



Neutral Citation Number: [2022] EWHC 1363 (Ch)

Case Nos: E00YE350 and 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: 7 June 2022

Before :

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

Between :

In the Possession Proceedings

AXNOLLER EVENTS LIMITED

Claimant

and

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

Defendants

In the Eviction Proceedings

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

Claimants

and

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

Stewarts Law LLP for the **Claimant (Possession) and the Defendant (Eviction)**
Mrs Nihal Brake for herself, Mr Andrew Brake and Mr Tom D'Arcy

Costs application 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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This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on Tuesday 7 June 2022.

HHJ Paul Matthews :

Introduction

1. On 29 April 2022 I heard the Guy Parties' application to continue the freezing injunction which I had granted originally on 28 February 2022. At the end of the hearing, I announced my decision to continue the injunction, but said I would give my reasons in writing. I also said I would deal with the question of costs when I handed down those reasons.
2. Those reasons were handed down by me on 4 May 2022. Unfortunately, I overlooked the question of costs at that stage. Fortunately, I was reminded of this question by Mrs Brake, and on 19 May 2022 I gave directions for written submissions on the question of the costs of the freezing injunction. I have received and considered those written submissions, and now give my decision on the question.
3. Mrs Brake submitted that it was inappropriate to decide the question of costs relating to the freezing injunction until both the quantum of damages claim in the Possession Proceedings and the appeal in the Eviction Proceedings were concluded. She gave two reasons in support of this submission. The first was that the costs were ongoing, as the administration of the freezing order continued. Rather than have a series of applications for further costs orders, it would be better to reserve the question of all these costs until the quantum hearing in the Possession Proceedings.
4. The second reason was that if the Brakes were successful in the Court of Appeal it would

“significantly change the cost landscape in relation to the [freezing injunction] particularly for Tom [D’Arcy]. He is not party to any other claims with the Guy Parties”.
5. She amplified this in a later submission. If the appeal in the Eviction Proceedings succeeded, and the costs order at first instance in those proceedings set aside, it would be wrong for Tom to face a costs liability in respect of a freezing injunction that should never have been made in the first place. She therefore submitted that the court should apportion as best it can the Guy Parties' costs of the freezing injunction between the two sets of proceedings, and reserve that part relating to the Eviction Proceedings until the determination of the appeal.

Administration costs

6. The Guy Parties in their submission agreed with Mrs Brake that the costs of the administration of the freezing injunction should be decided at a later stage, with liberty to apply, rather than piecemeal from time to time. I do not need at present to decide at what precise later stage they should be decided. I will therefore reserve these costs generally, with liberty to apply. On the other hand, the Guy Parties sought their costs of the two hearings on 28 February and 29 April, with detailed assessment on the standard basis if not agreed.

Hearing costs

7. I therefore turn to the question of the costs of the two hearings. The Guy Parties say that they were the successful parties at those hearings, and the general rule in CPR rule 44.2(2)(a) should apply. However, despite the general rule, the court may make a different order CPR rule 44.4(2)(b). The present is the case of an interim injunction, and the caselaw shows that the matter of costs in such a case is not quite so simple, and that a different order may well be made.

Injunctions

8. Where an ordinary injunction is granted on the basis of the test of balance of convenience in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, there is necessarily “a serious case to be tried”, but it is usual (though not invariable) to reserve the question of costs to the trial judge: *Digby v Melford Capital (Holdings) LLP* [2021] 1 WLR 1553, [35]-[36], CA. This was in fact what Mr Jarvis QC did in the documents claim: *Axnoller Events Ltd v Brake* [2021] EWHC 949 (Ch), [26]-[28]. The reason is that the court is not at that stage making any assessment of the merits of the claim, and is therefore unable to decide who is, in any meaningful sense, the successful party.
9. But I am concerned in this case with a freezing injunction, which proceeds on the basis of a different test, that is, “a good arguable case”. This expression is considered to refer to a higher threshold than a “serious issue to be tried”, and, in *Bravo v Amerisur Resources plc* [2020] EWHC 2279, [52] (decided some months earlier than *Digby*, but not referred to in it), Martin Spencer J said that the practice in ordinary injunction cases was “not wholly apposite [for] claims for freezing orders”.
10. He went on to say that, in freezing order cases,

