



Neutral Citation Number: [2022] EWHC 3118 (Ch)

Case Nos: 166 and 167 of 2015

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

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

Date: 6 December 2022

Before :

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

Between :

(1) PATLEY WOOD FARM LLP  
(2) LORRAINE BREHME  
(3) THE CHEDINGTON COURT ESTATE  
LIMITED

**Applicants**

- and -

(1) KRISTINA KICKS  
(2) BLAIR CARNEGIE NIMMO  
(as trustees in bankruptcy of Nihal Mohamed  
Kamel Brake and Andrew Young Brake)

**Respondents**

William Day (instructed by Moore Barlow LLP and Stewarts Law LLP) for the Applicants  
Rowena Page (instructed by Gateley Legal) for the Respondents  
Alexander Learmonth KC (instructed by Direct Access) for Mrs Nihal Brake and Mr  
Andrew Brake

Consequential matters 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 or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 6 December 2022.

## HHJ Paul Matthews :

### Introduction

1. On 25 November 2022 I handed down written reasons for judgment on an application dated 8 November 2022, which I had heard on 16 November 2022, and in which I had announced my decision on 17 November 2022. The application was for an order that the trustees in bankruptcy of Mr and Mrs Brake intervene in proceedings (known as the Cottage Eviction Proceedings) pending in the Court of Appeal. My decision as announced was that I would grant the order sought subject to one amendment.
2. I invited written submissions from the parties on consequential matters, and have now received and considered them. The submissions related to two matters: first of all the question of permission to appeal, and second, the question of costs. I shall deal first with the latter question.

### Costs

3. The rules relating to costs in English civil litigation are well known. Under the general law, costs are in the discretion of the court: Senior Courts Act 1981, section 51(1); CPR rule 44.2(1). However, if the court decides to make an order about costs, the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2(2)(a). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order and if so what, the court will have regard to all the circumstances, including conduct of all the parties and any admissible offer to settle the case (not falling under CPR Part 36) which is drawn to the court's attention: CPR rule 44.2(4).
4. In particular, the court may make an order (amongst others) that a party must pay a proportion of another party's costs, an order that costs be paid from or until a certain date only, and an order for costs relating only to a distinct part of the proceedings: CPR rule 44.2(6)(a), (c) and (f). But, before making an order of the last type, the court must first consider whether it is practicable to make one of the first two types: CPR rule 44.2(7). So, an issues-based order is possible, but the rules require the court first to consider making a proportion of costs order or a time limited order.
5. The general rule requires the court to ascertain which is the "successful party". In *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd* [2004] 2 Lloyd's Rep 119, Rix LJ (giving the judgment of the Court of Appeal) said (at [143]) that the words "successful party" mean "successful party in the litigation", not "successful party on any particular issue".

### *Successful party*

6. In the present case, I think it is appropriate to make an order for costs, and therefore I must first consider which was the successful party. The respondent trustees say that only the first and second applicants were successful, and that even they did not succeed on everything, because I amended the draft order to provide for an option and not a requirement for the trustees to grant a licence to Chedington.

7. I reject that submission. It is completely unreal. I have no doubt that the applicants were the successful party. I did not have to decide whether the third applicant had standing, because I was sure that the first two had such standing, but I expressed the provisional view that it did. The applicants succeeded on the substance of the application, and the respondents should have agreed at least to that substance. Instead, they chose to defend it, and vigorously. The reality is that the applicants won a highly contentious application. The letter of 15 November merely clarified the position from the earlier correspondence. In my judgment, it did not change the position materially. If the respondents had wished to seek such clarification, they could have done so, but they did not.

*A different order?*

8. Accordingly the general rule would be that the respondents should pay the applicants' costs. Is there any reason for the court to make a different order? The respondents say that there is. In addition to the point that the order made did not give the applicants everything they originally asked for, they say that the trustees should not be liable for costs before the applicants' letter of 15 November, and that any costs should be reduced to reflect the fact that the applicants instructed two firms of solicitors. They say that the fair order would be no order as to costs.
9. It is correct that the order made did not give the applicants everything they originally asked for, but, as I have said, in substance they were successful, and they did not oppose the option suggestion when made at the hearing. In these circumstances, I do not think it would be right to make a proportionate award of costs on that account. As for the point about the letter of 15 November, there is nothing in this. Funding and indemnity were clearly available on 9 November 2022, and the respondents refused to intervene then. Then they misunderstood the applicants' subsequent letter of 10 November. The misunderstanding was corrected in the letter of 15 November.
10. There is perhaps more to the point about duplication of costs by instructing two firms of solicitors. But this is in reality a point about the *assessment* of costs, rather than about whether in principle the respondents should pay the applicants' costs. Nevertheless, I should address it, and now is as good a point as any.
11. The authority usually cited in modern times for the proposition that claimants should be represented by a single set of solicitors is *Lewis v Daily Telegraph Ltd (No 2)* [1964] 2 QB 601, CA. That was a case where a plaintiff applied for an order to deconsolidate already consolidated libel actions intended to be tried before a judge and jury. The two plaintiffs were in fact then, and always had been, separately represented.
12. Pearson LJ said (at pages 619-621):

