Neutral Citation Number: [2020] EWHC 1959 (Ch)

Case No: 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: 21/07/2020

Before :

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

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Between :

(1) NIHAL MOHAMMED KAMAL BRAKE **(2) ANDREW YOUNG BRAKE** **(as trustees of the Brake Family Settlement)** **(3) NIHAL MOHAMMED KAMAL BRAKE** **(4) ANDREW YOUNG BRAKE**	**Applicants**
- and -	
(1) DUNCAN KENRIC SWIFT **(as trustee of the estates of Nihal Brake and Andrew Brake)** **(2) THE CHEDINGTON COURT ESTATE LIMITED**	**Respondents**

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Stephen Davies QC and Daisy Brown (instructed by **Seddons LLP**) for the **Applicants**
Andrew Sutcliffe QC and William Day (instructed by **Stewarts Law LLP**) for the **Second Respondent**
The First Respondent was not present or represented

Consequential matters dealt with on paper

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Approved Judgment

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

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 16:30.

HHJ Paul Matthews :

Introduction

1. On 13 July 2020 I handed down judgment ([2020] EWHC 1810 (Ch)) after the trial of the so-called "revesting issue" under section 283A of the Insolvency Act 1986, being the remaining part of what was called the Bankruptcy Application issued on 12 February 2019. Given the current circumstances, I invited written submissions on consequential matters, and have duly received and considered these. I set out my conclusions on the submissions below.

Costs

2. I deal first with the question of costs. Chedington seeks its costs (on the standard basis) on the basis that it was the successful party at trial and on the basis of the general rule in CPR rule 44.2(2)(a) that the unsuccessful party should pay the costs of the successful party. It asks for those costs to be the subject of detailed assessment, but seeks a reasonable payment on account of costs, in accordance with CPR rule 44.2(8). There was no costs budgeting in the present case, but Chedington has submitted a statement of costs in the sum of £548,268.95, and seeks £330,000 by way of interim payment, approximately 60% of the total.

Principle

3. The Brakes accept that, if it is established that Chedington has a legitimate interest in the cottage, Chedington was the successful party at the trial of the revesting issue and that the general rule applies. They also accept that in that case the costs should be assessed on the standard basis. But they object to an immediate payment on account. They also object to any quantification of such a payment on account on the basis of written submissions alone. I shall have to come back to these latter submissions.

Prematurity

4. However, the primary points taken by the Brakes are that the question of the costs of the trial should not be dealt with until (1) the costs of (a) the so-called "cottage application" brought by Mr Swift and dismissed on 3 March 2020 and (b) the costs of Chedington's application to amend dated 12 May 2020 but abandoned on the morning of the trial, are dealt with, and (2) the issue of Chedington's standing to contest the revesting issue is resolved, by awaiting the outcome of the appeal against the order dated 2 March 2020 (currently fixed for 13-14 October 2020).

5. As to (1)(a), the solicitors for Mr Swift wrote to the court on 28 May 2020 seeking a telephone hearing to deal with Mr Swift's liability for these costs. For some reason, this appears to have been overlooked by the court, for which I am sorry. It will be dealt with as soon as possible. This is an entirely extraneous matter, arising out of a separate application, and does not concern Chedington. I cannot treat it as a good reason for not dealing yet with the costs of the revesting trial. (In passing, I note that the Brakes appear not to have chased the court for a listing.) As to (1)(b), this is a relatively minor matter, and there is no issue as to liability between the parties. It is a

question of quantification. But, as I understand it, the Brakes have not yet served a statement of costs. If they do, and the matter cannot be agreed, I can deal with the matter on paper, I hope expeditiously.

6. As to (2), the issue of Chedington's standing to contest the revesting issue was dealt with in my judgment given on 4 May 2020 ([2020] EWHC 1071 (Ch)). Permission to appeal was refused by me on 7 May 2020 and then by Patten LJ in the Court of Appeal on 12 May 2020. That matter is therefore concluded, in favour of Chedington. I therefore cannot see the relevance of the appeal against the orders of 2 and 3 March 2020, due to be heard in October. If that appeal were successful, there would have to be a trial on the questions whether the disputed transactions should be set aside. But no such appeal can affect the decision at the revesting trial. Only an appeal against that decision can do that. And the fact that the Brakes seek to appeal against the revesting decision is not a good reason for postponing a decision on the costs of the trial.