“the court has regard to the question of whether there is a good arguable case on behalf of the claimants or not. That is sufficient for the court to determine whether a freezing order should be made, and even if at the subsequent trial it turns out that the claims fail on the basis of the evidence due to that trial, it does not at all follow that this means that the court was wrong to find that there was a good arguable case. ... The question is whether it is just and convenient to make an order.”
11. He concluded (at [52]) that

“in the circumstances, I do not consider that it is appropriate to make an order reserving the costs as I do not consider that a judge at trial is going to be in any better position than I am to adjudicate upon the costs of these applications”.
12. But the present case is not just an ordinary freezing injunction case with a good arguable case. In the written reasons which I gave for continuing the freezing injunction, I certainly held that it was just and convenient to do so. But I also said this:

“11. ... I took into account the fact that this was not a pre-judgment but a post judgment application. I considered that the Guy Parties had a strong case both in relation to damages in the Possession Claim and costs in relation to both cases.”

13. The fact that this was a post-judgment application, and that my assessment of the merits of the claims for costs (in relation to both cases) and damages (in the possession claim) was that those claims were strong ones, in my judgment takes the case even further away from the ordinary injunction case. However the further claims ultimately turn out, I do not think there is any real prospect of the court being satisfied at some point in the future that there was not a “good arguable case”, at least in relation to the Possession Proceedings.

The impact of an appeal

14. So far as concerns the appeal in the Eviction Proceedings, I accept that, permission to appeal having been given, my order at first instance may hereafter be varied or overturned. But I have never heard it suggested that, merely because there is the possibility of first instance decisions being overturned on appeal, *therefore* judges at first instance should reserve the question of costs of a freezing (or indeed any) injunction, not to the trial judge, but only to be determined at the conclusion of the proceedings (including any appeal). Nor have I ever heard it suggested that a trial judge being asked to award costs based on the trial judgment should not decide the question of costs, either because that judge is minded to give permission to appeal or because the losing party intends to seek permission to appeal.
15. In my judgment the proper course to take is this. The judge should *either* reserve the costs of an interim injunction to the trial judge or, in appropriate circumstances (such as may arise in the case of a freezing injunction), decide the question straightaway. In the latter case, the paying party can seek a stay on the order by reason of the appeal, either from the lower or the appellate court.

Apportionment

16. In the present case, I am in no doubt that it is appropriate to make a costs order relating to the two hearings for the freezing injunction at this stage. But Mrs Brake says I should first divide up the costs between the two sets of proceedings, so that half (or some other proportion) is payable in the Possession Proceedings and the remainder is payable in the Eviction Proceedings. It is true that I have done something similar in other proceedings in this long drawn out litigation.
17. In *Brake v Lowe* [2020] EWHC 1324 (Ch), two separate strike-out applications were made sequentially over two days, each application in one of two different insolvency proceedings. Unusually, I made an issue-based costs order, and then had to deal the potential application of rule 44.2(8). I said that if the solicitor accounts systems could not separate out the different sets of costs, but could produce only a global figure for the costs of the hearings, I would do so by apportioning the global figure between the different applications.

18. This case however is quite different. Instead of separate applications made sequentially in different proceedings, I have to deal with a single application (for a freezing injunction) made in relation to two sets of proceedings. The costs concerned are the costs of *that* application. The problem instead is that the application benefited the Guy Parties in two sets of proceedings.
19. However, I see no merit here in attempting to apportion the costs between the two sets of proceedings. The appeal problem arises in relation to the injunction only so far as it concerns the costs of the Eviction Proceedings. The costs of applying for the injunction in relation to costs and damages in the Possession Proceedings alone would not be significantly less than the costs of a single application in relation to both sets of proceedings. So applying for the order in both adds little to the costs.