“We have been urged on behalf of the plaintiff Lewis, and to some extent on behalf of the plaintiff company also, to permit the separate representations to continue and to make consequential provisions or suitable directions to fit that situation. But I think it is right to go further back and consider whether it was right in the first instance that such separate representation should be created. In my view, it was not regular, and not in accordance with the proper practice, that

two firms of solicitors should be placed on the record as representing the plaintiff Lewis and the plaintiff company separately.

[ ... ]

The rule is clearly stated in *Wedderburn v Wedderburn*, where Sir John Romilly M.R. said [(1853) 17 Beav 158 , 159] :

‘Mr. and Mrs. Hawkins may, in concurrence with the other four co-plaintiffs, remove their solicitor, and the other four may allow him to conduct the proceedings for all. But if the plaintiffs do not all concur, Mr. Hawkins cannot take a course of proceeding different and apart from the other plaintiffs, for the consequence would be, that their proceedings might be totally inconsistent. When persons undertake the prosecution of a suit, they must make up their minds whether they will become co-plaintiffs; for if they do, they must act together. I cannot allow one of several plaintiffs to act separately from and inconsistently with the others.’

That is the proper rule of practice, and it has plainly been departed from on the plaintiffs' side in this case.

There is the interest of the court itself in having actions properly constituted, so that regular trials may be had; and here is an irregular situation. I am not saying that it would be impossible ever in any case to have separate representation, wholly or partially, in a consolidated action. It is not very easy to envisage such cases; but they can arise, and an illustration is *Healey v A Waddington & Sons Ltd* [[1954] 1 WLR 688;]. In that case eight actions were consolidated as to the issue of liability but separate representation was allowed as to the issue of damages. That is an interesting case, and it shows the possibility of at any rate partial separate representation in consolidated actions. But it is, in my view, not a good guide or a good precedent for the present case, because there the trials were going to be by judge alone and were in respect of an accident, whereas here we are faced with an action or actions for libel to be tried by judge and jury. It would be extremely inconvenient and awkward, so far as one can see, to have any separate representation in a matter of that kind. Many difficult problems would arise. How would the opening speech (or speeches) be made? Would it be right that the plaintiffs should have as against the defendants the advantage of two opening speeches instead of one? Then, in the conduct of the case, if there were two plaintiffs separately represented, would each plaintiff be allowed to cross-examine the other plaintiff's witnesses and have the advantage of being able (as Lord Gardiner pointed out) to put leading questions to a witness who would be substantially on the same side? Again, when the defendants' witnesses were called, would it be right that both plaintiffs, separately represented, should be allowed to cross-examine those witnesses? The same problem would arise in respect of the final speeches at the end of the case. Would separately represented plaintiffs be allowed to have two speeches?

...

13. Russell LJ said (at pages 622-623):

“Prima facie co-Plaintiffs. whether in one original action or in an action consisting of consolidated actions, must be jointly represented by solicitor and counsel. In a proper case, an order may be made authorising severance in point of representation, but this must be, I think, rare and should only be done to avoid injustice ...

At present the plaintiffs have separate solicitors on the record, and appear by separate counsel. No order permitting that has ever been made, though for the purpose of these interlocutory proceedings the court has permitted it. ...”

Sellers LJ delivered a short concurring judgment.

