in other cases. All these various expressions were used in order to emphasise the point that the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible.”

19. Mr Peachey, on behalf of the Trustees, draws attention to an observation of Jonathan Parker J in *Claughton v Charalamabous* to the effect that, in a case such as the present, there is very little scope for the interference by an appellate court with a conclusion concerning the presence of absence of exceptional circumstances: see [1998] BPIR at 562H. That is correct. However, in the present case, it is common ground that there are exceptional circumstances. The question is whether those exceptional circumstances are sufficient to warrant the postponement of sale for the period ordered by the DJ. In that context, I would echo the words of Jonathan Parker J in saying to say that there is little scope for interference with his decision by this court. The Judgment
20. The judgment of the DJ is short, running to only 9 paragraphs. No criticism can be made of the succinct manner in which he dealt with the case.
21. In [2] of his judgment, the DJ deals in an uncontentious way with certain aspects of Mr Constable’s condition and the effect it has on his life. He refers at the end of that paragraph to the neurologist’s statement (referred to as the gp’s statement by the DJ) to which I have referred at paragraph 7.s. above. I should point out, however, that what the neurologist said was a general statement about one possible risk of the condition; it was not contained in any sort of formal report by way of expert evidence. Even taking the statement as entirely accurate (which the DJ appears to have done) it tells one nothing about the extent of the risk to Mr Constable or the consequences for him if he did enter into a crisis state. It is not, with respect, the sort of evidence which can carry any significant weight in the balancing exercise which has to be carried out.
22. In [3] of his judgment, the DJ states that Mr and Mrs Constable effectively live separate lives under the same roof. I do not consider that that can be treated as a finding that they are a couple who have broken their emotional and marital ties in the way that it can be said that a married couple are separated prior to divorce proceedings. The exigencies of their respective ill-health lead them to live, physically, in the way which they do. But I cannot accept the suggestion that the court, in exercising the discretion in relation to postponement of sale and possession, should assume that it need consider only Mr Constable’s housing needs, excluding his need or desire to continue to live with his wife.
23. In [4] of his Judgment, the DJ considered the ability of Mr Constable to rehouse himself. The DJ was satisfied that Mr Constable would not have the funds to do so until he received them from a sale of the Property. That is a finding which he was entitled to make. Although, Mr Constable did not adduce detailed evidence of his or his wife’s assets, he did say (a) that they

were dependent on income from the state and (b) that he would be unable to afford deposits or agency fees. It is true that funds were found to pay lawyers to represent him before the DJ when he made the order now appealed against but that is not enough to preclude the inference with the DJ drew. The burden of proving exceptional circumstance was, of course, on Mr Constable, but as the DJ made clear, he accepted that the absence of funds to rehouse himself was not of itself exceptional. However, once the burden of proving exceptional circumstances had been satisfied, which it was, the DJ was entitled to make the inference which he did in carrying out the balancing exercise which he had to do. If the Trustees had wished to challenge the inference which was sensibly drawn, they could have asked for more detailed financial information or cross-examined Mr Constable about his assets.

24. The DJ went on in [4] of his judgment to ask himself how Mr Constable would be rehoused. He stated that the position was that he cannot go on the general housing register because he is disqualified by the amount of his equity in the Property. That finding is not challenged. He said that he could not buy, even with temporary accommodation awaiting his funds: there would be no way of raising a loan to meet the balance of the purchase price. That finding is not challenged either. As to the possibility of a private rental, the DJ says at [6] of his judgment that he does “not believe for one moment that there is any private landlord who would take a gentlemen with such severe medical condition impacting on his life”. Whether there is a conclusion he could properly draw is a matter I will come to later when considering the grounds of appeal.
25. I have recorded what Mr Constable says he was told by the local authority about being rehoused. What he was told appears to have been based on a misunderstanding, namely that Mr and Mrs Constable would be deliberately homeless. At least so far as concerns Mr Constable, that is clearly wrong. He would be made homeless as the result of court order brought about by his wife’s bankruptcy and over which he has no control. The local authority can be expected to comply with its statutory duties and not treat Mr Constable as though he had made himself deliberately homeless. Whether Mr Constable would be eligible to be permanently housed by the Council is not something which is in evidence. All I have is the statement by the DJ in [5] of his judgment – presumably based on his own knowledge and experience but not something of which I am in a position to take judicial notice – that Mr Constable is not eligible to go the general housing register.
26. The DJ assumed that the local authority will reconsider the suggestion that they have no duty to act in his case as distinct from Mrs Constable. But he concluded in [5] of his judgment that the reality was: “that he would forced in bed and breakfast accommodation which no person in his condition could possibly tolerate or survive, even if he found a hotelier or bed and breakfast proprietor who would take him. For him to have to present himself as street homeless is an affront to decency, but there is no way that he could be safely accommodated temporarily”.

