Neutral Citation Number: [2021] EWHC 2343 (Ch)

Case Nos: E00YE350, F00YE085

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

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

Date: 19/08/2021

Before :

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

- -

BETWEEN:

AXNOLLER EVENTS LIMITED

Claimant

and

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

Defendants

AND BETWEEN:

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

Claimants

and

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

- -

Andrew Sutcliffe QC and William Day (instructed by **Stewarts Law LLP**) appeared on behalf of **Axnoller Events Ltd and The Chedington Court Estate Ltd**
Mrs Nihal Brake appeared on her own behalf and that of **Mr Andrew Brake and Mr Tom D'Arcy**

Consequential matters decided on written submission only

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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 12:30 pm.

HHJ Paul Matthews :

Introduction

1. On 17 August 2021 I formally handed down written reasons ([2021] EWHC 2308 (Ch)) for the decision I had made in principle on 13 August 2021, following an all-day hearing on 12 August of the Guy Parties' application dated 26 June 2021. I had circulated my reasons in draft on 16 August. I have received written submissions on consequential matters, for which I am grateful, and now give my decision on these.

Submissions

Costs

2. The Guy Parties ask for 50% of their costs on the standard basis, on the grounds that they were partially successful. They also seek these as part of the unless order to be paid on 30 September. The Brakes resist this, and submit that they won on the majority of issues, and that therefore they should have their costs. As they are litigants in person, they would in fact be content with no order as to costs.

Permission to appeal

3. The Brakes also ask for permission to appeal, on the basis that the Regulations are new, and this is the first case to consider the meaning of "additional debt" under regulation 15. Their grounds of appeal are (1) that "additional debt" should include future debts, for the reasons already argued, and (2) that costs orders are in any event debts dating from the past, because by entering into litigation parties render themselves potentially liable for costs orders: see *Re Nortel* [2014] AC 209, [89]. Here the two costs orders arose out of decisions that had been made before the moratorium was entered into, on 13 April and 2 May respectively.

Other matters

4. If permission is given, the Brakes seek a stay on the basis that they would suffer "irreparable harm" if they had to draw down pension funds with a consequential charge to tax, which could not be remedied if the appeal succeeded. They also ask whether, if they cannot draw down their pension funds, they could assign them to the Guy Parties. Finally, they seek to remove what they call the Brake Family Trust from the claim.

Reply

5. The Guy Parties say in reply that the Brakes had the means to pay the costs orders but chose not to do so. They should therefore pay the costs, albeit discounted to reflect partial success. They also resist the application for permission to appeal and the stay. They resist the former on the basis that

ground (1) has no real prospects of success, and that ground (2) was not an issue in the proceedings, and was decided against the Brakes in my earlier judgment of 4 June 2021, which has not been appealed. In any event, *Re Nortel* was dealing with *contingent liabilities*, not *debts*, and is not relevant to the present issue.

Costs

Law

6. I deal first with costs. Under the general law, costs are in the discretion of the court (CPR rule 44.2(1)), but 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 under CPR part 36) which is drawn to the court's attention: CPR rule 44.2(4).

7. I consider that it is appropriate to make a costs order. This was a significant application and produced a result. The application of the general rule would require me 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". And in In *Day v Day* [2006] EWCA Civ 415, [2006] CP Rep 35, Ward LJ said (at paragraph 17):

> " in a case like this, the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case…."

In my judgment, these authorities govern the present case also.

Discussion

8. In the present case, the Guy Parties sought relief of different kinds and obtained some of it. In terms of 'writing cheques', at least they are the clear winners overall, even though they obtained less than they sought. But, in any event, they have come away from the application significantly better off than they were previously. And the Brakes are correspondingly worse off as a result. I can see no good reason here to disapply the general rule. In my judgment, the Guy Parties should have their costs, but discounted to reflect the fact that they were unsuccessful on some things. I think that 50% fairly represents the appropriate discount.

9. They ask for this on the same basis as the unless order itself, but payable with the 30 September sum, rather than the 30 August sum. The Guy Parties' statement of costs amounts to some £68,729. Therefore, the *maximum* costs order would be £34,364.50. Given the history of this lengthy litigation, and the specific considerations which weighed with me on the application itself (see at

[70]-[80] of my reasons), as well as the total value of the assets available to the Brakes on the evidence, I will accede to this request.

Permission to appeal

Law

10. As for the question of permission to appeal, I have said this before, but it bears repeating. Under the Civil Procedure Rules, rule 52.6, the court (whether the lower or the appellate) may not grant permission for a first 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 that the prospect of success is '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.

Discussion

11. As to ground (1), in the face of the clear (and backward-looking) definition of moratorium debt in regulation 6 and the emphasis in regulation 15 on things that happened before the moratorium, I regard this as simply unarguable.

12. As to ground (2), this strictly does not arise, as it was not in issue before me. It *was* in issue previously, and I dealt with it in paragraph 22 of my judgment of 4 June 2021 ([2021] EWHC 1500 (Ch):

> "The order of 2 May undoubtedly created a *contingent liability* of uncertain amount. But it could not be enforced before being liquidated (by agreement or assessment) in a certain sum. Any order I make now will (partly) liquidate that contingent liability. In ordinary language a 'deb'" is a liquidated sum that is due and owing: see *eg Webb v Stenton* (1883) 11 QBD 518, CA. In my judgment that is also its meaning in the regulations. Thus, the order of 2 May 2021 did not create a debt for the purposes of the regulations. On the other hand, any order I now make ordering a sum to be paid on account *will* create a debt, which will be a *qualifying* debt, but not a *moratorium* debt."

13. That decision has not been challenged, and the Brakes are not now entitled to go behind in in another case between the same parties. *Re Nortel* does not help the Brakes, as it did not deal with the concept of a *debt*. Instead, it dealt with the idea of a contingent liability that was provable in a liquidation. In consequence, in my judgment the Brakes do not reach the threshold for permission to appeal on either ground, and I must refuse permission accordingly.

Stay

14. The question of a stay does not therefore arise. I only add that, if it did, and provided the Guy Parties were prepared to undertake to compensate the

Brakes in case the appeal were successful, I cannot see why a possible liability to tax would be an 'irreparable' harm, since it is a money liability and there is no reason to suppose the Guy Parties would be unable to pay it, if they were found to be wrong on any appeal. But, as I say, that question does not arise.

Assignment of pension funds

15. The Brakes ask whether they could assign their pension funds to the Guy Parties. As the Guy Parties observe, that is entirely hypothetical at present. In any event, the court would need information from the pension providers as to what problems were presented to drawing down funds before it could decide whether there was any alternative mechanism available. At present the court has no such information.

Joinder

16. Finally, there is the question of the joinder of the family trust and Loxley & Brake Ltd. This is not a consequential matter, and therefore not something for me to deal with at present. But I will observe that I did not say at any stage that *the family trust* was already joined. What I said was that the *trustees* did not need to be joined if (as I supposed to be the case) they were Mr and Mrs Brake, because they were already parties, albeit in a different capacity. I made clear that the Brakes might wish to adjust their statements of case to cover additional claims arising from their being trustees. If they wish to do nothing, then the position will remain as it is.

Summary assessment

17. I shall summarily assess the costs. I invite written submissions from the Brakes on the Guy Parties' statement of costs by 10 am tomorrow (20 August 2021), copied to the other side, and any written submission in reply by 4 pm tomorrow, copied as before, after which I shall proceed to carry out the summary assessment.