14. That was a case of an action going to trial, and indeed of a case to be tried before a jury. The difficulties that were envisaged with double representation were connected either with its being a trial (rather than an application), or being the trial of a libel action before a jury. The present case is very different. This is in effect an interlocutory application in the course of existing proceedings. There is no trial involved. All the applicants have an interest in obtaining the relief sought. There is no conflict between them as to that, and they have jointly instructed the same counsel. But their interests are different, proceeding from their different positions, and they should be separately advised as to those.
15. The most important point is that there should be no, or at least minimal, duplication of effort and therefore costs. This is partly achieved by jointly instructing the same counsel, but also of using the same associate solicitor under the instruction of a partner in each firm. The only possible duplication of effort is the need for the (modest) input of two partners, rather than one. But it is right to say that one of the respondents’ (unsubstantiated) allegations throughout has been that the third applicant was funding the other two. To have only one firm involved for the applicants would have lent weight to that allegation. Two partners from separate firms is the minimum price for avoiding that risk. So I do not think that the respondents can complain.
16. In my judgment there is no good reason to depart from the general rule, that is, that the respondents should pay the applicants’ costs.

*Basis of assessment*

17. The next question is as to the basis of assessment. The applicants ask for costs to be assessed on the indemnity basis. They ask for this on the basis of five points which they also rely on as justifying an order that the respondent’s costs should not be allowed as an expense of the bankruptcies (I deal with that point later). Those five points are as follows:
  - (1) the first and second applicants represent about 60% of proving creditors;
  - (2) the respondent set up their own significant costs and expenses as a basis for objecting to the applicants’ standing;

(3) the respondents took into account an illegitimate consideration, namely their desire to avoid at all costs taking part in litigation against the Brakes, and forgot their basic duty to creditors;

(4) the applicants provided clarification and offered to waive costs if the respondents were neutral on the application, but the respondents insisted on being neutral as between the creditors and the bankrupts;

(5) the respondents made other unmeritorious objections, including speculating that the Court of Appeal might make an order benefiting the estates anyway.

18. Whatever the merits of these points in the context of the question whether these costs should be allowed as an expense of the bankruptcies, I do not think that they take the case out of the norm so as to justify the assessment of costs on the indemnity basis. The indemnity basis is not intended for cases where a party gets the law wrong, or makes a bad judgment call. That is not without more conduct “out of the norm”. Accordingly, costs here will be assessed on the standard basis.

*Mode of assessment*

19. Next, I must consider whether it is appropriate to assess these costs summarily, or whether to send them for detailed assessment. The applicants seek a summary assessment. The respondents say in their submissions that they assume

“that the court does not intend to summarily assess costs and will direct that they be assessed if not agreed”.

I have to say that I do not understand why that assumption was made.

20. CPR PD 44 paragraph 9 relevantly provides:

“9.2. The general rule is that the court should make a summary assessment of the costs –

[ ... ]

(b) at the conclusion of any other hearing, which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim,

unless there is good reason not to do so, for example where the paying party shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily”.

[ ... ]

9.5(4). The statement of costs must be filed at court and copies of it must be served on any party against whom an order for payment of those costs is intended to be sought as soon as possible and in any event –

[ ... ]

(b) for all other hearings, not less than 24 hours before the time fixed for the hearing.”

21. In the present case, the application lasted less than one day, and statements of costs was served by *both* sides 24 hours before the hearing, in accordance with paragraph 9.5(4) of the practice direction. In my judgment, this is not a case

“where the paying party shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily”.

22. What I said recently in *Brake v Guy* [2022] EWHC 2907 (Ch) in my judgment applies just as much here as it did there:

:

“15. In my judgment, this is just the sort of case in which the court should assess the costs summarily. It concerns a short piece of satellite litigation, which might have been dealt with in court in a few minutes after judgment was given on the main application, and will cause a great deal more trouble and incur disproportionate costs if it is sent off for a detailed assessment. I will therefore make a summary assessment of the costs.”

#### *Assessment of costs*

23. The statement of costs for the first and second applicants seeks a total of £7200, comprised exclusively of partner (Grade A fee-earner) time (including work on documents of £1880), plus VAT of £1440, making a grand total of £8640. The (updated) statement of costs for the third applicant seeks a total of £29,796.36 (no VAT), comprised largely of senior associate (Grade B fee-earner) time (including work on documents of £10,450.02), but also partner (Grade A fee-earner), associate and costs draftsman (Grade C fee-earner) time.
24. The respondents make five main points in relation to the assessment of costs. First of all, they submit that duplication between the cost schedules must be avoided. They give various examples: in considering the draft application, attendances on co-applicants, preparing two statements of costs, letters in and out, evidence in support of the application and replying to the trustees’ evidence and attendance at the hearing and travel.
25. Secondly, the respondents say they should not be required to pay costs which would have been avoided altogether, had a single set of solicitors been used. Under this head, they give the example of the costs of the applicants attending on each other, although in fact they have already given that example under the first point, and I am not sure that there will be any examples falling under this second point that do not fall under the first.
26. The third point relates to the applicants’ hourly rates. First there is a question of principle. Although the respondent’s own statement of costs shows that they have instructed London lawyers at rates exceeding the guidelines, and that their own costs actually exceeded those of the applicants, they nevertheless submit that the appropriate



