Neutral Citation Number: [2024] EWHC 101 (Ch)

Case No: PT-2023-BRS-000017

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: 25 January 2024

Before :

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

- -

Between :

Chedington Events Ltd	**Claimant**
- and -	
(1) Nihal Mohamed Brake	**Defendants**
(2) Andrew Young Brake	
- and -	
Diana Rebecca Cawley	**Third Party**

- -
- -

William Day (instructed by **Stewarts Law LLP**) for the **Claimant**
The First Defendant in person and for the **Second Defendant**
The Third Party in person

Hearing dates: 26-27 September 2023

- -

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 revised version as handed down may be treated as authentic.

……

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 25 January 2024.

HHJ Paul Matthews :

Introduction

1. This is my judgment on the further consideration of an interim third party debt order ("TPDO") made by me as long ago as 26 July 2022. The interim order was made on the application of the claimant to seek payment from the third party of a debt alleged to be owed to the defendants by the third party. The liability of the defendants to the claimant arises from a costs order made in favour of the claimant and against the defendants by me on 6 June 2022. That order was originally in the sum of £800,000, later varied to £700,000. It followed the claimant's success at the trial of this claim for possession of a valuable rural property known as West Axnoller Farm, in Dorset.

Background

2. The background to the claim, and indeed to much of the rest of the wide-ranging, even sprawling, litigation between the parties (which in significant respects has not yet concluded), is to be found in my judgment on liability in the claim: [2022] EWHC 365 (Ch). An application for permission to appeal against that decision was refused by the Court of Appeal on 7 April 2022. The defendants, together with the first defendant's son Tom D'Arcy, who lived with them (and whom, without intending any disrespect, I shall hereafter call "Tom"), left the property on 25 April 2022. I understand that no part of the costs order has so far been paid.

Procedure

3. The draft liability judgment had been circulated confidentially to the parties on 18 February 2022, and formally handed down on 25 February 2022. A freezing injunction was applied for and granted pre-emptively on 28 February 2022 against the defendants in support of the costs order which at that stage had not yet been made. Pursuant to the terms of the freezing injunction the defendants made an affidavit dated 19 May 2022. It exhibited bank statements which revealed payments in February 2022 to a third party, whose details were given only as "Diana Rebecca", of £20,000 (from the first defendant) and £5000 (from Tom).

4. By letter dated 24 May 2022, the claimant asked for details of the recipient, so that she could be notified with the terms of the freezing order. By email dated 25 May 2022, the first defendant responded to the enquiry. She gave the name of the recipient of these payments (in two different places in the email) as "Diana Rebecca *Cauley*" (rather than *Cawley*). She did not however give the recipient's address or any other contact details, although these had been requested for the purposes of service. Not only did she not spell correctly the name of the recipient (whom she had known for nearly two decades), but also she did not disclose that she was the second defendant's sister. In cross-examination she accepted – indeed, asserted – that she made the spelling mistake deliberately in an attempt to prevent, or at least delay, the claimant from finding out who the recipient really was and where she lived.

5. Further enquiries led the claimant to apply on 23 June 2022 for the interim TPDO against Mrs Cawley. The claimant's evidence was that the third party owed the second defendant the sum of £25,000. As I said above, I made the interim order on 26 July 2022. The further consideration of the order was originally listed for 15 September 2022. But the application was stayed once the second defendant was entered into her moratorium at the end of August 2022. After that moratorium came to an end in July 2023, it was ultimately listed for hearing on 26 and 27 September 2023.

The defendants' preliminary point

6. Shortly before that hearing, the defendants sought to argue a preliminary point. This was that the TPDO application should be dismissed because the claimant's own case was that the relevant debt was owed *jointly* to the defendants and the first defendant's son Tom. But Tom, unlike the defendants, was (and is) not a judgment debtor. Although originally a party to the possession claim, he was removed at an early stage. In their written submission, the defendants said that, for a TPDO to take effect, the debt had to be owed to the judgment debtor *alone*. They relied on the decision of the Supreme Court in *Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2018] AC 690, [24], where Lord Clarke said that the words "any debt due or accruing due to the judgment debtor from the third party" in CPR rule 72.2(1) referred to "a debt owed solely to the judgment debtor".

7. The defendants also referred me to the decision of the Court of Appeal in *Ferrera v Hardy* [2015] EWCA Civ 1202. In that case Mr Hardy was a judgment creditor of Mr Ferrera, who was his judgment debtor. Mr Hardy obtained an interim TPDO against Liverpool City Council, in respect of a debt alleged to be owed by the council to the judgment debtor. That interim order was set aside in part by the district judge. Appeals by Mr Hardy to the High Court and the Court of Appeal both failed. The debt allegedly owed by the council to Mr Ferrera consisted of housing benefit, to which certain tenants were entitled, but which was to be paid to him as agent for the (foreign resident) landlords of the property where the tenants lived. The Court of Appeal held that, in paying the housing benefit over to the landlord's agent, the council was discharging the debt of the *tenants* to their landlords, and not discharging any debt of the *council* owed to the landlord's agent. The money so paid was therefore not a debt within CPR rule 72.2(1).

8. The defendants' preliminary issue was argued on 26 September 2023, when I resolved it in the claimant's favour. I held that it was impossible for me to decide whether or not the relevant debt was owed to the defendants and Tom jointly without hearing the evidence and making factual findings. I also dealt with objections by the defendants to some of the evidence filed by the claimant. As a result, I struck out some passages in the third witness statement of Harry Spendlove (the claimant's solicitor), and directed that others be treated as part of the claimant's submissions. I reserved the costs of the hearing.

Hearing of further consideration

Witnesses

9. On the following day, 27 September 2023, I dealt with the further consideration of the interim order. Three witnesses were tendered for cross-examination on their witness statements: Harry Spendlove (for the claimant), the first defendant (for the defendants), and the third party herself. The first of these was professional and knowledgeable, and his evidence was transparently honest. The third party, who is the headteacher of a local school, came across as someone not at all versed in business, who accepted uncritically what the first defendant told her about their affairs, relied on her to tell her what to do and to draft documents for her, and would do whatever she could to assist and support her own family (including the defendants). Her evidence changed in the course of cross examination. I am sorry to have to say that I am satisfied that in certain respects at least she did not tell me the truth.