Payment on account of costs

20. The Guy Parties apply for an interim payment on account of costs. Under CPR rule 44.2(8), the court must make an order for such an interim payment “in a reasonable sum ... unless there is good reason not to do so”. Their statement of costs for the two hearings shows costs of £28,103.45 for the first hearing, costs of £34,896.15 for the second, and further expenses of £1,299.20, all totalling £64,298.80. The Guy Parties seek an interim payment of £35,000 (about 55% of the total).
21. The questions for me are, first, whether there is a good reason for *not* ordering an interim payment, and then second, if there is not, what is a “reasonable sum on account of costs”. Mrs Brake submits that “the Court should strongly consider not making any order for a Payment on Account”. This is because of (i) the size of the costs claimed and (ii) the fact that the injunction straddles two sets of proceedings. I do not consider that either reason is a good one for not making a payment on account of costs.
22. As to the size of the costs, these figures are indeed high. But this is complex, high-end litigation about large sums of money. As is well known, a freezing injunction is one of the law’s “nuclear weapons”: see *Bank Mellat v Nikpour* [1985] FSR 87, 92, per Donaldson LJ. It therefore demands a high level of care and attention from well qualified and experienced lawyers. Unfortunately, and in the nature of things, their skills do not come cheaply. Where the court considers that a freezing order is justified, that will usually be the consequence of highly skilled work.
23. As to the fact that two sets of proceedings are concerned, I struggle to see why this should make a difference. If the point is that one of the two judgments that I handed down on 25 February is under appeal, then I have already dealt with that point above. So I turn to consider the second question, what is a “reasonable sum on account of costs”.
24. In *Brake v Lowe* [2020] EWHC 1324 (Ch), I said this:

“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.”

25. In an earlier part of this litigation, *Axnoller Events Ltd v Brake* [2021] EWHC 949 (Ch), the Guy Parties sought an interim payment on account of costs. As in this case, they had not been budgeted, but there was a schedule of costs signed by a partner in their solicitors. Marcus Smith J had already made an order for a payment on account, and I (pursuant to a reservation in the earlier order) ordered a further payment, so that in total the interim payment amounted to some 60% of the certified costs.
26. In the same litigation this year, after the trials in both the Possession Proceedings and the Eviction Proceedings, I awarded the Guy Parties their costs of the former proceedings on the indemnity basis and their costs of the latter proceedings on the standard basis: [2022] EWHC 1162 (Ch). In relation to the costs of the Eviction Proceedings, where there was no approved budget and an award of costs on the standard basis, I ordered an interim payment of 50% of the certified costs. I left over the question of a payment on account of the costs of the Possession Proceedings, where there was a costs budget and an award of indemnity costs, and resolved that a few days later, deciding that a payment equal to 80% of the budget would be appropriate.
27. In the present case, the Guy Parties seek an interim payment of about 55% of the certified costs. Judges have been prepared to award interim payments of up to 90% of budgeted costs, at least where costs were to be assessed on the indemnity

basis. That is because the scrutiny involved in budgeting, and the more generous basis of assessment, mean that they can be clearer as to what the assessed costs are likely to be. In this very litigation I have awarded 80% in such circumstances. Here, where there is no budget, and costs are awarded on the standard basis, I have to be more cautious. In all the circumstances, and, given that the Guy Parties seek a figure of about 55%, I will award the sum of £35,000 sought by the Guy Parties, to be paid within 14 days.

Conclusion

28. I will therefore reserve the costs of the administration of the freezing injunction with liberty to apply, but order that the Brakes pay the costs of the Guy Parties of the two hearings on the standard basis if not agreed, and further order the payment on account of £35,000 within fourteen days. I should be grateful to have an agreed minute of order for approval.