Neutral Citation Number: [2021] EWHC 1282 (Ch)

Case Nos: E00YE350, F00YE085

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

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

Date: 17/05/2021

Before :

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

- -

BETWEEN:

AXNOLLER EVENTS LIMITED

Claimant

and

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE

Defendants

AND BETWEEN:

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(3) TOM CONYERS D'ARCY

Claimants

and

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

- -
- -

Andrew Sutcliffe QC and William Day (instructed by **Stewarts Law LLP**) for the **Guy parties**
Ashfords LLP for the **Brakes**

Costs assessments on written submissions, without a hearing

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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 10:30 am.

HHJ Paul Matthews :

Introduction

1. This short written judgment deals with two points arising out of proceedings following the hand-down of my judgment on the trial of the claim in *Brake v Guy* [2021] EWHC 671 (Ch), known to the parties as the "Documents Claim". On 13 April 2021, after an oral hearing conducted remotely by video-conference, I refused an application by the Brakes for me to recuse myself from presiding over the two then forthcoming trials in further litigation between (in substance) the same parties, known as the Possession Proceedings and the Eviction Proceedings respectively. I subsequently gave written reasons for that decision: [2021] EWHC 949 (Ch). The first of the two points relates to the costs of that recusal application. Secondly, on 21 April 2021, following written submissions, I decided that those two same forthcoming trials would be adjourned and relisted in the autumn: [2021] EWHC 982 (Ch). The second point relates to the costs thrown away by those adjournments.

Payment on account of costs of the Recusal Application

2. In relation to the first matter, on 2 May 2021, again following written submissions, I decided that the Brakes would pay the Guy parties' costs of the Recusal Application on the indemnity basis, to be the subject of detailed assessment (because no schedule of costs had been served) if not agreed. Because of the absence of a schedule, I was not then in a position to decide about ordering a payment on account, as provided for by CPR rule 44.2(8). That schedule was sent to the court and to the Brakes under cover of a letter dated 4 May 2021. In that letter, the Guy parties' solicitors said that their clients "intend to seek an interim payment on account of the Recusal Costs. Consequently, the Guy Parties' statement of costs is enclosed". However, that letter did not say formally that their clients asked the court to order and assess the appropriate sum, and neither did it make any submissions as to what that sum should be (as would usually be the case if a request were being made).

3. In an undated written submission in reply, dealing mainly with the assessment of costs thrown away by the adjournment, the Brakes noted the service of the schedule and that it was the Guy parties' "intention to seek a payment on account in respect of" the Recusal Costs, but added that "no such request has been made at the time of these submissions and the Brake Parties' [sic] will respond to such request once made". However, they went on to "put a marker down in respect of those costs at this stage", and made certain comments about the costs of three of the four counsel of the Guy parties. These comments were responded to by the Guy parties in written submissions from Mr Sutcliffe QC and Mr Day, dated 10 May 2021. They said that the Brakes in their submissions had not identified any good reason for not ordering a payment on account, and therefore one should be made.

4. It is thus clear that the parties are at cross purposes. The Guy parties may well have intended to make a request for a payment on account, but the Brakes did not understand what was said in that sense, and I have some sympathy with them. What the Guy parties said in their solicitors,' letter was not clear. I accept that CPR rule

44.2(8) does not depend on a request having been made, but in my view the Guy parties' letter confused the issue by referring to their *intention* to seek an interim payment. The sensible course is therefore for the Guy parties as soon as possible to indicate in writing what they consider a reasonable sum would be, with any supporting reasoning, for the Brakes to respond also in writing to that indication by 4 PM on the second business day following, and for the Guy parties make any written submissions in reply by 4 PM on the second business day following that response. I will then deal with the matter as soon as possible.

Summary assessment of costs thrown away by adjournment

5. In relation to the second matter, again on 2 May 2021 and following written submissions, I decided that the Brakes would in any event pay the Guy parties' costs thrown away by the adjournment, although the costs of the adjournment application itself should be the Guy parties' costs in the cases. The Guy parties served a costs schedule dealing with the costs thrown away by the adjournment, and I received written submissions on that schedule from the parties. This is accordingly my summary assessment.

6. The Guy parties have however limited their claim on this summary assessment to (i) *a part* of counsels' brief fees for the two trials, and (ii) the costs of preparing the costs schedule (which are small). Although I am told that further solicitors' costs have also been incurred, the only such costs claimed are those in (ii), apparently on the basis that it would be too time-consuming to try to separate them out from other costs incurred. The costs of preparing the costs schedule (£131.50) are in my judgment both reasonably incurred and reasonable in amount, and proportionate, and are properly recoverable as part of the costs thrown away. No challenge is made to them by the Brakes.

7. The claim for counsels' fees is more significant, and amounts to £63,750. This is made up of one equal one-fourth tranche of each of the four counsels' individual brief fees (there being one leading and one junior counsel in each trial). I am told that in fact all four tranches in the Possession Proceedings, and two of the four in the Eviction Proceedings, had become due before 21 April 2021. However, it appears that the brief fees for the relisted trials are currently being negotiated, and it is clear to the Guy parties that they will have to pay a second time at least the equivalent of one tranche to each counsel.

8. In many, perhaps most cases, the *whole* of the costs thrown away by the actions of one party, and ordered to be paid by that party to the other, can only be ascertained on detailed assessment. This is because in many, perhaps most cases, exactly what has actually been wasted can only be known after the trial is over. A feature of the present case, however, is that the Guy parties have limited their claim (aside from the modest costs of preparing the statement) to an identifiable part only of the (larger) counsels' brief fees that they tell me became payable before the decision to adjourn the further trials, and which they also tell me will, at a minimum, have to be paid in preparation for those trials as relisted.

