



Neutral Citation Number: [2020] EWHC 1324 (Ch)

Case No: 21 of 2019 and 166 and 167 of 2015

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 26 May 2020

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

1. In the Liquidation Application

IN THE MATTER OF STAY IN STYLE (IN LIQUIDATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N :

- (1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(as trustees of the Brake Family Settlement)
(3) RITCHIE PHILLIPS LLP
(4) REBECCA HOLT
(5) SLADE ASSOCIATES (A Firm)
(6) TOMASZ WEGRZYN
(6) KATARZYNA WEGRZYN
("the Liquidation Creditors")

Applicants

and

- (1) SIMON LOWES
(2) RICHARD TOONE
(as joint liquidators of the Stay in Style Partnership (in liquidation))
(3) DUNCAN KENRIC SWIFT
(as former trustee in bankruptcy of Nihal Brake and Andrew Brake)
(4) THE CHEDINGTON COURT ESTATE LIMITED

Respondents

2. In the Bankruptcy Application

**IN THE MATTER OF NIHAL MOHAMMED KAMAL BRAKE
AND IN THE MATTER OF ANDREW YOUNG BRAKE
AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

B E T W E E N :

- (1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(as trustees of the Brake Family Settlement)
(3) NIHAL MOHAMMED KAMAL BRAKE
(4) ANDREW YOUNG BRAKE**

Applicants

and

- (1) DUNCAN KENRIC SWIFT
(as former trustee in bankruptcy of Nihal Brake and Andrew Brake)
(2) THE CHEDINGTON COURT ESTATE LIMITED**

Respondents

3. In the Cottage Application

**IN THE MATTER OF NIHAL MOHAMMED KAMAL BRAKE
AND IN THE MATTER OF ANDREW YOUNG BRAKE
AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

B E T W E E N :

- DUNCAN KENRIC SWIFT
(as former trustee in bankruptcy of Nihal Brake and Andrew Brake)**

Applicant

and

- (1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(3) LORRAINE BREHME
(4) THE CHEDINGTON COURT ESTATE LIMITED**

Respondents

**Stephen Davies QC and Daisy Brown (instructed by Seddons LLP) for Mr and Mrs Brake
Anna Lintner (instructed by Porter Dodson LLP) for the Liquidation Creditors
Andrew Sutcliffe QC and William Day (instructed by Stewarts Law LLP) for the
Chedington Court Estate Ltd**

**Messrs Lowes, Toon and Swift and Mrs Brehme did not appear and were not represented
at the original hearings, and did not participate in these paper applications**

Applications dealt with on paper

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii on the date shown at 2 pm.

HHJ Paul Matthews :

INTRODUCTION

1. This judgment concerns paper applications made in respect of costs in three different but related insolvency proceedings, and dealt with on two separate occasions. The first occasion was on 3 March 2020, when after *extempore* judgments I made costs orders in principle, but left over some matters of detail to be dealt with on paper. The second occasion was on 23 March 2020 when I handed down a written judgment dealing with applications which arose out of my decisions on 3 March 2020. On that occasion, I invited submissions on the costs of the application so dealt with. I will deal with the applications in respect of each occasion separately.

THE ORDERS OF 3 MARCH 2020

2. On 3 March 2020, after dealing with a number of different interlocutory matters over that day and the previous one, I made various costs orders. Those that I am currently concerned with arise out of (1) the strike-out applications by Chedington of 30 January 2020 relating to the Liquidation Application and the Bankruptcy Application, and an alternative application for security for costs in the Liquidation Application (2) the application dated 4 February 2020 by the Brakes for summary judgment on the Bankruptcy Application, (3) the application dated 30 January 2020 by Chedington for disclosure against the Brakes, and (4) the application by the Brakes to strike out an application by Mr Swift called the Cottage Application.
3. As to (1) I ordered that (i) the Brakes and the Liquidation Creditors jointly and severally pay Chedington's costs of the application to strike out the Liquidation Application, and that the Liquidation creditors jointly and severally pay Chedington's costs of its alternative security for costs application, and that (ii) the Brakes pay Chedington's costs of the application to strike out (most of) the Bankruptcy Application. As to (2) I ordered that the Brakes pay Chedington's costs of the summary judgment application. As to (3) I ordered that Chedington pay the Brakes' costs of the disclosure application. As to (4) I ordered that Chedington pay 60% of the Brakes' costs of the application to strike out the Cottage Application. I gave directions for written submissions to be filed, and received them in accordance with the timetable (as extended), concluding on 26 March 2020. I was then very busy with other matters (including in particular urgent matters in this very litigation) which have prevented me from dealing with the costs until now. I am sorry for this delay.
4. In relation to the strike-out applications and the summary judgment application (nos (1) and (2) above), Chedington seeks a detailed assessment of its costs, coupled with a payment on account under CPR rule 44.2(8). This provides that:
"Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."
5. In relation to the costs awarded to them on the disclosure application and the Cottage Application (nos (3) and (4) above), the Brakes' primary case is that there should

simply be a detailed assessment ordered. However, if I were against them on this, then they too seek a payment on account of their costs, and an order for such sum to be set off against the amount due to Chedington. I will come back to the position in relation to their costs in due course.