rates to be allowed for the applicants would be those for Bristol (*ie* National 1) rather than London. In this connection, they refer to *The Guide to the Summary Assessment of Costs*, 2021 edition, at paragraph 30 (reprinted in the White Book at paragraph PD44SC 17).

27. This relevantly reads:

“In a case which has no obvious connection with London and which does not require expertise only to be found there, a litigant who unreasonably instructs London solicitors should be allowed only the costs that would have been recoverable for work done in the location where the work should have been done: *Wraith v Sheffield Forgemasters Ltd* [1998] 1 WLR 132 (CA). It follows that a party who instructs London solicitors to pursue in London a claim which concerns a dispute arising outside London and which was suitable to be heard in the appropriate regional specialist court should also be allowed only the costs that would have been recoverable for pursuing the claim in that regional court (and see Practice Direction 29 para 2.6A).”

28. The second point relating to hourly rates is that they are excessive in any event. Grade A fee earners have been charged at £400 and £736, grade B at £550, and grade C at £403, £380 and £350. The Bristol rates would be: A £261, B £218, and C £178.

29. The next point taken by the respondents is that it was not necessary for counsel to be attending court by solicitors and therefore the costs of solicitors’ attendances should not be allowed.

30. The fifth and final point is that Chedington’s fees specifically involve excessive time being spent at senior associate and partner level, and in reviewing the respondent’s evidence and drafting evidence in reply, and that the respondent should not be required to contribute to the costs of the transcribers.

31. As to the first point, of course I accept the need for duplication between the cost schedules to be avoided so far as possible. The senior associate at Stewarts was acting under the supervision of a partner at each of the two firms involved, and they jointly instructed the same junior counsel. I think the examples of possible duplication put forward by the respondents are in practice inevitable if it is appropriate (as I consider that it is) to allow two firms of solicitors to be involved because there have different clients with different interests (but the same interest in the relief sought). But they are minor.

32. As to the second point, I have already said that this seems to cover cases which would fall under the first point, and I do not think I need consider it any further.

33. As to the third point, I have earlier in this litigation dealt with submissions, based on *Wraith v Sheffield Forgemasters Ltd*, that the Guy Parties should not have instructed London lawyers or should not be allowed to charge for London lawyers’ rates. In *Axnoller Events Ltd v Brake* [2021] EWHC 2362 (Ch), I said:

“6. The Guy Parties have instructed London solicitors, who are inevitably more expensive than provincial solicitors. But *Wraith v Sheffield Forgemasters*

*Ltd* shows that that by itself does not make their retainer unreasonable when it comes to assessing the costs as between the parties. In that case Mr Truscott had instructed a small firm of London solicitors (ATC) to act for him in a county court case after he became dissatisfied with his previous solicitors (MFC). The judge in the county court said it was unreasonable for him to do so because their charging rates were higher than those of local solicitors. The Court of Appeal allowed an appeal by Mr Truscott.

7. Kennedy LJ (with whom Waite and Auld LJJ agreed) said (at 141):

‘The following are matters which, as it seems to me, the judge should have regarded as relevant when considering the reasonableness of Mr. Truscott’s decision to instruct A.T.C. (1) The importance of the matter to him. It was obviously of great importance. It threatened his home. (2) The legal and factual complexities, in so far as he might reasonably be expected to understand them. Due to the incompetence of M.F.C. the matter had taken on an appearance of some complexity. (3) The location of his home, his place of work and the location of the court in which the relevant proceedings had been commenced. (4) Mr. Truscott’s possibly well-founded dissatisfaction with the solicitors he had originally instructed, which may well have resulted in a natural desire to instruct solicitors further afield, who would not be inhibited in representing his interests. (5) The fact that he had sought advice as to whom to consult, and had been recommended to consult A.T.C. (6) The location of A.T.C., including their accessibility to him, and their readiness to attend at the relevant court. (7) What, if anything, he might reasonably be expected to know of the fees likely to be charged by A.T.C. as compared with the fees of other solicitors whom he might reasonably be expected to have considered.’