27. Then, at [7] of his judgment, the DJ said that he needed “to consider also the impact physically, let alone financially, of effecting a move, which will be impossible for Mr Constable”.
28. I will consider those conclusions set out in paragraphs 26 and 27 above later, it being part of the grounds of appeal that the DJ could not properly have reached them on the evidence before him.
29. The DJ, at [8] of his judgment, considered that the Trustees were downplaying the nature of the accommodation needed by Mr Constable; and that they were downplaying the risk, in that there has been no substantial intervention in the last years. Save an increased dosage of medication in 2016. He stated “I do not see how that is a conclusion this court could come to”.
30. He refers to the bankruptcy in [9] of his judgment saying that it is quite clear what its purpose and underlying objective is (although he does not identify that purpose or objective). He found the circumstances of Mr Constable to be “truly exceptional”. He acknowledged the major effect for the creditors in that there would an indefinite postponement.
31. He added this: “It is not for me to second guess but I personally would be surprised if Mr Constable is able to maintain his state as it currently is without deterioration. Conditions tend to deteriorate and the risk of crisis can come from an infection. This is the best place for Mr Constable to protect his future and I suspect it is the only place he can do so, and I do not see it just that the court should dispossess him of that, in my judgment, opportunity. In those circumstances I find that his interests do exceptionally override those of the creditors.” It difficult to think that the view he expressed in the first two sentences of that quotation did not have any influence on his decision. It was, however, a view which was not based on any of the evidence before him. As to the third sentence, it is not easy to see quite what he was intending to say. Clearly there are many places where Mr Constable would just as well placed to enjoy such quality of life if only they could be made available to him; so one is left simply with his suspicion that in practical terms the Property is the only place where he can protect his future. The Grounds of Appeal
32. Mr Peachey, in his skeleton argument on behalf of the Trustees, divides the grounds of appeal into two categories:
 - a. Attacks on the findings of the DJ on the basis that they were conjecture or speculation and not open to him on the evidence.
 - b. As was the case in *Grant v Baker*, an attack on the exercise of the discretion on the basis of the facts as found.
33. As a preliminary point, Mr Peachey raises a point on the correct test to be applied. This was not a ground raised in the Appellant’s notice. I need to consider the point, however, because, in considering the exercise of the discretion, it is necessary to know whether, applying the

correct test, it would have been possible to reach the conclusion which the DJ did reach. What Mr Peachey submits is this: the DJ found that Mr Constable's circumstances were "truly exceptional". This, he submits, is not the correct test, which is described by Henderson J in *Grant v Baker*. I do not accept that the DJ adopted an incorrect threshold. When Henderson J used the words "most truly exceptional" he was simply identifying the high hurdle facing an applicant seeking a postponement of a long period, so as to distinguish it from the "exceptional circumstances" required to escape the strictures of section 335A(4). The DJ was similarly applying a higher threshold: he identified Mr Constable's circumstances as being truly exceptional justifying not only rejection of the creditors' interests as outweighing all other considerations but also that the truly exceptional nature of those circumstances actually resulted in the creditors' interests being outweighed by Mr Constable's interests. Whether he was entitled to reach that conclusion is another matter to which I will come.