9. I have no reason not to accept what the Guy parties, through their solicitors, tell me about their liability for the part of counsels' fees that they now claim, nor what they tell me about the need to pay at least that instalment again in due course. For what it

may be worth, I am myself aware, as a former litigation solicitor, that such arrangements were and are common. Quite properly, the Brakes do not challenge either point of fact. I am satisfied that these sums, at least, have been thrown away by the adjournment. As a matter of fact, I find that these sums have been wasted, and the liability that they represent will have to be discharged again in some form.

10. However, the Brakes do challenge the *assessment* of the costs thrown away as the whole of these sums. They say that the court "has a discretion in relation to the costs to be awarded and that the scale of those costs should be determined on a case by case basis". For this proposition they rely on the decision of M D Faieta J, sitting in the Ontario Superior Court of Justice, in *Emami v Furney* 2019 ONSC 1731, [7]. They did not supply a copy of this decision, but fortunately I managed locate one on the CANLII website, and I have read it.,

11. I accept that in our system even 'costs thrown away' have to be assessed under the CPR on a particular basis, either indemnity or standard. In the present case, the basis of assessment was not stated in the order to be the indemnity basis, and therefore it falls to be assessed on the standard basis: CPR rule 44.3(4). What that means is that the court will allow only *reasonably incurred* costs, *reasonable in amount*, which are *proportionate* to the value of the proceedings, resolving any doubt in favour of the paying party: CPR rule 44.3(2), (5). I must therefore consider the sums claimed by the Guy parties from this point of view.

12. With great respect to my Canadian colleagues, some of whom I am privileged to know, I do not think that the citation of the costs decision of a judge in Ontario is helpful to me in this context. I acknowledge the close relationship between the common law courts of England and Wales and those of Ontario, but, as is evident from the report I have read, the (statutory) costs rules in these two jurisdictions are not the same, and the test set out in the Ontario rules is quite different to that which I must apply in this jurisdiction. I regret that the Brakes were not able to locate and cite any English case on the point.

13. Having already tried two trials between the present parties, and being likely to try at least two more, I am as familiar as any judge would be at this stage with the scope of the litigation between the parties, the issues that arise and the way in which the litigation has been carried on up until now. In my judgment, I can be, and am, satisfied that, in relation to the two significant forthcoming trials, the Possession Proceedings and the Eviction Proceedings, it was reasonable to incur a staged payment liability for counsels' fees by the time of the adjournment decision, and that the proportions of the stages concerned, one quarter of the total brief fees at each stage, were reasonable. I am further satisfied that, in the context of the present "no holds barred" litigation war raging between the parties, the sums involved were proportionate.

14. Accordingly, if that were the end of the matter, I would, on the standard basis, assess the costs thrown away (so far as claimed by the Guy parties) as the sums claimed in the statement of costs. But that is *not* the end of the matter. The Brakes submit that the court should not assess the costs thrown away at the level claimed. Instead, they say that the court should take into account a number of other factors, and (it is inferred) *reduce* the amount assessed as costs thrown away. These factors are (i) the reasons for the adjournment were not of the Brakes' own making, (ii) the adjournment was

necessary in the interests of justice, (iii) some at least of the preparatory work carried out by counsel is transferable to the relisted trials, and (iv) the fees charged may not relate to actual work carried out. I deal with each in turn.

15. As to (i), my decision to adjourn was based on the submission that the withdrawal of both of the Brakes' counsel, which precipitated the application for an adjournment, was not of their making. I said at the time that I was not in a position to be able to test that proposition, but that, for the purposes of considering and adjudicating on the application, I would proceed on that basis. I have no further information at this stage, and therefore adhere to that same view now. In itself, however, I do not think that it makes any difference. This is not about culpability. This is about compensating innocent parties who will have to pay some costs twice because of an adjournment that they did not seek and did not want. In a sense, it is part of the price of the adjournment.

16. As to (ii), the same point applies. The interests of justice overall required that there be an adjournment. But the interests of justice also include compensating innocent parties who did not cause the circumstances in which another party sought an adjournment, as *Bilta (UK) Ltd v Tradition Financial Services Ltd* [2021] EWCA Civ 221, [30], makes clear. The bereavement of a party or an important witness on the eve of trial may, for example, justify an adjournment, but it does not justify reducing the assessment of the other party's costs thrown away by that adjournment.

17. As to (iii), in my judgment this misses the point. It is about *costs* thrown away, not about *work* thrown away. Usually, of course, the two are linked. But if they are not, or not necessarily, it is the costs and not the work that matters. If, as I find in this case, the Guy parties will have to pay a tranche of counsels' fees a second time, because they reasonably agreed a ''stage payment" brief fee, not *necessarily* or *completely* connected with work done (but, say, connected also with being prevented from taking on alternative work), they will suffer an injustice if this is not compensated by the Brakes, whether or not the work done (if any) is transferable.

18. As to (iv), there is a certain tension between this point and the previous one. Point (iii) is about work that is or ought to be transferable. Point (iv) is, in effect, about no work at all. But the answer to point (iii) is also the answer to point (iv). It is costs *liability*, reasonably incurred, reasonable and proportionate in amount, that matters, not whether any particular work was done. Once stage payment brief fees are accepted as proper, the point falls away, although the reasonableness of the amounts and the proportionality points remain.

19. In my judgment, there is nothing in any of these points, and I therefore summarily assess the costs thrown away by the adjournment and payable by the Brakes to the Guy parties in the sums claimed, that is, £63,851.50, to be paid within 14 days.