10. I have heard the first defendant give evidence before in other matters between the same or similar parties. However, I judge her solely on the evidence before me in this case. She was a fluent but highly argumentative witness, giving over-lengthy answers. She insisted on asking counsel questions, though as an experienced litigant in person she knows very well that this is not permitted. In my view she was trying to use up the time set aside for her cross-examination so that it would be less effective against her. In giving evidence, she exploited every ambiguity in the documents, and interpreted everything to her own advantage. As with the third party, I think that in certain respects she did not tell me the truth, and I am not prepared to accept what she said without independent corroboration.

11. There is a further point that I should mention. The first defendant refused, point blank, to answer counsel for the claimant's question as to where she lived. This is a long-running sore: see *eg Axnoller Events Ltd v Brake* [2022] EWHC 1162 (Ch), [14]-[27]. The first defendant's witness statement made in this application gives her address as one in London. So far as relevant, CPR rule 6.23 provides:

> "(1) Unless the court orders otherwise, a party to proceedings must give an address at which that party may be served with documents relating to those proceedings. The address must include a full postcode.
>
> (2) Except where any other rule, practice direction or order makes different provision, a party's address for service must be –
>
> (a) the business address within the United Kingdom of a solicitor acting for the party to be served; or
>
> […]
>
> (c) where there is no solicitor acting for the party –
>
> (i) an address within the United Kingdom at which the party resides or carries on business;
>
> […]"

12. The first defendant said that the London address she had given to the court was an address "where I carry on business". Counsel sensibly did not waste time at the hearing in pressing the first defendant on this. However, for my part, as at present advised, I consider that the words "carries on business" in CPR rule 6.23(2)(c)(i) refer to a business of which the litigant is an owner or part owner, and do not refer to the place of work of an employee or consultant. An employee or consultant has no control over the post received at the address, whereas an owner does. There was no evidence that the first defendant owns (or part owns) the business carried on at the London address.

13. Rule 6.23 may be compared with paragraph 18.1(2) of Practice Direction 32, in relation to a person making a witness statement in "a professional, business or other occupational capacity". This relevantly says:

> "The witness statement ... should also state:
>
> […]
>
> (2) his place of residence or, if he is making the statement in his professional, business or other occupational capacity, the address at which he works, the position he holds and the name of his firm or employer,
>
> […]"

14. Even if the first defendant were entitled to rely on this provision, she would be obliged to state the position she held and the name of the firm or employer, which she has not done. But the matter was not argued out before me, and, having expressed a provisional view, I simply leave it over to another occasion. In any case, even if I were wrong about the meaning of "carries on business", the *second* defendant plainly does not carry on business at that London address, and so, unless there is some other answer to the point, he at least must give his residential address.

Evidence and inferences

15. This is not the trial of a Part 7 claim, and there has been no disclosure ordered. I note that the claimant, having received copies of certain limited documents from the defendants and the third party which the latter wished to rely on in resisting this application, sought voluntary disclosure of further documents from them, for example, documents in the chain preceding or following those disclosed. But no such disclosure was given. That is the right of the parties concerned. Nevertheless, I may take that into account in considering what to make of the documents which the parties have chosen to place before me.

16. In particular, in *Royal Mail Group Ltd v Efobi* [2021] 1 WLR 3893, SC, Lord Leggatt (with whom all the other members of the court agreed) said:

> "41. … Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what

> relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole … "

Facts found

The transfers in February 2022

17. On the basis of the witness statement evidence and the cross examinations carried out, I find the following facts. As I have said, the judgment in the possession claim had been sent out in draft to the parties on 18 February 2022. But it was not formally handed down and made public until 25 February 2022. On 21 February, however, the first defendant transferred £20,000 (approximately a half of her remaining bank balance) to the third party, with the reference "REF 12 months Rent from N Brake" On 22 February Tom transferred £5,000 (again, approximately a half of his remaining bank balance) to the third party, with the reference "REF RENT FROM T D'Arcy". The claimant's case is that (1) Tom was a nominee for his mother and made the transfer at her direction, and (2) the total sum of £25,000 was held by the third party to the order of the defendants, and that this is a debt owed to the judgment creditors for the purposes of CPR rule 72.2(1).

The new barn at Parshalls Farm

18. In January 2021, the third party bought Parshalls Farm from Somerset County Council. This is a residential property where she lives with her partner, Paul Maple. The transfer contained a restrictive covenant requiring her not to use the land at the property (other than the house and its garden) for residential purposes. In April 2021 she made an application for planning permission in respect of the construction of a new barn (stated not to contain residential accommodation) at the property. Planning permission for this barn was given in May 2021. However, at a very early stage (the third party could not be more precise than that), she decided that she would nonetheless incorporate a residential holiday let in the barn construction. In cross-examination she accepted that this was a breach of both the restrictive covenant and the planning permission, but said she intended to apply for retrospective permission. The barn, including residential unit, was completed in about May 2023, later than anticipated. It included a single "bedroom" (actually a space on a mezzanine floor, not physically separated from the living area below). As at the date of the hearing, the evidence was that no application for retrospective permission had been made.

19. In cross-examination, the third party did not accept that she was taking a financial risk by acting in this way. But she did accept that "If I get caught out, I will take the kitchen and bathroom out". For present purposes, I put on one side the poor example being thus set by a school headteacher, who should know better than blatantly to ignore her legal obligations, both private and public. Given the wasted costs involved in having to remove these units that have been

bought and installed, and the consequent inability to house a tenant to whom a letting may have been made, this was on any view a significant financial risk, and I do not understand why the third party thought that it was not.

20. It was suggested to her that a tenant paying rent upfront in such a situation would also be taking a significant financial risk. The third party simply said that the situation would not arise. It was "hypothetical and not a situation that I am familiar with at all". However, in a letter dated 26 May 2022 in response to an enquiry from the claimant's solicitors dated 24 May about the payments made to the third party by the first defendant and Tom, the first defendant said that the payments were "1 year's rent paid upfront at £2000 PCM so that [the third party] could expedite the build and we could move in sooner rather than later". This was confirmed by a letter from the third party to the claimant's solicitors dated 2 June 2022. On the basis of her evidence to the court, I do not understand how the third party could say that this was "not a situation that I am familiar with at all". On the contrary, *if the first defendant and the third party were telling the truth*, that would exactly be the situation.