34. Mr Peachey submits that the passage from [5] of the judgment which I have quoted at paragraph 26 above contains a number of findings which are in objection being either incorrect or speculative:
 - a. "...no person in [Mr Constable's] position could possibly survive..." being forced into bed and breakfast accommodation. Mr Peachey submits that the only evidence on which this could be based was that of a neurologist who gave generic details of the condition and noted that Mr Constable had been diagnosed in 2009. He had not examined Mr Constable himself. There was no evidence about the likelihood of a "myasthenic crisis" except that people with the condition can occasionally experience such a crisis. The DJ of course had before him as well all the other evidence which I have recited which give a strong flavour of Mr Constable's poor health but that does not establish that Mr Constable could not survive a move to bed and breakfast accommodation, whatever meaning one gives to survive. As to that, if by not survive the DJ meant literally die or perhaps less extremely have a wholly debilitating breakdown, the evidence does not support the conclusion and in that sense I agree with Mr Peachey's submission. If the DJ meant something less, then it is not clear quite what he did mean. And if he used the word survive so as to underline the fact that Mr Constable would find bed and breakfast accommodation intolerable it lends scant support to the view that Mr Constable's circumstances were "truly exceptional". In the context of this ground of appeal, Ms Mattsson relies on what she refers to as the professional opinion of Ms Pickles that there is no way the Mr Constable could cope if he had to move. It is not apparent what, if any, weight the DJ attached to that evidence. In my view, no weight can be attached to it at all. Ms Pickles has, as far as I know, no professional qualifications, certainly not ones enabling her to give an expert opinion on the emotional effect of a move and on Mr Constable's ability to cope, whatever she means by the word cope. It would be wholly unsafe to attach any weight to that evidence.

- b. “[E]ven if he found a hotelier or bed and breakfast proprietor who would take him”. What the DJ is saying here, it seems to me, is that it is not only to be taken into account that bed and breakfast accommodation would be unsuitable but that Mr Constable would have difficulty finding such accommodation in the first place. I agree with Mr Peachey when he says this is wrong because it is the local authority which would find such accommodation in line with its statutory duty, not Mr Constable. In any case, there was no evidence that the local authority would not find suitable accommodation and it is pure speculation that it would not. The DJ himself recognised that the local authority would reconsider the position apparently adopted that Mr Constable would be deliberately homeless and having reached that conclusion it was not open to him to speculate that the temporary accommodation provided according to its statutory duty would not be adequate. I reject Ms Mattsson’s submission that the DJ was merely emphasising the that finding bed and breakfast accommodation would be difficult because of Mr Constable’s condition. It might well be difficult for Mr Constable himself to find it, but the local authority would be obliged to find some temporary accommodation.
- c. “For [Mr Constable] to present as homeless is an affront to decency..”. Mr Peachey says that whether this is true or not it is not relevant to the exercise of the discretion. It is unfortunate that many people find themselves presenting as homeless due to an order for sale being made in a bankruptcy. Many such circumstances involving young families or the elderly or frail would be considered by many to be an affront to decency. Ms Mattsson is correct to say that the DJ was not making any general observation about homelessness being an affront to decency but was concerned with the particular situation of Mr Constable. There is, however, some force in Mr Peachey’s comparison with other types of people presenting as homeless. In fact, what the DJ said was not that it was an affront to decency that Mr Constable should present as homeless but that he should present as street homeless, by which I imagine he meant that Mr Constable would find himself evicted pursuant to a warrant for possession and find himself of the street. But there was no evidence that such an extreme situation would occur. It must surely be that a local authority knowing of the impending eviction of a seriously disabled person would take steps to ensure that he was not simply thrown onto the street with nowhere to go. There was no evidence that this would happen. The DJ added at the end of [5] of his judgment that there is no way that Mr Constable could safely be accommodated safely: I can see no justification for that finding at all.
- d. As part of his finding that there would be an affront to decency, the DJ must be seen as taking into account what he said in [7] of his judgment, that (as I understand what he said) it would be impossible physically for Mr Constable to move. I simply do not understand that. Of course Mr Constable could not physically move without assistance but that is not the point. Obviously someone will have to help him move, as would be the case with almost any household move.