Payment on account – Chedington

The Brakes

6. The Brakes and the Liquidation Creditors resist the application for a payment on account to Chedington in principle. The Brakes do so for five reasons. First, they say that the strikeout applications were brought late. The Liquidation Application and the Bankruptcy Application were issued in February 2019. The application to strike out was issued only on 30 January 2020, so that significant costs were incurred in the meantime. In itself, in my judgment, that is not a good reason to refuse an interim payment on account, though it might affect the quantum. They are right that the application was made late. But, as is clear from the chronology, it followed the evidence of Mr Gostelow of 11 December 2019, which persuaded Chedington that the Brakes were using the liquidation creditors to protect their position on standing. Before then, there would have been little point in Chedington’s challenging the Brakes’ standing, as the Liquidation Creditors otherwise clearly had such standing. So I do not think it should even affect quantum.
7. The Brakes make a separate sub-point arising out of the fact that, in relation to an entirely different application concerning legal professional privilege, where they were successful against Chedington, the judge reserved the costs of that application pending final determination of another claim (the so-called “Documents Claim”) for which a trial has not yet been listed. They say that Chedington should not be permitted in these proceedings to claim an interim payment on account whilst in other proceedings no adverse costs order should be made pending final determination of other substantive issues. This is amplified in their written submission dated 26 March 2020, in reply to Chedington’s submission of 19 March 2020.
8. In that submission they say that

“it is wrong now to direct any payments on account because the court has not yet had the opportunity to consider the alleged corruption and other wrongs caused to the Brakes. If they are correct, the court will then appreciate that Chedington’s only function in this litigation (as the Court of Appeal found of the defendants in *Motion v Moojen*) is to cause delay and that a payment on account in such circumstances would not be appropriate. The Brakes’ claim for payment of their own very substantial costs (c. £122,000) of successfully defending Chedington’s LPP Application over a seven-day hearing within these proceedings (as defined by the order of Mr Jarvis QC dated 28 November 2019) were reserved by that order in recognition of the need to wait and see. The detailed assessment at the end of these proceedings will be conducted in respect of all such costs and it is the settled practice of the court that, in directing a payment on account, the court should take care not to order payment exceeding what the receiving party could reasonably hope to recover on the detailed assessment: and the benefit of any area of doubt about that was to be given to the paying party (see the reasoning of

Rimer J in *Gwembe Valley Developments Co Ltd v Koshy* [2004] EWHC 2202 (Ch) at [43-44].”

9. *Motion v Moojen* (1872) LR 14 Eq 202, referred to in the Brakes’ submission, was a decision of Vice Chancellor Bacon (rather than, as suggested, the Court of Appeal) in a case where the plaintiff, an undischarged bankrupt, filed a bill alleging that he had been the victim of a fraudulent conspiracy between various persons, including his own solicitor, his assignee in bankruptcy, and his former partners in a distillery in Albany St, London NW, to deprive him of his interest in that business. This was a bill brought in the Court of Chancery before the Judicature Act, and therefore open to the old procedure of demurrer. In fact, none of the defendants actually demurred to the suit, on the grounds that the plaintiff was an undischarged bankrupt (and therefore only the Court of Bankruptcy had jurisdiction to entertain his claim). Instead, they “answered the bill at great length”. As a result, at the trial, both sides went into evidence. At the same time, however, the defendants all submitted in their answers that the plaintiff could not succeed in his bill, as an uncertificated bankrupt, and claimed the same benefit *as if* they had demurred.
10. In his judgment, Vice Chancellor Bacon held that the quasi-demurrer argument was unanswerable, but he also pointed out that he had gone fully into the facts. He said (at pages 207, 209-10):

“A bankrupt, whose bankruptcy is not closed, is, in my opinion, by very plain law incapacitated from maintaining such a suit. To permit him to do so would be to transfer from the court which has full jurisdiction over the subject to this Court, which would have less extensive jurisdiction, a right which this Court has never assumed.

[...]

I am of opinion, therefore, that the demurrer must prevail, and that the Plaintiff’s bill must needs be dismissed.

[...]

But then that does not dispose of the whole case before me. The Plaintiff has stated what he has to complain of, and the Defendants have put in answers. Evidence has been gone into, and many hours have been expended in discussing and arguing upon the facts of the case. It is plain that those facts were wholly irrelevant to the subject, if a demurrer would, as I have expressed my opinion that it does, hold in this case. But since the Defendants had chosen to go into that case, then, upon the subject of costs, a totally different consideration presents itself; and I must needs consider the case made by the Plaintiff, and met as it is by the Defendants, because I must decide whether the Plaintiff who has made these charges has shown such reasonable grounds for making them as that, although the demurrer is allowed, we ought not to be called upon to pay any costs. Upon that subject the case, in my opinion, is one of the clearest that was ever presented.”