21. Moreover, in her written witness statement (with which the first defendant in her own witness statement agreed), the third party said:

> "8. In or around the third week in February 2022, Alo Andy and Tom approached us and offered to pay 'rent' in advance in order that Paul and I could move the build along which would enable them to use the holiday let until more permanent arrangements could be put in place or they got the Cottage back.
>
> 9. Paul and I agreed. As family, we desperately wanted to help Andy, Alo and Tom.
>
> 10. On 21 February 2022, Alo transferred £20,000 to me, and on 22 February 2022, Tom transferred £5000 to me."

22. The first defendant voluntarily disclosed a few texts passing between her and the third party, but these do not go so far as the statements in the witness statement. These were sent on about 19th February 2022. In one there is a suggestion from the first defendant that "We could rent the holiday let". In another, there is the response from the third party that

> "The roof goes on in three weeks. I don't know how much time you've got, but happy to bunk up until it is ready! We are happy to help."

In cross-examination, the first defendant insisted that these were the *only* relevant texts, and that she was unwilling to disclose others passing between her and the third party, because in her view they were irrelevant.

23. In cross-examination, counsel for the claimant put to the third party that her evidence was that the first defendant and Tom

> "paid you a year's worth of advance rent for a property which had been built in breach of planning permission and in breach of restrictive

> covenants, and I suggest to you that, on your evidence, the Brakes were taking a very significant risk by putting that money into the project".

The third party responded, "yes, it was a risk that I was prepared to go with". So now the third party was saying that she not only recognised the significant risk, but indeed accepted it. That is the opposite of what she had said a few moments before.

24. Yet, it was simply impossible for the defendants and Tom to occupy the new unit in April 2022. First of all, it was not big enough. There was space for just one double bed, on the (unseparated) mezzanine floor, and a living area below. Indeed, the third party agreed in cross-examination that the unit would be not be big enough for three people long-term. So Tom would have to stay in the house, with the third party, her partner, and her own child. Secondly, it was not finished. In fact, it would not be finished for well over a year after that, that is, *after* any one year lease had expired. Indeed, even once the residential unit was finished, the defendants and Tom did not move in. The third party's evidence in cross-examination was merely that they "have been using it off and on since then", but also that it has also been advertised for rent to unconnected parties as a holiday let at £500 per week. Indeed, she said at the hearing that it had been let to such unconnected parties on two occasions.

25. Subsequently, in answer to a question whether the defendants and Tom had paid to be in the unit, she replied

> "No they haven't paid to be there."

She also asserted that

> "There is no tenancy. There was no tenancy, there was no leases, there was no loans. It was a gift of money that we arranged for the purpose and I have spent money on this, money on the living expenses, way, way beyond their gift to me."

26. I also bear in mind the evidence of rental values in that part of the country at that time, provided by Mr Spendlove in his third witness statement (dated 8 September 2023), and unchallenged by the defendants or third party. At the time of the statement the online portal Rightmove was advertising 2 one-bedroom properties for £600 and £675 per month, seven two bedroom properties at £600 to £900 per month, and four three-bedroom properties at £975 to £1100 per month, all within five miles of the third party's village, Donyatt. The evidence of the third party herself was that she let her small one bedroom flat in Taunton (a much bigger urban environment) for £1000 per month longterm, and that she was asking £500 per week for the residential unit as a fully furnished holiday let (*ie* in short lets of a few days at a time, which are self-evidently more expensive than long term lets).

The £25,000 payment: findings

27. In my judgment, any idea of the defendants and Tom paying £25,000 for a year's rent (more than £2000 per month) in advance for the "use" of the unfinished

unit, which as a single bedroom unit in any event was not big enough for them, was plainly absurd. That amount of money would have bought them almost two years' rent of the most expensive three bedroomed house in the same area advertised on Rightmove. Indeed, from June to December 2022 they (together with Tom) stayed in the house at Leigh-on-Mendip (which is about 35 miles away from Donyatt, and on the other side of Somerset, near Bath) at a rent of more than £2000 per month, which tends to show the level of property which they really needed.

28. I find that the sum of £25,000 was not paid over as rent, and that first the first defendant, and then the third party, told a false story in correspondence to the claimant's solicitors about the payment of rent in advance. Presumably they did this so that the money could be said to have been paid for a consideration, and therefore was not owed back. I have no doubt that the first defendant proposed the story, and that the third party acquiesced. But that is all it was, a story. In cross-examination, the first defendant admitted that "The rent part of it is a notional label, if you like, that we put on it". Nor was it simply an out and out gift, as the third party asserted in cross-examination.

29. The reality, I find, was that the money paid was to be held by the third party to the order of the defendants. This could be used, for example, to pay rent for another property, so that the address of that other property would not become known to the claimant. Or, if the claimant agreed to payments of rent out of the defendants' remaining resources, it could be used for other matters, again without the claimant's knowing. In fact, the third party paid the rent for the defendants on two properties successively, details of which were withheld from the claimant until the claimant's solicitors diligently uncovered them. Notwithstanding this, on 21 April 2022 the first defendant in her evidence sought an increase in the living allowance under the freezing injunction, allegedly in order "to cover our need to pay rent … "

Payments out by the third party

30. In fact, the very next day, Friday 22 April 2022, the third party paid £1,723.81 to AirBnB for the defendants and Tom to stay temporarily at 9 St Peter's Close, Ilminster. As I have said, on Monday, 25 April 2022, the defendants and Tom gave up possession of the house at West Axnoller Farm. On 30 April 2022, the third party paid a further £844 to the owners of 9 St Peter's Close (a Mr and Mrs Bennett). On 9 May 2022, she paid £414.23 to Lettings R Us to obtain a lease for the defendants at 3 Church Walk, Leigh on Mendip. On 7 June 2022, she paid a further £12,426.92 as rent for 3 Church Walk from 8 June to 8 December 2022. She also made two payments of £569 for appeal court fees, one payment of £340 for the defendants' internet connection at 3 Church Walk, and a payment of £358 to a removals firm in June 2022. These payments amount to £17,244.96, all made before the interim order which I granted on 26 July 2022. Perhaps I am old-fashioned, but I think it was dishonest of the first defendant to seek an increase in her living allowance under the freezing injunction to cover an expense which she knew (but the claimant and the court did not) was being covered by the use of other funds in the hands of the third party.