7. The Brakes go on to say that

> "If the Court is not minded to leave the issue of the costs of the Trial until after the conclusion of the appeal, it is submitted that the court should make an order to stay any detailed assessment Ordered, pursuant to CPR 47.2.
>
> […]
>
> The costs of the detailed assessment proceedings and the Court time engaged will not be insignificant and could all be potentially wasted should the appeal be successful."

8. For the reasons already given, I do not agree the costs of detailed assessment proceedings and court time engaged would be wasted if the appeal were allowed. Subject to any successful appeal of my decision, the section 283A issue is settled. The costs of a detailed assessment pursuant to any costs order that I make in relation to the trial of that issue will not be affected by a successful appeal against my order of 3 March 2020.

9. Accordingly, I can see no valid objection to my proceeding to deal with the costs of the trial at this stage, without waiting for future events. I turn therefore to the question of making an order in principle, and of ordering a payment on account of costs. As I have said, the Brakes accept in principle that the general costs rule applies, and that there should be an order that the Brakes pay Chedington's costs on the standard basis, to be subject to detailed assessment if not agreed.

Payment on account

10. But they do object to any order for a payment on account of costs. They say that the proceedings are not yet concluded within the meaning of CPR rule 47.1. Therefore, subject to any order of the court, the costs of the trial are not to be assessed yet. As to that, it seems to me that the proceedings known as the "Bankruptcy Application", of which the revesting issue trial formed part, are now in substance concluded.

11. One part of the relief sought in the Bankruptcy Application ((h)) was dealt with by consent. Some parts were struck out by my order of 3 March 2020 (and the fact that there is currently an appeal on foot against the strike-out is irrelevant to the present question). Some were determined in the section 283A trial. The only outstanding head of relief (paragraph (g), relating to documents) was stayed by the order of 3 March 2020, on the basis that the relevant parties would deal with it between themselves. In my judgment, the court should treat these proceedings as concluded for the purposes of CPR rule 47.1.

12. The Brakes also say that the court has a discretion to have regard to future set-off rights when deciding whether to direct an assessment and/or a payment on account, and refer to the decision of Morgan J in *Rawlinson & Hunter Trustees SA v ITG Ltd* [2015] EWHC 1924 (Ch). That was a case where the judge had to decide whether to order an immediate detailed assessment of the costs of a particular application (in which the defendants had been successful) or to leave them to be dealt with at the conclusion of the whole proceedings (which was some way off). In the present case, however, the proceedings are or should be treated as concluded, and so that case is not of much assistance.

13. However, in case I am wrong, I will say this. In *Rawlinson & Hunter* there was evidence that the defendants were insolvent, and so the paying party (the claimant) argued that the costs should be dealt with at the conclusion of the whole proceedings because, if the claimant obtained a costs order in its favour later on, in that way the costs could be set off. If there were an immediate assessment and costs were paid to the defendants, an injustice might be caused if the claimant could not set off future costs orders in its favour against those costs.

14. The judge said:

> "19. The relevance of these considerations to the exercise of the power under CPR r. 47.1 was considered by Robert Walker LJ in *Hicks v Russell Jones & Walker* [2001] C.P. Rep. 25. He held in a somewhat comparable case that he should not depart from the default position under CPR r. 47.1 and order immediate assessment because the effect might be to deprive a party of the possibility of a future set off of costs resulting in non-recovery of future orders for costs in that party's favour. It was considered that such a result might work a substantial injustice."

15. In the present case, the Brakes do not complain that there is a risk of insolvency on the part of Chedington. Instead they say that there are other special factors in play. In particular, they say that they

> "have been unfairly deprived to date of a fair trial of the pleaded case that Chedington has no legitimate interest in the revesting issue and … have unfairly had to wait until now to seek payment of their costs … of succeeding on the LPP application against Chedington".

16. I accept that there has been no trial of the Brakes' pleaded case that Chedington had no legitimate interest in the revesting issue. But that is the result of my judgment of 4 May 2020, for which permission to appeal was refused. Even if they can properly be regarded as having been "deprived" of a trial, it was not *unfair*, but in accordance

with the law, as I understood it (and Patten LJ, in refusing permission to appeal, expressed the same view).