8. In the present case I consider that the retainer of the London solicitors was reasonable. The property the subject of the Possession Claim is worth several million pounds, and the Guy Parties have been kept out of possession for the best part of three years. The facts of the case are complex, and parts at least of the claim are legally complex. The matter is being tried in the High Court rather than the county court, albeit in Bristol rather than London. This is the regional centre for High Court work relating to the location of the properties concerned.”

34. I similarly consider that the retainer of London solicitors was reasonable for the third applicant in the present case. This is partly because the matter was very important to the applicants, partly because the expertise needed to deal successfully with an application under section 303 of the Insolvency Act 1986 is largely to be found in London (and Dr Guy is used to instructing London solicitors), but also because it needed to be done very quickly, and the applicants’ present solicitors had the relevant expertise, were familiar with the background and would not spend time getting up to speed. This was also the case in *Brake v Guy* [2022] EWHC 1911 (Ch), [46].

35. However, it does not follow, if City or central London solicitors are instructed, that the guideline rates will be London 1. In *Brake v Guy* (at [50]), I applied London 2 because the matter was not sufficiently “heavy”. I think the same applies to this application. The

guideline rates for London 2 are: Grade A £373, Grade B £289, and Grade C £244. So far as concerns the first and second applicants, they retained Moore Barlow LLP, based in Eastleigh, Hampshire. That is within the area for the National 1 guideline. The guideline figures are Grade A £261, Grade B £218 and Grade C £178.

36. The respondents also complain under this head that the hourly rates charged are excessive in any event. All the rates applied by both firms exceed the guideline figures. Of course they are guidelines, and are not set in stone. But, as the Court of Appeal said recently in *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466, and again in *Athena Capital Services SICAV v Secretariat of State for the Holy See* [2022] EWCA Civ 1061, if a rate in excess of the guideline rate for solicitors' fees is to be charged to the paying party, a clear and compelling justification must be provided. The applicants have however not put forward any such justification. So, as things stand, I see no reason for allowing more than London 2 for Stewarts and National 1 for Moore Barlow.
37. The fourth point concerns solicitors' attendance at the hearing. On the facts of this case, I think it was entirely reasonable for a solicitor to attend counsel at the hearing. However, I see no reason why a partner (from Moore Barlow) needed to attend as well. The reason why a solicitor needed to attend was because it was an urgent application in a complex case of high-value, and instructions might be needed immediately. A single senior solicitor supervised by the two partners (remaining at their offices, but contactable by telephone) should have been sufficient. Indeed, for Stewarts it was.
38. The fifth point relates to excessive time being spent, and the transcribers' fee. I agree that the time recorded by Stewarts as work done on documents seems rather high, especially by comparison with Moore Barlow. Some allowance must be made for that.
39. As for the transcribers' fee, the question is not whether the respondents agreed to contribute or obtained a copy of the transcript (they did neither), but whether the costs incurred by the applicants were reasonable and proportionate. For my part, I found the transcript very useful in preparing my written judgment, and the applicants have made considerable (and helpful) use of it in making submissions on consequential matters. In the context of this long drawn-out and high-value dispute, it was not expensive, and I think it was both reasonable and proportionate for the applicants to incur it.
40. As I have noted on other occasions, summary assessment is not a line-by-line billing exercise, like detailed assessment. It involves instead a broad brush approach: see eg *Football Association Premier League v The Lord Chancellor* [2021] EWHC 1001 (QB), [20]. Taking account of the various points which I have made above, I consider that the applicants should be summarily assessed at a rather lower level than claimed. In the case of the first two applicants, the most important matters are the charging rates claimed, and the exclusion of partner attendance at the hearing. In relation to the third applicant, the main matters are that and the excessive hours charged.
41. Overall, I consider that the reasonable and proportionate costs for the first and second applicants amount to £2500 plus VAT of £500, so making a total of £3000. In relation to the third applicant, I consider that the reasonable and proportionate amount of costs for the third defendant to amount to £17,500 (no VAT).

*Conclusion on costs*

42. Accordingly, I will order that the respondents pay the applicants' costs of the application. For this purpose, the total costs are summarily assessed at £20,000 plus applicable VAT of £500. The costs are to be paid within 14 days, as to £3000 to the first and second applicants, and as to £17,500 to the third applicant.