31. In a letter dated 2 June 2022 to the claimant's solicitors, the third party said:

> "Tom, Andy and Alo have not instructed me to make any payments."

I simply do not accept this. The third party paid the sums stated in the previous paragraph. She did not do this by chance, or out of caprice. She would not have known who to pay, or how much to pay, or when to pay, unless the defendants had told her. What the third party says in the letter is palpably untrue, and I am afraid that she knew it.

32. The third party's evidence is that the upfront "rent" of £25,000 was largely spent in getting the barn ready for occupation by the defendants, and that she herself funded the payments of rent for them out of her own resources. As to the works on the barn, the third party's witness statement says:

> "11. … Paul and I spent over £22,000 trying our best to get it ready for [the defendants] to move in. I have previously exhibited the bills that I have paid, and they are exhibited with Mr Spendlove's statement HS2 pages 32-46. The only difference is that the money which is represented by an estimate for a boiler oil tank has now also been spent, bringing the total spent to over £22,000."

The invoices

33. I have looked at the invoices which the third party says that she paid, and which are exhibited to the second witness statement of Harry Spendlove. These were apparently sent by her to Stewarts on 2 June 2022 in response to a letter from them dated 31 May 2022. Self-evidently, they include invoices only from before 2 June 2022. They include an invoice from a company called Strukta (£295), which contains no information connecting it with the third party, or with her property. More importantly, it is dated (and apparently was paid) on 3 December 2021, which is well before the payments of £25,000 to the third party by the defendants and Tom. There is a further till receipt for payment for diesel fuel from Tesco (£91.33), but this is undated, and it is not stated who incurred it. It could have been anybody, at any time.

34. They also include two invoices, one from Gale Plastic Products (£309.41) and one from LAS Scaffolding (£1,300), addressed, not to the third party, but to Paul Maple, her partner, without any information connecting them to the third party or her property. Mr Maple gave evidence before me in the trial of the Possession claim, when he was described as a handyman or maintenance man who had done some work for the claimant in that case. In his witness statement dated 14 March 2021, he described himself "by trade" as "a DIY maintenance man". There is nothing on these invoices to indicate whether these are expenses incurred by Mr Maple in his own self-employed maintenance business, or simply incurred by him on his own account in working on the barn (or indeed the house).

35. A further invoice, from Daniel Palmer Electrical (£1,326.89), is addressed to the third party and Mr Maple jointly, and appears to be in respect of a lighting system for a "stable" (at an unstated address). It is difficult to see what that has

to do with the construction of a residential unit for the defendants' use. There are three statements addressed to the third party from Jewson, dated 28 February 2022 (£750.08), 31 March 2022 (£1,798.01), and 30 April 2022 (£1,693.81). They are builders' merchants (now owned by the French conglomerate Saint Gobain), but the statements do not set out details of the items which have been purchased, and it is therefore impossible to know whether they had anything to do with the construction of the residential unit in the barn, or with some other aspect of the third party's property.

36. So far as concerns the third party's financial position, her evidence in cross-examination was that she was paid about £3,000 per month net (that is, what actually was paid into her bank account), and that she owned a small flat in Taunton, which was rented out for £1,000 per month gross. Although she exhibited bank statements evidencing the payments of rent and other expenses referred to above, the statements were redacted, so that the balances on the different accounts were not visible. In cross-examination, she was asked about the balances on her accounts, but said that she did not remember. It would have been easy for her to provide that information, but she did not do so.

37. The first defendant, both in "re-examination" (where, after her cross-examination, she had the opportunity to give further information and to refer the court back to other documents) and in submissions, made the point that none of these invoices was put to the third party in cross-examination, and submitted that "therefore that evidence stands". In order to deal with that point, I need first to refer to the evidence of Mr Spendlove, for the claimant. In his third witness statement, dated 8 September 2023, Mr Spendlove dealt with the invoices at [14]-[15]. There he said that, as evidence of work done on the residential unit of the barn, they were deficient in a number of ways (some of which I have already pointed out). There can be no doubt that by doing this he challenged the third party's witness statement evidence (which stands as her evidence in chief). He summarised the position as follows:

> "16. In summary, it is not clear what payments have actually been made, by whom and to what they relate (whether the barn or unrelated projects). All that is clear is that the [defendants] transferred the Payment to [the third party] and she has then, in effect been repaying it over time through payment of the [defendants'] living expenses".

38. Then, when the first defendant cross-examined Mr Spendlove, she took him to bank statements taken from the third party's Santander bank account, and in particular to entries apparently showing payment of various of the invoices. Mr Spendlove, who had not seen the bank statements when he made his witness statement, accepted

> "what these statements show on their face, which is the money coming in and various payments going out".

The payments out included payments to "SaintGobainBuil" (trading as Jewson), of £750.08, £1,798.01, and £1,693.81, Daniel Palmer (£1,326.89), LAS Scaffolding (£1,300), Drainage Superstore (£3,300) and Colourclad

(£3,160.13). These are some (but not all) of the sums shown on the invoices disclosed by the third party to the claimant on 2 June 2022.

39. But there is also an entry for 25 March 2022 in the sum of £964, with the explanation "BILL PAYMENT TO MR PAUL MAPLE REFERENCE shed". On its face that does not refer to the barn, and the third party disclosed no invoice in relation to it. The redacted bank statements for June onwards show further payments out of the third party's bank account thereafter, which may be for building materials and building parts, but of course there are no invoices in relation to them (and in any event it does not matter once the interim order was made on 26 July 2022). Accordingly, there are insufficient details to connect them to any work on the residential unit at the barn.