17. I also accept that Mr Jarvis QC in his order of 28 November 2019 reserved the question of costs of the interim applications before him to the judge hearing the trial of the separate proceedings known as the "Documents Claim". But I do not see how that bears on the question of costs in *these* proceedings. When the "Documents Claim" is tried is a matter of case management. An application can always be made for a trial to be listed sooner or later if a good enough reason can be shown.

18. A third objection to an order for payment on account of costs is that the costs order sought by Chedington is an issue-based order rather than a percentage-based order. The Brakes say that a percentage-based award would be more appropriate, and seek a hearing at which to make detailed submissions on the appropriate percentage, before a realistic payment on account can be calculated. The Brakes submit that this is not a case where costs should be determined on the basis of written submissions alone. I note, however, that the Brakes have not suggested what an appropriate percentage might be. I cannot regard this objection by the Brakes as a reason either for not making a costs order at this stage or for not making an order for payment of costs on account. At best, it is an argument for adopting a particular procedure (oral hearing rather than written submissions) in relation to the question of an order for payment of costs on account.

19. In my judgment, however, Chedington has not asked for an issue-based order. What Chedington has asked for is 50% of the *total* costs of the Bankruptcy Application and the Liquidation Application (less any costs for interlocutory matters which are already the subject of costs orders), on the basis that these two proceedings were managed together, and it is impossible to split them out. The Brakes go on to say that the revesting issue claim played almost no part in the litigation before the hearings on 2 and 3 March 2020. In addition, they say that it is necessary to distinguish between the costs of the Bankruptcy Application and the costs of the Liquidation Application. They say that, if Chedington

> "is entitled to costs in principle, it should not be entitled to any of their costs of the Liquidation Application and should only be entitled to a portion of the Bankruptcy Application, as they have only been successful on the revesting issue."

20. I disagree. In my judgment, this argument misunderstands the position. If a claimant sues a defendant on two separate grounds, and during the course of the litigation the defendant applies successfully to strike out one of those grounds, at that stage the defendant will usually be awarded the costs of the application to strike out, but nothing as to the costs of the action incurred beforehand, even though some of those costs will be attributable to the ground which has been struck out. If then the defendant successfully defends at the trial on the remaining issue, and the defendant is awarded costs, what are these the costs of? Are they the costs only of the issue on which the defendant was successful, or are they the costs of the whole action less the costs of the application to strike out the first ground? In principle, they should be the costs of the whole action, less the costs of the strikeout application. If it were otherwise, the defendant would not recover the costs of the earlier part of the proceedings relating to the issue struck out.

21. Then, suppose that, in the meantime, the claimant has appealed the strike out decision, but the appeal has not yet been heard. The question is whether that makes any difference. In my judgment, it does not. The court does not refrain after trial from making a costs award or ordering detailed assessment of that award merely because an appeal against the trial decision is intimated or pending. In the same way, the court should not be inhibited from making a costs order in relation to the earlier costs of the litigation on an issue which has been struck out, simply because an appeal against the strikeout is pending. If the appeal against the strikeout order should be allowed, there will have to be a consequential adjustment to any costs order which is made at the trial. Again, there is no suggestion that Chedington would be unable to meet any repayment obligation if the order on appeal were to require one.

22. If Chedington had been litigating only one set of proceedings (say, the Bankruptcy Application) the matter would have been comparatively straightforward. But it so happens that there were two insolvency proceedings launched at the same time, that is, the Bankruptcy Application and the Liquidation Application. The Brakes do not argue that these two proceedings were not managed and run together, or intertwined as Chedington says, or that splitting the costs down the middle is not a proportionate and cost-effective way of resolving the question as to how much was spent on each. In my judgment, it is not sensible to spend even further resources on this lengthy and hyper-expensive litigation in trying to untangle the costs spent on one application and on the other. They were pursued together, both directed at the actions of the relevant insolvency officials in connection with the same or connected transactions. A 50-50 split is a sensible and just way to cut the Gordian Knot.