11. So the judge made plain that the evidence he had heard was relevant to the question whether the unsuccessful plaintiff should pay the successful defendants’ costs. Vice Chancellor Bacon went on to say (at pages 215-16) that:

“But having regard to the conduct which has been pursued against this unfortunate Plaintiff – who, before this litigation began, was a tradesman with a considerable capital in a most flourishing business, and who now finds himself utterly stripped – who has passed four months in prison and several years before the Court of Bankruptcy, and finds himself utterly stripped of the whole of his property – that he is without remedy I do not say. All I say is that he is without remedy in this Court, because the law, which is not made for him, nor for his hard case, has decided that he cannot file a bill or maintain the suit under the circumstances which here exist. But that he has been cruelly wronged, that the practice of this court and of the Court of Bankruptcy has been perverted corruptly against him and the interests of his creditors, I entertain no doubt whatever; and I think that the conduct of each and every of the Defendants has been such as not only justifies me, but requires me imperatively, in dismissing the bill upon the narrow ground upon which I have been obliged to dismiss it, to do so without giving costs to any of them.”

12. This was an unusual case, in the pre-Judicature Act system, in which there had been no demurrer on legal questions at the usual time, and instead the whole trial of the matter had taken place. Accordingly, the court felt able to make a decision on costs which was different from that which would have been made if the demurrer had been dealt with in the usual course, and the trial had never taken place. In the present case, however, the greater part of the claims against the trustee in bankruptcy and Chedington have been struck out, and therefore there has been no substantive hearing, let alone trial, of the allegations against them. To suggest therefore, that, until the *appeals* on the strike-outs have been heard and decided, and (on the Brakes’ case) successfully, there should be no determination of the costs consequences of these applications, seems to me to be unsustainable. So far as concerns the order deferring a decision on costs made by Mr Jarvis QC on 28 November 2019, I cannot find any explanation in the judge’s own words for making this order, and I decline to draw any firm conclusion from that which should influence me in making my decision here.

13. At the same time, I accept that, as Rimer J in *Gwembe Valley Developments Co Ltd v Koshy* [2004] EWHC 2202 (Ch) at [43-44]) made clear, if the court is satisfied that A

“has an arguable case that [B] owes him in costs more than £133,000, I consider it would be unjust to make an interim order in that sum against [A] on this application. If I cannot be so satisfied, then I can see no injustice in ordering [A] to pay the £133,000 now (or else £133,000 less whatever lesser sum is arguably due to him from [B]).”

14. This feeds into the second point, which is that the Brakes say that there should be a set-off between costs ordered under this heading and costs ordered (in the opposite direction) under headings (3) and (4). They say that, pending detailed assessment, no interim payment should be ordered at all. I accept that in principle if an interim payment is ordered in favour of A against B, and at the same time another interim payment is ordered in favour of B against A, then in ordinary circumstances there should be a set-off, one against the other. But I cannot see why that should mean there should be no interim payments at all. The whole point about interim payments is to get closer to justice pending final resolution. I reject this argument.

15. Thirdly, in relation to the costs in the Cottage Application, which had been ordered to be paid by Mr Swift, the Brakes argue that they will be seeking a substantial payment from him together with an interim payment on account of those costs in due course. They further argue that under the “Contract for Services” between Mr Swift and Dr Guy of 10 January 2019, Chedington agreed to cover any adverse costs order falling upon Mr Swift. So they say that it would be unjust for them to be ordered to make an interim payment to Chedington in circumstances where they will receive a sum from Mr Swift which (they say) will significantly exceed their liability to Chedington.
16. I reject this argument. Assuming that the Contract for Services is valid at all (and, as I understand the matter, the Brakes argue that it is wholly *invalid*) it will simply create a right of indemnity between Chedington and Mr Swift. It does not confer any right upon the Brakes. But in any event there is as yet no quantified order against Mr Swift. This argument is not a good reason for not ordering an interim payment against the Brakes at this stage.
17. Fourthly, the Brakes argue that, because (as I stated in court on 3 March 2020) there is a “real prospect of success” on the appeal in relation to the question of standing, if an interim payment is ordered, “the Brakes will seek a stay of enforcement pending the outcome of the appeal rendering the function of the interim payment on account redundant”. I have to say that I find this argument extraordinary.
18. First of all, the test for what is a “real prospect of success” is, as is well-known, a low threshold. “Real” does not mean “likely to succeed”, or anything as high as that. It means that the prospect of success is not “*unreal*” or “*illusory*” (which would be very low indeed): see *Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 1311, CA, [21]. Secondly, I regard the suggestion by the Brakes that the court should *not* follow the norm set out in CPR and award an interim payment as to costs nearly because there is a “real prospect” of a successful appeal as simply wrong. There is no suggestion in the authorities that, where permission to appeal is given, there should *automatically not* be an order for a payment on account. In my judgment that is not the law.
19. For its part, Chedington refers to *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm). In that case, Christopher Clarke LJ said:
- “24. In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party will have any difficulty in recovery in the case of any overpayment.”
20. I note that the Lord Justice did not say that the mere granting of permission to appeal meant that no order for payment on account could be made. Instead, he referred to the “*likelihood*” of a successful appeal. As I have already said elsewhere, I do not consider that it is *probable* that the appeal will succeed (and if I did I would not have made the decision I did). Instead, I consider that there is a “real prospect” (in the

special, limited sense in which those words are used in the CPR) of success. In my judgment, the court must consider in every case whether there is a “good reason” not to order an interim payment. Giving permission to appeal is not by itself enough.