40. But the fact remains that these invoices were not put to the third party in cross-examination. This leads the first defendant to submit that the evidence given by the third party as to payments out for building the holiday let cannot now be impeached. The rule which she claims to invoke is sometimes known as the rule in *Browne v Dunn* (1894) 6 R 67, an old decision of the House of Lords, reported only in an obscure set of law reports. It was examined in some detail by the Court of Appeal in *Markem Corporation v Zipher Ltd* [2005] RPC 31, [51]-[61].

41. However, as Morgan J pointed out in *Rahme v Smith & Williamson Trust Corporation Ltd* [2009] EWHC 911 (Ch), where a Mr Haddad was not challenged in cross-examination on certain evidence he gave in chief,

> "90. … I will therefore proceed on the basis that Mr Haddad's evidence was honestly given. If it was honestly given, then so far as Mr Haddad's own observations of events are concerned, there is no room for me to hold that he was mistaken although, as I have earlier pointed out, it does not necessarily follow that I am obliged to accept all the matters of detail spoken to by Mr Haddad, on which he might not have been reliable. … "

So a lack of challenge prevents the court finding a deliberate lie, but not necessarily a mistake.

42. However, the matter goes further than this. What Lord Hershell LC actually said in *Browne v Dunn* was that

> "All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been *no suggestion whatever in the course of the case that his story is not accepted*" (emphasis supplied).

This extends backwards the temporal reach of the challenge that may be made to the credibility of a witness. In today's litigation world, where evidence in chief is normally given in written form in advance of the trial, and skeleton arguments disclose lines of attack, this is significant.

43. At all events, this led Lord Neuberger and Lord Mance, giving the advice of the Board of the Judicial Committee of the Privy Council in *Chen v Ng* [2017] UKPC 27, to say:

> "53. … In other words, where it is not made clear during (or before) a trial that the evidence, or a significant aspect of the evidence, of a witness (especially if he is a party in the proceedings) is challenged as inaccurate, it is not appropriate, at least in the absence of further relevant facts, for the evidence then to be challenged in closing speeches or in the subsequent judgment …
>
> 54. The Judge's rejection of Mr Ng's evidence, and his reasons for rejecting that evidence, do not infringe this general rule, because it was clear from the inception of the instant proceedings, and throughout the trial that Mr Ng's evidence as to the basis on which the Shares were transferred in October 2011 was rejected by Madam Chen."

44. Most recently, there is the decision in *Griffiths v TUI UK Ltd* [2023] 3 WLR 1204. This concerned the evidence of an expert witness, rather than a witness of fact. The Supreme Court extended the rule in *Browne v Dunn* to expert evidence, in these words of Lord Hodge DPSC (with whom the other judges agreed):

> "61. From this review of the case law it is clear that there is a long-established rule as stated in *Phipson* at para 12.12 with which practising barristers would be familiar … There are also circumstances in which the rule may not apply. Several come to mind. First, the matter to which the challenge is directed is collateral or insignificant and fairness to the witness does not require there to be an opportunity to answer or explain. …
>
> 62. Secondly, the evidence of fact may be manifestly incredible, and an opportunity to explain on cross-examination would make no difference. …
>
> 63. Thirdly, there may be a bold assertion of opinion in an expert's report without any reasoning to support it, … a bare ipse dixit. But reasoning which appears inadequate and is open to criticism for that reason is not the same as a bare ipse dixit.
>
> 64. Fourthly, there may be an obvious mistake on the face of an expert report. …
>
> […]
>
> 66. Fifthly, the witnesses' evidence of the facts may be contrary to the basis on which the expert expressed his or her view in the expert report. …
>
> 67. Sixthly, … an expert has been given a sufficient opportunity to respond to criticism of, or otherwise clarify his or her report. …
>
> 68. Seventhly, a failure to comply with the requirements of CPR PD 35 may be a further exception …

> 69. Because the rule is a flexible one, there will also be circumstances where in the course of a cross-examination counsel omits to put a relevant matter to a witness and that does not prevent him or her from leading evidence on that matter from a witness thereafter. In some cases, the only fair response by the court faced with such a circumstance would be to allow the recall of the witness to address the matter. In other cases, it may be sufficient for the judge when considering what weight to attach to the evidence of the latter witness to bear in mind that the former witness had not been given the opportunity to comment on that evidence. The failure to cross-examine on a matter in such circumstances does not put the trial judge 'into a straitjacket, dictating what evidence must be accepted and what must be rejected' … This is not because the rule does not apply to a trial judge when making findings of fact, but because, as a rule of fairness, it is not an inflexible one and a more nuanced judgment is called for. In any event, those circumstances, involving the substantive cross-examination of the witness, are far removed from the circumstances of a case such as this in which the opposing party did not require the witness to attend for cross-examination."

45. So, the first defendant is not right to say simply that, where the witness's evidence is not challenged *in cross-examination*, "the evidence stands". The rule is that the court cannot reject it either as a deliberate lie or for other substantial reason, *unless* it was clear that the evidence in question was challenged, but the challenge does not necessarily have to come in cross-examination. It could come at an earlier stage. And, even where there has been no challenge at all, in an appropriate case the judge can still hold that the evidence was mistaken, in whole or in part, for example as an honest confusion of thought, or confabulation. The judge is not therefore bound to accept the evidence as true.

46. In the present case, as shown above, Mr Spendlove did not challenge the simple facts of the several payments out of the third party's bank account shown in the statements. But there is no reason to suppose that they did not happen. On the other hand, the evidence in chief of Mr Spendlove (and indeed his evidence in his cross-examination) *did* challenge the third party's evidence that she had spent most of the £25,000 paid to her by the first defendant and Tom on building the residential unit in the barn. The first defendant and the third party could not have been under any illusions as to that. Indeed, at one stage in her cross-examination of Mr Spendlove, the first defendant said as much (transcript page 30, lines 19-21).

47. Moreover, it was put to the third party by the claimant's counsel that the first defendant's statement in her letter to the claimant of 25 May 2022 that the defendants would pay her £25,000 "so that she could expedite the build" of the residential unit in the barn, "and we could move in sooner rather than later", was untrue (transcript, page 81). The third party denied this, and said that she was given the money to "be able to race things along a bit faster so that we could get the build finished quicker". So in fact the third party dealt with the allegation that the statement that payment of the £25,000 was for building the residential unit was false by simply saying that, indeed, that was what it was for.