23. In these circumstances, therefore, I have concluded that it is right for the court to make an order for the Brakes to pay to Chedington on the standard basis the costs of and incidental to this claim (that is, the Bankruptcy Application) on the basis that these costs are 50% of the total costs of the Bankruptcy Application and the Liquidation Application taken together, less the costs of the strikeout applications and the costs the subject of any other interlocutory costs orders, to be subject to detailed assessment if not agreed, and for the court to order the payment of a sum on account of costs.

24. As I have said, Chedington has put forward a statement claiming that it has spent £548,268.95 on the Bankruptcy Application, and seeks £330,000 by way of payment on account. As I have also said, the Brakes seek a further hearing at which to make detailed submissions on a percentage-based award. In my judgment, this is unnecessary. Chedington is entitled to its costs of this claim, albeit with the deductions mentioned. The Brakes have chosen not to address the statement of costs put forward in any detail, although they had the opportunity to do so. What they have said is:

> "35. Given the submissions above in respect of apportionment, coupled with submissions to be made in respect of proportionality (the cottage is valued at £500,000 and the Brakes' interest is only in respect of part thereof) and conduct, costs claimed would be likely to be significantly reduced below that which is claimed."

25. In my judgment, it is just to award a proportion of the claimed costs which gives a sufficient margin to accommodate the arguments which will be made on a detailed

assessment, when no doubt all of the arguments raised by the Brakes will be put forward. But it is not necessary at this stage to have a further hearing, at greater expense. Chedington claims a payment on account of £330,000, about 60% of its costs. Taking a conservative approach, I will order a payment on account of £300,000, to be paid in 14 days. I am in no doubt that the sum awarded on detailed assessment will exceed this sum, and it would not be right to keep Chedington out of this money at this stage.

Permission to appeal

Question of fact

26. I turn now to the question of permission to appeal. In my judgment, the main problem for the Brakes in seeking permission to appeal against my decision on the revesting issue, is that I have determined that, as a matter of fact, the Brakes' principal residence at the time of their bankruptcies was not in the cottage, but in the house. Moreover, I made this factual findings on the basis of a legal test that was *agreed* by the parties, being drawn from the decision in *Williams v Horsham District Council* [2004] 1 WLR 1137, CA. Unless my finding as to the Brakes' principal residence at the time of their bankruptcies can be overturned, there is no point in any appeal to the Court of Appeal. But as a finding of fact, where I saw and observed and heard the witnesses, there is no real prospect of the Court of Appeal overturning it. The Court of Appeal will not be in as good a position as I was to assess the evidence.

Specific comments

27. In addition to this fundamental point, I make the following further comments. As to ground 1, I applied the test for principal residence *agreed* by the parties. It should not be open to the Brakes now to argue for a different test, based on what they say is the policy behind section 283A. As to ground 2, the plain language of the section expressly requires the court to consider the position as at the date of the bankruptcy. There is no room for any subsequent "election" which would be at odds with that position. Grounds 3 and 5 to 8 simply repeat evidence put forward at the trial in an attempt to overturn the findings of fact. All of this evidence was taken into account. There is no real prospect of a successful appeal on these points. Ground 4 seeks to reopen the question decided in my judgment 4 May 2020, as to the sufficient interest of Chedington in contesting the application of the Brakes on the revesting issue. This is impermissible. But in any event the argument that the Brakes did not bear any evidential burden of proof against Chedington is in my judgment unarguable.

Points of law

28. In these circumstances, there would no point in giving permission to appeal on any points of law which arise in relation to (for example) the "interest issue" and the "dwelling-house issue", even if the threshold of "real prospect of success" were attained, because even if I were wrong they could not change the result. But, in any event, there is no real prospect of a successful appeal on ground 9, because bankruptcy law cannot and does not alter property rights arising from partnership law. And there is no real prospect of a successful appeal on ground 10, because the fact that the cottage and the adjacent parcels were used together as part of the same residence was simply not conclusive (as the Brakes assumed) of the question whether

the adjacent parcel formed part of the cottage for the purposes of section 283A. I therefore refuse permission to appeal.

Conclusion

29. I should be grateful if the parties could agree and lodge a minute of order to give effect to my main judgment and this supplementary consequentials judgment.