21. Fifthly, the Brakes argue that there is “an overwhelming disparity between the parties’ respective means”. They assert that the application for a payment on account is “an attempt to drain the Brakes’ resources to make it difficult for them to last to the end of the litigation”. They do not however provide any evidence whatever of their means, nor do they reveal anything about their funding. That is their right. But it means that their arguments are the less meaningful as a result. Moreover, they do not in fact say (let alone demonstrate) that their funding arrangements do not permit them to pay. And in my judgment, even if they did, inability to pay is not in itself a good reason for not awarding an interim payment.

The Liquidation Creditors

22. The Liquidation Creditors also put forward five reasons for not awarding a payment on account. They overlap to some extent with those of the Brakes. The first reason is that it is unlikely that Chedington will be awarded their costs in the amount sought. But this is an argument that goes to quantum at best. It does not constitute a “good reason” for not awarding a payment on account at all.
23. Second, they say that the Brakes will be able to meet the payment on account (thus cutting across the Brakes’ argument). I infer that the Liquidation Creditors argue that *therefore* they should not be liable. But I made an order that they were jointly and severally liable with the Brakes for these costs, and I can see no reason why, if an order for a payment on account is to be made at all, it should not equally be made jointly and severally against the Liquidation Creditors. This is a bad point.
24. Their third point is in essence the same as the fourth point made by the Brakes, that is, that there is a ‘real prospect’ of success on appeal. I reject this for the same reasons as I have done in relation to the Brakes.
25. The fourth point is that the Liquidation Creditors have fewer means than Chedington. There is no evidence of this, because the Liquidation Creditors have chosen not to give any evidence of their means. But even if it were true, in my judgment it would not be a good reason not to order a payment on account. As I said above, inability to pay is not a good reason for not ordering an interim payment.
26. The final point made by the Liquidation Creditors is based on the lateness of the application to strike out. I have already dealt with this, in relation to the first point made by the Brakes. For the reasons then given, there is nothing in this point.
27. The Liquidation Creditors in the alternative seek a stay of the costs order because permission to appeal has been given. This seems to me to be a variant of the third point. Nevertheless, CPR rule 52.16 provides:

“Unless –
(a) the appeal court or the lower court orders otherwise; ...

an appeal shall not operate as a stay of any order or decision of the lower court”.

28. In *DEFRA v Downs* [2009] EWCA Civ 257, Sullivan LJ said:

“8. ... A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.

9. It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal.”

29. In the light of the rules, and the default position that they create, the burden is on the Liquidation Creditors to show that a stay should be granted. However, there is no evidence (or even argument) to show that any harm, let alone any irreparable harm, will be done to them in the meantime if execution of the order is not stayed and yet the appeal is successful. On the material before me, there are no other grounds for a stay of the order.

30. In my judgment, there is no ‘good reason’ within CPR rule 44.2(8) not to make an order for a payment on account of costs against the Brakes and the Liquidation Creditors. I am disappointed to see that such a series of bad points has been taken in relation to something which is usually not the subject of argument, because the policy of the law is clear. A successful litigant should not be kept out of his or her costs for a long period simply because time is needed for a detailed assessment. I therefore turn to consider the question of the quantum of that payment.

Quantum - Chedington

31. The statements of costs served by Chedington show that it claims (1) the total sum of £94,174.83 in respect of costs of the strike out and security for costs applications, and (2) the sum of £55,492 in respect of the Brakes’ application for summary judgment. (No VAT is claimed in either case.) The total sum claimed therefore is £149,666.83. In relation to (1) above, this is subdivided into three sums, one of £45,484.42 in respect of the strike out of the Liquidation Application (payable by the Brakes and the Liquidation Creditors), one of £45,484.42 in respect of the strike out of the Bankruptcy Application (payable by the Brakes) and one of £3,206 in respect of the security for costs application (payable by the Liquidation Creditors).

32. The amounts of these costs are challenged by both the Brakes and the Liquidation Creditors as excessive. The grounds of challenge by the Brakes are (in summary) global disproportionality, excessive hourly rates, excessive numbers and seniority of fee earners, excessive work done on the documents, fees charged by counsel which

could never have been incurred, and a lack of detail of apportionments applied to the costs. The grounds of challenge by the Liquidation Creditors are (in summary) disproportionality, excessive hourly rates, the excessive number and grade of fee earners, excessive hours spent and excessive counsel fees. It will be seen that there is considerable overlap in these objections.

The test to be applied

33. In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), Christopher Clarke LJ disagreed with the statement of Birss J in *Hospira UK Ltd v Genentech Inc* [2014 EWHC 1688, that “the task of the court is to ensure that it finds the irreducible minimum, which could be recovered”. He said:

“22. It is clear that the question, at any rate now, is what is a ‘reasonable sum on account of costs’...

23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.”