**Recoupment from the estates**

*The law*

43. The next question is that of the recoupment of the respondents' costs (their own and those that they are ordered to pay) from the bankrupt estates. The applicants submit that these costs should not be a cost of the bankruptcies. The respondents oppose that, and submit that they should. The applicants rely on the decision of Richard Snowden QC (as he then was), sitting as a deputy judge of the High Court, in *Re Capitol Films Ltd* [2010] EWHC 3223 (Ch). That was the case of an administration.

44. The judge said:

“100. When an administrator leaves office, any expenses properly incurred by him in performing his functions in the administration are charged on the property of which he has custody or control and are to be paid in priority to any floating charge: see paragraph 99(3) of Schedule B1 and rule 2.67(1)(a) of the Insolvency Rules 1986. The liability of an administrator for an adverse costs order made against him, and his own costs of unsuccessful litigation brought by him as administrator, are both capable of being an administration expense in an appropriate case. However, by analogy with cases on liquidation expenses, I believe that the court plainly has a discretion to deprive an administrator of such right of recoupment: see e.g. Mond v. Hammond Suddards [2000] Ch 40 (CA), affirmed in Lewis v. IRC [2001] 2 BCLC 392 (CA).

101. The circumstances in which the court might exercise its discretion to deprive an office-holder of a right of recoupment have, in the case of liquidations, been said to include cases in which the office-holder has been guilty of misconduct (see Re Wilson Lovatt & Sons Ltd [1977] 1 All ER 274 at 286f-g); where he has made a “blunder” or serious mistake (see Re Silver Valley Mines (1882) 21 Ch D 381 at 385-386); or where it would be unjust for other reasons to permit such recoupment (see MC Bacon Ltd (No.2) [1990] BCLC 607 at 615-616). In the latter case, Millett J. held that it would plainly be unjust for a liquidator to recover his costs of an unsuccessful challenge to the validity of a floating charge from the very property which was subject to that charge in priority to the holder of the charge.

102. In the instant case, whilst I have not needed to decide whether the Administrators were guilty of misconduct, I have held that the approach of the Administrators to the application under paragraph 71 was irrational and misconceived. That conduct is, in my judgment, in the same category as the “blunder” or serious error discussed in the Silver Valley Mines case, and

justifies an order preventing the Administrators from recouping themselves from the assets of the Company.

45. On the other side, the respondents refer to the decision of Chief ICC Judge Briggs in *Re Nimat Halal Food Ltd* [2020] EWHC 734. That case too concerned the costs of an application made by the administrator of a company, and whether they should be an expense of the administration. The judge reviewed the authorities (including *Re Capitol Films Ltd* [2010] EWHC 3223 (Ch)), and said:

“13. It is apparent that the court has not spoken with one voice when it comes to nomenclature, but it has enunciated a principled approach. In my judgment the starting point is the Rule 14.9(2). An order should not ordinarily be made against an office holder personally. Something more is required. Something more relates to the conduct of the office holder. The degree of conduct deserving of a personal costs order will depend on the circumstances of each case. A mere mistake is unlikely to be sufficient. Acting in a neutral manner, on an appeal from a rejection of proof, is unlikely to be sufficient. Acting for a personal advantage in resisting an appeal is very likely to lead to a personal costs order. Such conduct would present a ‘special case’ and a ‘good reason’, and may be characterised as ‘irrational conduct’, or ‘unreasonable conduct’.”

46. The respondents also refer to the decision of the Court of Appeal in *Nutting v Khaliq* [2012] EWCA Civ 1726, for the proposition that the court may cap the extent of the prohibition. In that case the court dismissed an appeal from the decision at first instance, applying a 30% cap. The respondents, whilst contending that all their costs should be expenses of the bankruptcies, submit that, if the court is against them on that, then they should be able to claim 50% of their costs in the bankruptcies.
47. As it happens, the test of “misconduct” referred to in *Re Capitol Films Ltd* as derived from liquidation cases chimes with that applied in the case of private trusts. In such cases it has been said that the trustees will generally lose their right of indemnity against the trust fund if they commit “misconduct”: see *Turner v Hancock* (1882) 20 ChD 303, *Re Jones* [1897] 2 Ch 190, *Re Londonderry’s Settlement* [1964] Ch 594, 614, *Armitage v Nurse* [1998] Ch 241.
48. But, looking at it simply as a part of the law of insolvency, rather than the law of trusts, the statement of principle at paragraph 101 of the decision in *Re Capitol Films Ltd* seems to me entirely apt for the case of a trustee in bankruptcy operating in the insolvency regime. I do not think that Chief ICC Judge Briggs in *Re Nimat Halal Food Ltd* was saying anything different.