48. So, the position is that the connection alleged to exist between the invoices produced and the work on the residential unit *was* challenged, both in the evidence in chief of Mr Spendlove (served in advance of the hearing), and in cross-examination at the hearing. One way or another, the third party had the opportunity to deal with the challenge. In any event, for the purposes of the rule, I need not go so far as to find that the third party deliberately lied in making the allegation (though I think she did). It is sufficient that she is mistaken about it. I am therefore satisfied that I am not bound by the rule in *Browne v Dunn* to accept the third party's evidence that the invoices admittedly paid by the third party were paid (a) out of the £25,000 from the first defendant and Tom, and (b) for the purpose of building the residential unit in the barn.

49. I am asked to accept (i) that the third party used most of the £25,000 to pay for work and materials connected with the construction of the residential unit in the barn, although none of the invoices is expressly associated with that work, some cannot be related to it, some are addressed to Mr Maple, who carried on his own business, and some have no associated payment shown in the bank statements, and also (ii) that the third party paid additional expenses for the defendants amounting to £17,245 in a period of two months out of her own resources, although these resources are stated only to amount to a net salary of £3,000 per month, and a gross rent of £1,000 per month.

50. On the material which the parties have chosen to place before me, I am not prepared to accept that a person with that level of income could or would finance such payments for the benefit of others out of her own resources, whilst she also had in her bank account £25,000 paid to her by the very same persons for whose benefit she was paying these expenses. It seems to me far more likely, and I find, despite the third party's evidence that she paid these expenses out of her own money (transcript, page 63, lines 6-13), that she paid the expenses out of the £25,000, at the defendants' direction. I also find that such incremental building costs (whether for the residential unit in the barn or otherwise) as she may have incurred were financed in some other way, perhaps by Mr Maple, perhaps by the use of their own savings. It was after all her property. The third party gave no details of any savings that she had (or did not have) at that time, though she could easily have done so. Nor is there any evidence as to Mr Maple's financial position or savings, or how far he contributed to the barn project beyond supplying his own labour, although he could have provided that.

The position of Tom

51. As I have already said, the claimant's case is that Tom is simply a nominee for his mother, the first defendant, and that the funds which he transferred to the third party were transferred at her direction, and belonged beneficially to the defendants. The defendants and the third party deny this. In cross-examination, the third party said that Tom took a part in the discussion and made his own decision to contribute to the sums transferred to her in February 2022. The first defendant accepted that she and the second defendant had paid a total of £27,800 to Tom in several transfers during April 2021, but denied that this was to protect the defendants' funds from the costs order which was expected to be made against the defendants in the so-called "Documents" claim. Judgment in that

case was handed down on 25 March 2021 (see *Brake v Guy* [2021] EWHC 671 (Ch)), and an interim payment on account of costs was ordered on 31 March 2021, but the substantive costs order was not made until May 2021.

52. The first defendant pointed out that, although the freezing injunction as varied in May 2022 had extended to Tom's own assets, it was further varied in August 2023 to remove the Eviction proceedings from its scope, and thereby ceased to apply to Tom's beneficially owned assets (though of course it would still apply to any he might hold as nominee for the defendants). She also said that the claimant had not made any allegation that Tom was a nominee for either or both defendants until now, although they had had the relevant bank statements since May 2022. However that may be, the claimant's skeleton argument dated 25 September 2023 says in terms:

> "The £5000 payment made by [Tom] was monies held by [him] as a nominee for [the defendants] and paid to the [third party] on that basis."

53. It is to be noted that Tom did not make a witness statement, and neither was he tendered for cross-examination. Nor was there any suggestion of the need for an adjournment to enable him to do so. As appears from the evidence, he still lives with the defendants, although he is now 23 years old. He attended court to give evidence in person in the Eviction proceedings, to which he was a party. I proceed on the bases (i) that it would have been easy for him for to give evidence in this matter too, and (ii) that in principle he would wish to assist his mother and his aunt in relation to the litigation brought against them by the claimant. But no explanation was given as to why he did not give evidence.

54. Bank statements for Tom's Lloyds current bank account were in evidence, and the first defendant was taken to them by counsel for the claimant. They begin in February 2020, and show regular payments of approximately £204 per week from the first defendant to Tom until March 2021. At that stage Tom had a balance of about £5,500. The judgment in the Documents claim was handed down on 25 March 2021. In the month following, the defendants between them paid considerable sums to Tom in several payments. The statements suggest a total of £27,800, but there is a question about one payment, of £2,800, which I shall have to come back to. Without that payment, the total would be £25,000. In cross-examination the first defendant refused to accept that this was a considerable amount of money to give to Tom in the short period of time, but she could not explain why it was given. In particular, she denied that it was because of any impending costs order in the Documents claim. Nevertheless, these payments meant that Tom had balance of about £30,000 in his current account (rather than in an interest-bearing deposit account) in April 2021.

55. On 6 May 2021, the second defendant entered his mental health crisis moratorium, meaning that his assets were protected against being taken for existing liabilities. These included costs orders made in the Documents claim. On 20 May 2021, Tom paid £5,000 to Isadore Goldman, a firm of solicitors, and £5,000 to the second defendant (from whom he had received £7,500 a month before). Counsel for the claimant put to the first defendant that Tom was paying the defendants' solicitors' bill, and repaying the second defendant part

of the money he had been given before because there was no longer any risk that this money would be taken from the second defendant to pay the costs order. The first defendant denied both allegations, saying "I don't even know what you are talking about, to be honest". From someone who is so very intelligent, quick thinking and knowledgeable, that is a statement which sounds extraordinarily hollow, and I do not accept it. I find that she knew very well what counsel was talking about. It is also to be noted that no explanation was given as to why no-one from Isadore Goldman was being called to refute the claimant's allegation. But it is not necessary for me to draw any conclusion from this.