In that case, the judge regarded 80% of the sum claimed as a reasonable figure to take in the case. It was litigation on a large scale which required a lot of work and where the judge had awarded costs on the indemnity basis.

34. It is therefore clear that I am not to carry out even a summary assessment of the costs. I am instead to find what is “a reasonable sum on account of costs”, which will inevitably be an estimate, potentially formulated in one of several possible ways. I am afraid that the approach taken by the Brakes and also by the Liquidation Creditors on the question of the quantum of any interim payment cuts across the policy behind this rule. If I were to investigate every criticism made by the costs defendants of the costs claimed (some of which, I regret to say, are frankly petty) I would end up carrying out something like a summary assessment of costs.

Particular points

35. I will nevertheless make the following comments. The total sum claimed by Chedington in the statement of costs is £149,666.83, in respect of proceedings which took up about three quarters of the two days allowed for the hearings. In respect of the Brakes’ successful application to strike out the Cottage Application and their successful defence of the disclosure application, which took up about ¼ of the two days allowed, they claim £77,069.40, about one third of the total costs claimed by both sides. Just as a matter of impression, therefore, Chedington’s costs do not seem

out of line compared to those of the Brakes. I accept, of course, that both sides' costs may be equally inflated.

36. The hourly rates claimed are indeed high, compared to the guidelines in the White Book, last updated in 2010, and there is room for argument. But the guidelines are now well out of date compared to the current hourly rates charged by many London solicitors' firms: see *Ohpen Operations UK Ltd v Invesco Fund Managers Ltd* [2019] EWHC 2504 (TCC). As it happens, both Chedington and the Brakes have chosen to use London solicitors, no doubt because of their particular expertise and experience in specialist litigation of this kind. It is nothing to the point that they could have been represented by law firms outside London that were cheaper but not so experienced. Apart from anything else, a more experienced law firm may be expected to deal with a given specialist subject matter more quickly than a less experienced law firm, and therefore charge for a smaller number of hours. Nor is there anything in the point that Seddons' charge out rates are lower than Stewarts' charge out rates. There is no rule that a successful party is only entitled to costs at the rates charged by the unsuccessful party's lawyers.
37. I am disappointed to see that an apparently serious objection is taken to Chedington's costs on the basis that it is charged for two QCs. As the costs defendants know well, Ian Gatt QC is not acting for Chedington as counsel, but as a solicitor, and is the partner at Stewarts with conduct of the litigation. A further point on counsel's fees is the apparent objection to brief fees being charged for applications which were not heard because the strike out applications were successful. It is obvious that in such circumstances the brief fees would have been incurred and the application is fully prepared before it was known that they in fact fell away.
38. Turning to the solicitors, the fact that there may be more than one solicitor at a given level on the Chedington side does not mean that there must be duplication of effort. It may simply mean that the amount of work to be done at that level requires more than one person to do it. There is nothing here to show that that is not the case. Nor is there anything in the objection that solicitors should not attend the hearing. But I accept that it will not usually be necessary for numerous and senior solicitors to attend the hearing, unless it is anticipated that there is some significant role for them (for example in giving undertakings, or having settlement discussions).
39. So far as concerns apportionment between different applications, at the time of making the issue-based order, I commented that I hoped that modern solicitor accounting systems would have the ability to distinguish the different sets of costs. If they do not, then apportionment of this kind is the only way forward. Unless it is obviously wrong (and I see nothing which for now so persuades me), I can see no reason at this early stage for not accepting what has been done for the purposes of deciding in what sum to order payment on account.
40. So far as concerns the objections taken by the Liquidation Creditors, most of the points have already been covered in relation to the Brakes. They do however submit that too much work has been done at too high a level. It is not possible for me at this stage to assess whether there is anything in this. That must be left for detailed assessment.

Conclusion - Chedington

41. Overall, there are inevitably a number of grey areas which will have to be investigated on detailed assessment, for example the charge out rates applied, the number and grade of solicitors needed to attend hearings, and whether counsel's fees are too high. But the point of ordering by way of payment on account only a proportion of the costs claimed is sufficient protection for the costs defendants. In the present case Chedington claims 65% of its claimed costs. This is not a case of indemnity costs, and even if it is on a large scale it is not yet "gargantuan" as was the case in *Excalibur Ventures*, where the judge awarded 80%. I think 65% is slightly too high in all circumstances, with so many uncertainties still to be resolved. But I still consider that a substantial payment on account should be ordered. I will therefore order a sum of 60% of the sums claimed to be paid on account of costs, and a detailed assessment of the costs as a whole. (The only objection put forward by the Brakes to a detailed assessment was that it should not take place before the trial. In fact, the trial has now finished, and I can see no reason for not proceeding with the detailed assessment.)

Payment on account – Brakes

42. I turn now to the position of the Brakes. As I have said, their primary position was that they did not seek a payment on account, because in their view it was not a case in which either party should have an interim payment on account. If that position were rejected (as I have indeed rejected it) then the Brakes seek a payment on account of their costs and a set-off against any interim payment awarded to Chedington. The costs claimed are £45,189 in respect of the Cottage Application and £31,880.40 in respect of the disclosure application. The interim payment claimed is at the same rate as Chedington, namely 65%.