35. Mr Peachey has explained the background to [8] of the judgment: see paragraph 29 above. He had submitted to the DJ that whilst the potential issue of a crisis state is raised, it was not clear on the evidence that it was not something which could not be managed in the transition to the new accommodation (which he accepted would be a difficult one). It was that risk which the DJ said the Trustees were downplaying. The DJ said that he could not conclude that the transition was something which could be managed. Mr Peachey submits that it was for Mr Constable to satisfy the DJ that his condition was most truly exceptional. The DJ incorrectly put the burden of proof on the Trustees to show that the transition could be managed when it was for Mr Constable to show those exceptional circumstances. If he was to rely on the difficulties in the transition, it was for him to demonstrate those difficulties as giving rise to truly exceptional circumstances. I agree with this submission. Ms Mattsson submits that it was open to the DJ on the evidence to reach the conclusion which he did. However, the DJ's decision was that he could not reach a conclusion that the transition could be managed. It was not for the Trustees to prove that: rather, it was for Mr Constable to produce some specific evidence (which he did not do) to show that his condition would make the transition impossible in some way. It may have been correct for the DJ to say that he could not be satisfied that the transition could be managed; but he clearly, as I read the judgment, saw that as counting against the Trustees when at best from Mr Constable's point of view, he should simply have ignored the point altogether.
36. Mr Peachey also submits that the DJ was in error in reach speculative conclusions or impermissible inferences in relation to finding rented accommodation. I have already set out what the DJ said at [6] of his judgment (see paragraph 24 above) and his holding in [9] of his judgment (see paragraph 31 above). I agree with Mr Peachey when he submits that there was no evidence which justify the conclusions and findings. The willingness or otherwise of private landlords in general to take on a person with Mr Constable's condition as a tenant without any evidence would be a matter of pure speculation and not something of which the DJ could take judicial notice; a fortiori if it is suggested that there is no landlord at all willing to do so. If Mr Constable had wished to rely on the absence of available accommodation for rent to him in the private sector, he should have made sensible and reasonable enquiries of agents in the area and adduced evidence of the lack of availability. The only evidence is from Mr Constable who says he has not managed to find anything. There is no evidence at all about what enquiries he had made about available accommodation or what other attempts if any he had made to find any. This is wholly inadequate evidence on which to base a conclusion that there is no available accommodation when it is for Mr Constable to establish the truly exceptional circumstances required if a sale is to be postponed for a potentially long period. Ms Mattsson draws attention to other evidence, namely the need for accessible accommodation and adequate hygiene facilities but I do not consider that those factors take the case further.

37. In addition, it must be recognised that the duty of the local authority to provide accommodation would continue so long as Mr Constable was unable to find suitable accommodation and was in priority need. That suggests that no great weight should be attached to the unavailability of private sector accommodation even if that were shown to be the case.
38. Mr Peachey submits that the DJ failed to consider imposing a postponement period of 6 months and whether this or some other period would provide Mr Constable with sufficient time to prepare for a move notwithstanding that both counsel before him had put their respective alternative positions before him, namely a 6 month suspension. Mr Peachey submits that the DJ failed to consider whether this period or some other fixed period would give Mr Constable sufficient time to prepare for the move. By the time 28 days before possession was due, he would be deemed to be threatened with homelessness for the purposes of the Housing Act 1996. He suggests, although I do consider this to be unrealistic, that Mr Constable might have been able to save enough for a move or deposit on rented accommodation. This failure meant that the DJ failed properly to consider the interests of the creditors and to balance their interests against those of Mr Constable.
39. Ms Mattsson rejects that approach. She submits that it is plain from the judgment that the DJ sought to balance these competing factors having made express reference in [9] to the obvious purpose of the legislation. He found that the circumstances were truly exceptional and found that Mr Constable's "dignity and life override the interests of the creditors". She submits that this was the correct decision and not one open to criticism.
40. I am bound to say that I find it surprising that the DJ did not expressly deal with, if only to reject, the alternative of a limited period of postponement to give the opportunity to Mr Constable actually to grapple with the local authority and to make proper enquiries in the private sector. The fact that he did not do leads me to me that he did not properly bring this aspect of the case into consideration. Had he focused on that issue, he might have realised that some of the inferences which he had drawn, in particular about how Mr Constable would be treated by the local authority, went further than the evidence justified. Decision
41. In my judgment, the decision of the DJ cannot stand. I have discussed his judgment in some detail and found that some of errors which Mr Peachey asserts are established. Reading the judgment as a whole, I am left with the clear impression that the DJ had reached the conclusion on a "feel" of the whole case that Mr Constable should not be dispossessed and that he drew conclusions from the evidence which supported that conclusion rather than deciding objectively what could properly be inferred and then asking himself whether what he could properly infer justified the conclusion. He gives no reasons for drawing the conclusion that bed and breakfast accommodation would be entirely unsuitable unless perhaps he was under the impression that during the day Mr Constable would have to leave the accommodation and roam the streets, something which no-one has, of course, suggested. He has failed properly to consider the alternative of a shorter period of suspension. It can perhaps be said that none of the suggested errors taken by themselves