### *Submissions*

49. The applicants make the same five points in support of their submission that they made in relation to the question of the basis of assessment of costs. In summary, these are that:

(1) the first and second applicants represent about 60% of proving creditors;

(2) the respondent set up their own significant costs and expenses as a basis for objecting to the applicants' standing;

(3) the respondents took into account an illegitimate consideration, namely their desire to avoid at all costs taking part in litigation against the Brakes, and forgot their basic duty to creditors;

(4) the applicants provided clarification and offered to waive costs if the respondents were neutral on the application, but the respondents insisted on being neutral as between the creditors and the bankrupts;

(5) the respondents made other unmeritorious objections, including speculating that the Court of Appeal might make an order benefiting the estates anyway.

50. The respondents submit that for the reasons already put forward in resisting an order for costs at all, they did not act unreasonably in resisting the application made against them. In particular, they say it was reasonable for them "to decline to act without the reassurance of a Court order requiring them to do so", and therefore some fees would always have been spent by the applicants.

### *Discussion*

51. The problem for the respondent trustees in this case is that I have held that their decision to continue to resist intervention in the Cottage Eviction Proceedings was perverse, in the sense that no reasonable trustee in bankruptcy would have done so (at [55]). I have also held that in so acting they did not act in the interests of the creditors but instead sought to be neutral as between the creditors *and the bankrupts* (at [54]). In addition, I also impliedly criticised the trustees for lacking the ordinary robustness needed for officeholders (at [52]).

52. These are all factors that have featured in decisions to prohibit recoupment of costs out of the insolvent estate. I also take account of the fact that creditors representing 60% of the total debts are among the applicants, and to allow the trustees to recoup their costs will mean the position of those creditors is made significantly worse, even though they succeeded. That does not seem fair to me.

53. Moreover, even if the facts had been such that it were reasonable for the trustees to decline to act without the reassurance of a court order, it does not follow that the trustees should oppose the order tooth and nail, as these trustees have done. They could have remained neutral on the application, as the applicants invited them to do. Nor does the trustees' submission sit well with the fact that they are even now seeking permission to appeal.

### *Conclusion*

54. In my judgment, this is an obvious case where the respondent trustees should not be allowed to recoup their costs from the estates. I add only that I can see no principled basis from saying that, even if costs were not to be recouped in full, they should nevertheless be recovered *as to 50%*. Certainly, no reasoning is given as to how this

figure is arrived at. It is not for example a case where each side wins something substantial, and there is a basis for saying that the honours are shared.

### **Permission to appeal**

55. Lastly, I turn to consider the question of permission to appeal. Under the Civil Procedure Rules, rule 52.6, the court (whether the lower or the appellate) may not grant permission to appeal unless *either* there is a real prospect of a successful appeal *or* there is some other compelling reason why an appeal should be heard. The phrase ‘real prospect’ does not require a *probability* of success, but merely means ‘not unreal’: *Tanfern v Cameron-MacDonald* [2001] 1 WLR 1311, [21], CA. If the application passes that threshold test, however, the court is not *obliged* to give permission to appeal; instead it has a *discretion* to exercise.
56. By way of an initial observation, there is perhaps something rather incongruous in the respondents seeking permission to appeal at all. They are trustees in bankruptcy, officers of the court. The court has given a direction as to what they should do, and as a general proposition officers of the court should simply go ahead and do it, and not appeal. If they had remained neutral during the application for a direction, they could not have been criticised for doing so, and (as the applicants confirmed in correspondence) costs would not have been sought against them.
57. The respondent’s position is the more difficult to understand, since, at several points in their submissions, they emphasised that they would implement the direction of the court, and it was the reassurance of that direction which they sought. In the law of private trusts, indeed, an appeal by trustees who have been given a direction is an irregularity: *Re Londonderry’s Settlement* [1965] Ch 918, 930, 931. A trustee in bankruptcy is not altogether the same as a private trustee, but it seems to me that there is a strong analogy in this respect.