43. As to the disclosure costs, Chedington submits that the Brakes' costs are unreasonable and disproportionate. Criticism is made of the amount of costs charged relative to the time spent on the application at the hearing, dealt with by junior counsel, with only two substantive letters written before the hearing and only a small part of the skeleton argument is devoted to it. Various particular criticisms are made in respect of attendances by solicitors, a brief fee for Mr Davies QC, the size of the brief fee for Ms Brown and the time spent upon documents by the solicitors.

44. I have already said above (at [34]), in relation to criticism made by the Brakes of Chedington's statements of costs, "If I were to investigate every criticism made by the costs defendants of the costs claimed (some of which, I regret to say, are frankly petty) I would end up carrying out something like a summary assessment of costs." That is not the function of the jurisdiction to order a payment on account of costs. That is the function of the detailed assessment of costs, if an interim payment is ordered. And what is sauce for the goose is sauce for the gander. This simply goes to bear out my observation, at an earlier stage of this litigation, that each side takes every conceivable point against the other, regardless of whether it is proportionate or sensible to do so.

45. I accept, of course, there are points which can be raised at the detailed assessment of costs, which will go to affect the amount of those costs. But the point of the interim payment jurisdiction is to identify a reasonable sum which can safely be paid at this

stage in order to reduce the injustice to the receiving party of being kept out of its costs for the period pending the detailed assessment itself. The court is not in a position at this stage of deciding on an interim payment to resolve all these intensely fact sensitive questions.

46. There is a quite separate question arising in relation to the liability of Mr Swift towards the Brakes. Chedington submits that “it is unclear how any liability Mr Swift may have for the Cottage Costs will impact on Chedington’s liability”. I do not accept this as a justification for not ordering an interim payment at this stage, or for altering the liability of Chedington in respect of such costs. I ordered that Chedington pay 60% of the Brakes’ costs of their application to strike out the Cottage Application. It does not matter how much of those costs are also the liability of Mr Swift. If Mr Swift is ordered to pay any of them, and does not, then it may be (depending on the numbers) that an indemnity can be obtained by Chedington in relation to the 60% that it pays. But that is a matter between Chedington and Mr Swift. As Ms Brown rightly says in her written submission (at [21]), “That is distinct from Mr Swift’s liability which will be determined separately”.
47. In principle, therefore, I consider that the appropriate course to take is to order Chedington to make an interim payment on account of costs awarded to the Brakes. There are similar grey areas in the statements of costs put forward by the Brakes, as there were in the statements of costs put forward by Chedington. Overall, and taking into account the various points which have been made, I consider that it is appropriate that Chedington should pay on account of costs a sum equal to 60% of the awarded 60% of the costs claimed by the Brakes in their statements of costs. These will obviously be a set off against the amounts ordered to be paid in the opposite direction.

ORDER OF 23 MARCH 2020

48. I now turn to consider the costs in relation to the order of 23 March 2020. By this order, I (i) (a) conditionally allowed an informal application by the Brakes for the lifting of the stay of the proceedings known as the Eviction Proceedings but (b) dismissed that application so far as it sought the listing in May 2020 of a preliminary issue concerning the validity of the licence granted by Mr Swift to Chedington of the cottage dated 15 January 2019 (the “licence validity issue”), and (ii) dismissed an application in Form N244 dated 13 March 2020 by the Brakes for a stay generally or alternatively an adjournment of the trial of the Brakes’ claim to re-vesting of property rights in the cottage under section 283A of the Insolvency Act 1986 (this trial has now been completed, and I have reserved judgment). By my order I invited written submissions on the question of costs. I received a submission from Chedington dated 25 March 2020 together with a statement of costs claiming a grand total of £12,941.10, a submission on behalf of the Brakes dated 30 March 2020, and a very short submission in reply from Chedington also dated 30 March 2020. Perhaps unusually, both Chedington and the Brakes seek their costs of these applications from the other.

Costs rules

49. So far as relevant, CPR rule 44.2 provides as follows:

- “(1) The court has discretion as to –
- (a) whether costs are payable by one party to another;
 - (b) the amount of those costs; and
 - (c) when they are to be paid.
- (2) If the court decides to make an order about costs –
- (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
 - (b) the court may make a different order.
- [...]
- (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
- (a) the conduct of all the parties;
 - (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
 - (c) any admissible offer to settle made by a party which is drawn to the court’s attention, and which is not an offer to which costs consequences under Part 36 apply.
- (5) The conduct of the parties includes –
- (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
 - (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
 - (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
 - (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.”

The parties’ submissions

Chedington

50. This is a case in which I consider that it is appropriate for the court to make an order about costs. I therefore need to know who (if either) is to be treated as the successful and who the unsuccessful party. Chedington says that it was the successful party, as it consented to the lifting of the stay in the Eviction Proceedings on certain terms which were in fact imposed, and it successfully opposed both the remainder of the Informal Application and the whole of the Notice Application. The only point on which it failed was the court did not order the Eviction Proceedings to be tried in May, as Chedington requested. But this, it says, was only a minor part of its response to these applications.