56. The effect of the two payments made by Tom on 20 May 2021 was to reduce the balance of his current account to about £20,000. Thereafter virtually no further money went into the account, but expenditure continued out of it. Accordingly, the balance drifted down, to £17,000 by July 2021, £14,000 by September 2021, £12,000 by November 2021, and £10,000 by January 2022. As has already been stated, on 22 February 2022 Tom paid £5,000 to the third party, reducing the balance in his account to £5,217.24, more or less what it had been before April 2021. It was put to the first defendant that the money paid over to Tom in April 2021 was simply the defendants' money given to Tom for safekeeping, and that most of this money had effectively been paid back, partly in the payment of the solicitors' bill, partly in the payment back to the second defendant, and partly in the payment to the third party, all at the direction of the defendants. The first defendant denied this, but, as I have said, in cross-examination she could give no explanation for why the money had been paid over to Tom in the first place.

57. In "re-examination", the first defendant referred me to statements for a "Standard Saver" interest-bearing account held by Tom with Lloyds Bank. This account had not been referred to by the claimant. The statements showed that on 11 June 2018 the sum of £15,000 was paid into that account, with the reference "Crewkerne". The first defendant said that this reference was given "because it was a cheque bounced in Crewkerne", but did not elaborate further. She went on to say that the entry represented a payment to him of Tom's entitlement under the will of his grandfather, John D'Arcy. However, there is nothing in the statement itself to indicate that, and so far as I am aware there is no other independent document in the materials before me to corroborate the first defendant's assertion. In consequence, I accept that Tom received a payment of £15,000 on that date, but without independent corroborative evidence I am not prepared to accept that it represented his entitlement under the will of his grandfather.

58. In closing submissions, the first defendant took me back to the savings accounts statements. An entry for 1 April 2021 shows the sum of £2,800 leaving the account with the legend "THOMAS D'ARCY … YOUR SAVINGS … " This corresponds to the sum of £2,800 paid into Tom's current account on the same day, but with the legend "N BRAKE". The first defendant told me that this was simply an internal transfer from Tom's savings to his current account. She said it bore her name because when the account was opened Tom was under 18 and she was required to give her consent to operations. This was not challenged by counsel for the claimant in reply, so I will proceed on the basis that the sums

transferred by the defendants to Tom in April 2021 amounted not to £27,800, but to £25,000.

59. In addition to that, Tom received payments of universal credit from the Department of Work and Pensions in sums of about £330 or £600 a time. On 2 September 2020 first defendant paid £1,300 into Tom's savings account. The first defendant produced a schedule of payments into and out of Tom's current and savings accounts covering the period between June 2018 and September 2023. This schedule suggested that during that time Tom had received £27,248.32 (including £15,000 from his grandfather's estate) but paid out £20,700 either to the first defendant or to lawyers (including the claimant's solicitors). Thus, she argued, Tom had been supporting the defendants, rather than the other way round.

60. By contrast, a schedule set out in Appendix 2 to the claimant's skeleton argument shows that between February 2020 and February 2022 a total of £44,247 was paid by the defendants to Tom, but only £7,748 was paid to him by others. The claimant's schedule does not of course refer to the payment of £15,000 in June 2018 (whomever it came from), because that falls outside the date range of the schedule. But it does include the sum of £2,800 which appears to have been a transfer between two of Tom's accounts. On the other hand, the first defendant's schedule ignores the payments of £25,000 in April 2021 from the first and second defendants to Tom. The two schedules are trying to deal with different matters, and are looking at different kinds of payments. And the month end balances in Tom's current account between March 2021 and February 2022 tell their own story. Overall, I am satisfied that, whether or not for a brief period funds in Tom's name were supporting the defendants, those funds came predominantly from the defendants. I am further satisfied that Tom was holding the funds paid over by the defendants in April 2021 as their nominee, to be paid out at their direction.

61. Accordingly, I hold that there was not a payment of £25,000 *jointly* by the first defendant and Tom to the third party, but two separate payments to her, of £20,000 and £5000 by the first defendant and Tom severally. But I further hold that Tom, in so paying, was paying as the nominee and at the direction of the first defendant, so that the total sum of £25,000 was paid by or on behalf of the first defendant to the third party. That means that, to the extent that any part of that sum is repayable, it is a debt due (at least beneficially) to the first defendant. In that case, it would be a debt falling within the third party debt order jurisdiction under CPR Part 72.

Is any money repayable, and, if so, how much?

62. The next question is whether the sum of £25,000, or any part of it, is repayable to the first defendant. I have already found (at [29]) that the money paid was to be held by the third party to the order of the defendants. Funds held by one person to the order of another are a paradigm case of a debt owed, and payable on demand. The most common example in modern society is a bank account, but it can happen between any two people. I have further found (at [30]) that the third party made a number of payments, amounting to £17,244.96, at the

direction of the first defendant, which might be attributed to the sum of £25,000 already paid to her in February 2022. If those payments represent a partial repayment of the sum of £25,000 (as suggested by Mr Spendlove, in a passage cited at [37]), that would leave a balance due from the third party of £7,755.04, capable of being the subject of a final third party debt order.

63. In closing submissions, the claimant accepted the principle that payments out of the £25,000 would go to reduce the debt due, but submitted that, on the evidence, in circumstances where the third party had not provided full disclosure of her financial resources, the court could not be sure that the £25,000 was still not in her hands intact, and that the payments she made were paid out of her own funds instead. I reject this submission. I have had to make a decision on the basis of the material available to me, coupled with any inferences which I may properly draw from all the circumstances. On that basis, I have already found (at [50] above) that the third party paid the expenses out of the £25,000, at the first defendant's direction. That is an end of this point.

64. The consequence is that there remains a debt due from the third party to the first defendant of £7,755.04, capable of being the subject of a final third party debt order. This result is not unfair to the claimant. The expenses actually paid out of the £25,000 would have been properly payable in any event out of the defendants' funds. If the £25,000 had not been paid to the third party, the rent, the court fees and the other expenses would still have been incurred and paid for, and the defendants' money so used (before 26 July 2022) would not now be available to satisfy the judgment debt.