### *Four grounds of appeal*

58. The respondents advance four grounds of appeal. These may be summarised as follows:
- (1). The court was wrong to conclude that the first and second applicants had standing, as the outstanding costs and remuneration due to the respondents would overwhelm the available resources of the estates, and there would be nothing for the creditors. So it was not in their interests to pursue the application.
  - (2) The court was wrong not to identify the relevant decision as that not to accept the offer in the applicants’ letter of 3 November 2022.
  - (3) The court was wrong to hold that developments occurring after the application was issued could provide the jurisdictional basis to found the application itself.
  - (4) The court was wrong to conclude that the trustees had acted perversely.

### *The first ground*

59. As to the first ground, I am not aware of any authority for the proposition that the trustees' own claim to remuneration and costs is capable of denying a creditor standing to challenge their decisions, and the respondents cite none. On the face of it, the proposition seems counterintuitive. The respondents say that the first and second applicants must have been to advance the interests of the third applicant, or simply to thwart the Brakes, and that there was ample evidence of this before the court.
60. However, that is not what I decided. In my judgment, the first and second applicants were and are pursuing their interests as creditors, and that was a conclusion open to me on the evidence. There is no real prospect of the Court of Appeal coming to the conclusion that my own decision on this point was not open to me. As Baker LJ (with whom Lewison and Asplin LJJ agreed) said in *Brake v Guy* [2022] EWCA Civ 235,

“51. It is of course well established that the assessment of evidence, and the apportionment of weight to be attached to each piece of evidence, are matters for the judge at first instance. An appeal court will not interfere with findings of fact by trial judges unless compelled to do so: *Fage UK Ltd v Chobani UL Ltd* [2014] EWCA Civ 5, *Re Sprintroom Ltd* [2019] EWCA Civ 932. This applies ‘not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them’: per Lewison LJ in *Fage* at [114]. In making his decisions ‘the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping”: *ibid* at [115].”

*The second and the third grounds*

61. The respondents say that the second and the third grounds of appeal are related but distinct. If they are distinct, then I think that it is a distinction without a difference for present purposes. Accordingly, I take them together. I am not aware of any authority for the proposition that the court may not take into account events since the application under section 303 was issued. This is after all an opportunity for the court to take stock of the situation as it is, and to direct its officeholder as to what ought to happen next in the insolvency to which it relates. By the time the court hears the application, events may have changed again. It is not like a court deciding whether a cause of action such as breach of contract or breach of trust had vested at the date of the issuing of the claim.
62. The respondents cite the decision of Mr Registrar Baister (as he then was) in *Osborn v Cole* [1999] BPIR 251, 255. In that case, the applicant, who was the bankrupt in the case, sought an order from the court under section 303 to direct the official receiver to assign to her a full cause of action against a third party. The court refused the order. The registrar said (at 255):

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



But there is nothing that I can see that the registrar said to indicate that, in considering its decision, the court can only take into account matters which had occurred prior to the issue of the application.

63. Again, it is rather curious that, in oral argument before me, the respondent's counsel made clear that she *agreed* that the court ought to look at events that follow the issue of the application. For example, on page 28 of the transcript counsel referred to the applicants' counsel's submission and said:

“His application is that we acted perversely in failing to accept the 3 November offer. I fully understand that matters have moved on and the court is not going to shut its eyes to them altogether ... ”

64. On page 29 she said:

“I, of course, understand that the court cannot close its eyes to what had happened since then but there is a jurisdictional question as to which act is it that is alleged to have been perverse.”

And on page 41 she said:

“ ... it would be wrong for the court to simply look at the four corners of this letter and not to consider the wider circumstances of the case, including the matters that I identified in my skeleton, when considering whether our refusal to accept the offer was perverse or not.”

65. In these circumstances, I cannot accept that there is a real prospect that the Court of Appeal would take a different view from me.

#### *The fourth ground*

66. As to the fourth ground, the finding of perversity in decision-making, that is an evaluative assessment of the evidence before the court. As pointed out earlier, it is not simply the findings of fact, but also the judge's evaluation of those findings and the inferences to be drawn from them, that the Court of Appeal is reluctant to interfere with. Every decision under section 303 is necessarily fact sensitive. I do not see a real prospect of the appellate court interfering with my assessment of the evidence and facts in this case.

#### *Conclusion*

67. In my judgment, there is no real prospect of success on any of the four grounds, No other compelling reason was advanced for an appeal, and I can see none. Accordingly, I must refuse permission to appeal.