The Brakes

51. The Brakes do not address this question (successful or unsuccessful party) directly. But indirectly they must accept that Chedington was the successful party overall, because they ask for a “different order” under CPR rule 42.2(2)(b), that is, they say that the general rule does not apply in this case, and that the Court should award them their costs against Chedington. Their reason for this

“is the conduct of Chedington in playing procedural games with both the Brakes and the court”.

Over some 23 paragraphs (about three quarters of the total written submission) the Brakes seek

“to explain the way in which Chedington has abused the court system and, by doing so, has successfully and cynically avoided summary determination of the question whether its licence is valid or enforceable”.

52. In the alternative, the Brakes invite the court to reserve the costs. It is not clear for how long it is suggested that the court should reserve its costs decision, but there is a reference to the determination of the licence validity issue, and it may be that the Brakes mean that the issue of costs should be postponed until that issue has been decided. In the further alternative, any award in favour of Chedington should be heavily discounted to reflect the conduct complained of by the Brakes.

Discussion

The successful party

53. Having considered the matter, and taken into account the relative success of the parties on these applications, it seems to me that overall Chedington has been the successful party. There is in effect no opposition from the Brakes to that conclusion. Accordingly, I proceed on the basis that the application of the general rule in CPR rule 44.2(2)(a) would lead to an award in favour of Chedington, and that I must consider whether the court ought instead to make a different order under rule 44.2(2)(b), as requested by the Brakes.

A different order?

54. The picture painted by the Brakes of this litigation is one where Chedington initially did not object to the standing of the Brakes to raise the licence validity issue in the Bankruptcy Application issued in February 2019, but was joined as a respondent in April 2019, when it still did not object. Moreover, Chedington’s defence in the Eviction Proceedings in May 2019 asserted that the Bankruptcy Application was the proper forum for the determination of the dispute. In its defence in the Bankruptcy Application in June 2019 no point was taken on the standing of the Brakes. In July 2019 Dr Guy asserted in a witness statement that the issues in the Eviction Proceedings should be tried in the Bankruptcy Application, and DJ Field was persuaded not to expedite the Eviction Proceedings but to transfer them to the High Court in Bristol. Also in July 2019 Chedington served an application dealing with legal professional privilege, where again no point was taken on standing. Directions were given by Mr Jarvis QC on 4 September 2019 and again Chedington did not raise the question of standing of the Brakes. This application was dismissed (with costs reserved) after a hearing in November 2019. The question of standing was not raised by Chedington during the hearing. In December 2019 Mr Jarvis QC gave permission to Chedington to amend its defence and stayed the Eviction Proceedings. The amended defence still did not raise the question of the standing of the Brakes, who concluded that the licence validity issue could be determined in the Bankruptcy

Application rather than in the Eviction Proceedings. At the end of January 2020 Chedington applied to strike out the Bankruptcy Application (listed for trial in May 2020) expressly on the basis of a lack of standing by the Brakes. On 2 March 2020 I heard and acceded to this application and struck out the Bankruptcy Application. The Brakes raised the issue of reapplying to expedite the Eviction Proceedings at the end of the hearing on 3 March 2020, and the court agreed to deal with that matter on paper. The “Informal Application” was (in part) the result. The Brakes assert that Chedington avoided the trial of the licence validity issue in the Eviction Proceedings on the basis that it would be tried in the Bankruptcy Application, and then successfully applied to strike out the Bankruptcy Application. They go on to refer to Chedington’s conduct in (i) separate proceedings concerned with the claim by Chedington’s subsidiary as owner of Axnoller House against the Brakes for possession of the House, and in (ii) the Eviction Proceedings, as “procedural game-playing” (cf *Cunico Marketing FZE v Daskalakis* [2019] 1 WLR 2881, [49]). Accordingly, the Brakes say that neither the Informal Application nor the Notice Application was unreasonable or abusive, but the inevitable product of misrepresentations by Chedington. So they ask the court to award them their costs of having to make those applications.

55. The above is of course only my short summary of the full explanation given, although I hope that it conveys at least the flavour of the longer version. Chedington criticises the procedural history given in the written submission as “selective and misleading”. It points out that no reference is made (for example) to the fact that once the Liquidation Application and (most of) the Bankruptcy Application had been struck out, time became available for the Eviction Proceedings to be tried, and Chedington applied for those proceedings to be tried then. (Indeed, in my judgment, at [46], I left open the possibility of holding the trial in May, if the Brakes agreed with Chedington that it should happen then; but this is not mentioned either, and I have heard nothing further.)
56. The problem is that I am in no position to decide at this stage whether one side or another is more culpable in the “game-playing” that is said to have been going on. As I have previously said in this litigation, it seems to me that both sides have been taking every conceivable point, and this is just another example. In a case like this, the court essentially has two choices. One is not to decide any question of costs at the time, but to reserve everything until the end of the whole litigation, on the basis that only then will the court be able to see where the merits lie. The other is to decide each costs question relating to an interlocutory step as it comes along on the information available then. That is the usual procedure, and in the circumstances of this case I think it is the only one I can properly follow, because I cannot make a judgment as to whether it is one side’s fault more than the other. This case is not like *Motion v Moojen*, the case I considered earlier.