Discretion

65. The court is not bound to make a third party debt order final. It has a discretion to exercise: see CPR rule 72.8(6)(a); *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192, HL. Where there is "a mandatorily applicable insolvency regime in the case of an individual, an estate or a company", it would be wrong to accord priority to the judgment creditor by making an interim third party order final. But, as Lord Denning MR once said, "The general principle when there is no insolvency is that the person who gets in first gets the fruits of his diligence" (*Prichard v Westminster Bank Ltd* [1969] 1 WLR 547, 549D). This principle has been discussed in many cases, including *FG Hemisphere Associates LLC v The Republic of Congo* [2005] EWHC 3103 (Comm), where Cooke J referred to it (at [14]) as the "first past the post rule". As I understand the matter, the defendants are not currently subject to any insolvency regime.

Intention to create legal relations

66. The first defendant in closing put forward a number of submissions. I need to deal here with two of them. One was that there was no intention, as between the first defendant and her sister-in-law, the third party, to create legal relations. The first year law student is taught that, in order for a valid contract to be created, there must be an intention to create legal relations. But it is not a proposition of law that where an arrangement is entered into between members of a family, even close members, then *as a matter of fact* there is no intention

to create legal relations. It is always a question on the evidence available (and the relationship is only one element in this) as to whether there is an intention to create legal relations.

67. In *Balfour v Balfour* [1919] 2 KB 571, a wife sued her husband on a promise to allow her a sum of money each month for her maintenance. The Court of Appeal held that the claim failed. Warrington LJ said:

> "[W]e have to say whether there is a legal contract between the parties, in other words, whether what took place between them was in the domain of a contract or whether it was merely a domestic arrangement such as may be made every day between a husband and wife who are living together in friendly intercourse. It may be, and I do not for a moment say that it is not, possible for such a contract as is alleged in the present case to be made between husband and wife. The question is whether such a contract was made."

68. At 575 he said:

> "These two people never intended to make a bargain which could be enforced in law. The husband expressed his intention to make this payment, and he promised to make it, and was bound in honour to continue it so long as he was in a position to do so. The wife on the other hand, so far as I can see, made no bargain at all."

69. Atkin LJ said (at 578):

> "[I]t is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality."

70. It will be noted that Warrington LJ concentrated on the domestic nature of the relationship between the parties as the reason for finding that in that case the parties had no intention to make a legally enforceable bargain. Duke LJ (at 576) had taken a similar view. But Atkin LJ concentrated more on the nature of the agreement concerned. Some things may be supposed (unless proved to the contrary) not to be the subject of binding contracts. Both approaches lead to the resolution of the same question: what did the parties intend?

71. Close family members sometimes do create legal relationships between themselves, intending them to take effect. When one person gives another a present for the latter's birthday, or at Christmas time, no one doubts that both parties intend the transfer of legal ownership of the present to be effective. It was formerly in the legal ownership of the giver, and now it is in the legal ownership of the recipient. It is also perfectly lawful, and quite common in family businesses, for a business owner to employ a close relative in that business and undertake to pay the employee under the terms of the contract of employment. In *Pearce v Merriman* [1904] 1 KB 80, a wife granted her husband the tenancy of a house belonging to her, both parties intending the tenancy to have legal effect. Again, one member of a family may lend a large sum of money

to another. The lender may think long and hard before asking for repayment, and may grant indulgences that he or she would not grant to non-family members, but that does not mean that there was no intention to create a valid contract of loan.

72. So it is here. £25,000 is not a trivial sum of money in the domestic context. The first defendant was trying to keep her money out of the hands of her creditor by putting it in the possession of a third party, allegedly for the purpose of improving the third party's own property. But she was not making a gift to her sister-in-law. I have held that that was not the reality of the situation. I have no doubt that the first defendant and the third party knew very well what they were doing. Even though the first defendant would no doubt hesitate before suing her sister-in-law, that does not mean that the parties did not intend the ordinary legal consequences to attach to their agreement. In my judgment, on the evidence here there clearly was such an intention.

"Drop in the ocean"

73. A second argument put forward by the first defendant was that, if only about £7,000 or £8,000 was owing, this was "a drop in the ocean" compared to the costs liability of £700,000 owed by the defendants to the claimant. She referred me to my decision in another part of the forest which is this expansive litigation, *Brake v Guy* [2022] EWHC 1746 (Ch). This decision concerned the question whether the court should grant a mandatory inunction to order the second defendant to draw down his pension from his pension provider, as he was otherwise entitled to do, and thereby create a debt due from the pension provider, which would thereupon be capable of becoming subject to a third party debt order.

74. The first defendant argued that the amount that could thereby be realised would amount to a tiny percentage ("drop in the ocean") of the total costs liability which the defendants have towards the claimant, its parent company and Dr Guy. I held that in fact the proper comparison figures in that case meant that the proportion of costs paid would be about 45%, so that it was not a "drop in the ocean" at all. But the important point to note is that the argument was being made in relation to the exercise of discretion *to grant an injunction*, and not in relation to the making of *a third party debt order*. The grant of an injunction is always a serious matter, because breach of the injunction may result in committal for contempt of court, and hence possible imprisonment. It is the response to a challenge to the authority of the law, and of the court applying it. The grant of a third party debt order, by contrast, is simply a form of execution of an *existing* order. The court has already decided what ought to happen.

75. In my judgment, considerations of the proportion of a judgment debt that may be satisfied by a third party debt order are less important than they are in considering whether to grant a mandatory injunction against a defendant. I do not say that they cannot be taken into account at all. But the fact that an asset exists in the form of a debt owed to a judgment debtor, and that the judgment creditor will be better off if the order is made than if it is not, in my judgment is *prima facie* a good reason for making it. A judgment creditor may generally

execute on the judgment debtor's goods and chattels, or serve a statutory demand and present a bankruptcy petition based on a judgment debt, without a judge exercising any discretion. Whilst the nature of the asset concerned (an intangible chose in action) requires a different form of execution, a third party debt order ought not to be appreciably more difficult to obtain.

Conclusion

76. For all these reasons, I will make the interim order final, in the sum of £7,755.04. I add this. The litigation between these parties began in 2018. But this is 2024, so we are now in the seventh calendar year of this legal war, which has so far wandered over practically the whole face of English private law and procedure. I very much hope that the analogy with Virgil is inexact, and that we have not reached the end of only the first book of twelve (*cf The Aeneid*, Book 1, 755-756). Litigation is not a game, the court system today has limited resources, and these litigants have had quite a large share of them. Other litigants have disputes to be resolved as well.