would justify overturning the exercise by the DJ of his discretion. But taking the evidence as a whole, it does not, in my view, pass the threshold necessary to justify a postponement of the length which the DJ provided for the reasons which are apparent from what I have already said.

42. The Appellant's notice asks for an order that the sale be postponed in effect for a further 6 months. The Trustees sensibly do not ask for an order for immediate sale and possession.
43. What order should I then make? It seems to me that there are broadly three options (and I consider that the wide power under section 335A(2) would enable me to adopt any of these options):
 - a. To order a sale and possession within a specified period, such as 6 months or 12 months.
 - b. To make such an order but with express permission for Mr Constable to make an application for a further postponement in which case it would be necessary for me to say whether he would need to demonstrate a change of position.
 - c. To remit the matter for a full rehearing with the parties being permitted to adduce further evidence.
44. Option a. and b. restrict me to the evidence available already before the Court. I have to say that I am uncomfortable with an approach which runs the risk of shutting Mr Constable out from making a further application which option a. would do: if it is implicit in option a. that an application could be made in the case of a change of circumstance, it would be more sensible to say so expressly and adopt option b. The sort of case I have in mind here is that it transpires for one reason or another that the local authority is in fact unwilling or unable to provide suitable accommodation (perhaps unlikely in the light of its statutory duties). However, restricting an application to change of circumstance would be unsatisfactory. A judge exercising a power reserved by my order to vary the period of suspension would want to do so in the light of all the relevant facts including Mr Constable's condition at the time of the application. Mr Constable ought to be able to give evidence of that condition but if a change or circumstance has to be relied on, he would need to show that his medical condition had worsened. That will depend on what his condition actually is today and the difficulties which that condition leads to rather than his condition and difficulties as demonstrated by the inadequate evidence currently before the court.
45. As between options a. and b. I therefore favour option b. with liberty for Mr Constable to apply (to the bankruptcy court, not to this court) for an extension of the period of postponement with permission to adduce such further evidence as he wishes. The Trustees must, of course, have liberty to respond to such evidence in whatever way they wish. If I were to adopt that option, I would specify a period of postponement of 12 months, being a period within which Mr Constable can realistically investigate all of the possibilities open and enter into sensible discussions with the local authority in the light of this judgment.

46. Option c. is not to be dismissed out of hand. If one ignores expense (which cannot of course be done) there is a lot to be said for this approach. Since, if I were adopting option b., there would be a delay of 12 months before sale and possession in any case, a redetermination of the exercise of discretion by the bankruptcy court would not delay possession if it were to decide that an extension should not be granted. In my judgment, however, option b. is to be preferred. It throws the onus, appropriately in my view, on Mr Constable to progress matters: if he does not act effectively, then he will be faced with eviction in 12 months. In an application under the liberty to apply under option b., he will be able to adduce the same evidence and the same arguments as he would do under option
- c. And if, as I sincerely hope, sensible arrangements can be made with the local authority, such an application may be unnecessary whereas, if I adopt option c., the matter will inevitably have to proceed and costs be incurred.
47. I therefore allow this appeal. I postpone the orders for sale and possession until 12 months hence, 6 October 2018 and provide liberty for Mr Constable to apply to vary the date for possession and to rely on such further evidence as he wishes. I would only add that if Mr Constable is to have any hope of succeeding in such an application, he will have to produce far more cogent evidence from medical experts who have examined him than he has done so far about his condition and its effects and potential effects on him. He will need to produce far more cogent evidence about non-availability of private sector accommodation; he will need to engage with the local authority and give evidence about that; and he will need to give full details of his and his wife's financial positions. For the avoidance of doubt, the Trustees are to be entitled to put in such evidence as they wish in resisting any such application.

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Prepared on 28 October 2026 · Esheria