Basis of assessment

57. Accordingly, I will make the usual order that the unsuccessful party pay the costs of the successful, here that the Brakes pay Chedington’s costs of these applications. Chedington asks for those costs to be assessed on the indemnity basis, and refers me to the decision of Hildyard J in *Hosking v APAX Partners LLP* [2019] 1 WLR 3347, [37]-[42]. In that case, after the claimants discontinued their claim, based on

allegations of commercial impropriety, the defendant sought costs on the indemnity basis because (they said) the claim was hopeless. So far as most relevant to this case, the judge said this:

“37. The standard basis of costs is, as its description denotes, the norm. Only if the case is ‘out of the norm’ may the indemnity basis be justified.

[...]

39. ... Morgan J [in *Digicel (St Lucia) Ltd v Cable and Wireless plc* [2010] 5 Costs LR 709, [9]] asked whether the ‘conduct of the paying party was at a sufficiently high level of unreasonableness or inappropriateness to make it appropriate to order indemnity costs’.

40. More recently, the Court of Appeal said the following on the subject in *Excalibur Ventures LLC v Texas Keystone Inc (No 2)* [2017] 1 WLR 2221, para 21:

“ ... To award costs on an indemnity scale is a departure from the norm and one therefore looks for something, whether it be the conduct of the relevant party or parties, or the circumstances of the case, which takes the case outside the norm ... ”

41. In the passage from her judgment in *Euroption Strategic Fund Ltd v Skandinaviska Enskilda Banken AB* [2012] EWHC 749 (Comm) ... Gloster J said the following:

“ ... Fourth, to demonstrate that a case has gone outside the norm of behaviour, it is not necessary to show that the paying party’s conduct lacked moral probity or deserved moral condemnation in order to attract recovery of costs on an indemnity basis ... ”

42. The emphasis is thus on whether the behaviour of the paying party or the circumstances of the case take it out of the norm. The merits of the case are relevant in determining the incidence of costs: but, outside the context of an entirely hopeless case, they are of much less, if any, relevance in determining the basis of assessment.

43. The cases cited show that amongst the factors which might lead to an indemnity basis of costs are: (1) the making of serious allegations which are unwarranted and calculated to tarnish commercial reputation of the defendant; (2) the making of grossly exaggerated claims; (3) the speculative pursuit of large-scale and expensive litigation with a high risk of failure, particularly without documentary support, in circumstances calculated to exert commercial pressure on a defendant; (4) the courting of publicity designed to drive a party to settlement notwithstanding perceived or unaddressed weaknesses in the claims.”

58. In the present case, Chedington criticises the Brakes for not raising the Informal Application in correspondence between solicitors (as had been foreseen during the hearing on 3 March 2020), for not issuing a formal application notice, for not drawing the court’s attention to the relevant principles upon which it would decide whether or not to order a preliminary issue, and not focusing the preliminary issue on the pleadings in the Eviction Proceedings. Chedington further criticises the Brakes for

issuing the Notice Application without any prior warning in correspondence particularly when that application changed the complexion of the first one (for a preliminary issue), and rendered much of its submissions on that application redundant.

59. As I said in my judgment, at [36], some of this conduct on behalf of the Brakes was “unhelpful, and wasteful of judicial and other resources”. Other aspects, on the other hand (such as the failure to issue a formal application notice) really do not matter in the grand scheme of things. I am not persuaded that, taking it altogether, this conduct justifies a costs award on the indemnity basis. My order therefore will be that the Brakes pay Chedington’s costs on the standard basis.

Summary assessment

60. I turn therefore to consider the question of assessment. Chedington wishes me to assess these costs summarily. The Brakes in their submission do not object to this course and indeed make submissions intended to assist the court in carrying out such a summary assessment. These submissions criticise the time spent on documents by Mr Gatt QC (2.7 hours) and Mr Spendlove (8.3 hours). There is no further breakdown of these hours, but the work done is stated to include

“reviewing and discussing the stay application and supporting evidence; reviewing draft skeleton for the court in response and considering underlying documents relevant to these submissions; reviewing the judgment from His Honour Judge Matthews; reviewing and commenting on the draft cost submissions; and drafting the statement of costs.”

61. In addition to this, there are fees to counsel, “for advice and drafting/preparation” in the sums of £2,941.60 (Mr Sutcliffe QC) and £1,637.50 (Mr Day). Given that this matter was dealt with on paper, I have no problem with the fees to counsel. What troubles me is very large amount of time spent on documents by the solicitors. I quite accept that all the things that are stated to have been done needed to be done. What I find difficult to accept however is that it should take as long as 12.2 hours spread across three fee earners (and where the lead partner indeed spent a considerable amount of that time – about one fifth). In the circumstances, I shall summarily assess Chedington’s costs in total at £10,000, thus in effect taking away £2,941.10 from the work done on documents. There will be the usual 14-day order.