NEUTRAL CITATION NUMBER: [2021] EWHC 2640 (Ch)

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

Case No: E00YE350 & F00YE085
29 September 2021

Before
HHJ PAUL MATTHEWS
BETWEEN:

In the Possession Proceedings
AXNOLLER EVENTS LIMITED

Claimant

-v-

(1) NIHAL MOHAMMED KAMAL BRAKE

(2) ANDREW YOUNG BRAKE

Defendants

In the Eviction Proceedings
(1) NIHAL MOHAMMED KAMAL BRAKE

(2) ANDREW YOUNG BRAKE

(3) TOM CONYERS D'ARCY

Claimants

-v-

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

William Day (Instructed by **Stewarts**) appeared on behalf of the Claimant in the Possession Proceedings and Defendant in the Eviction Proceedings
Mrs Nihal Brake appeared on behalf of the Defendants in the Possession Proceedings and Claimants in the Eviction Proceedings

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JUDGMENT
(As Approved)

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(Official Shorthand Writers to the Court)

1. **JUDGE PAUL MATTHEWS**: This is my judgment on an application by notice dated 29 July 2021 by the applicant/defendant, The Chedington Court Estate Limited ("Chedington"), against the respondents, Mr and Mrs Brake and Mrs Brake's son Tom D'Arcy (together, "the Brakes"), who are the claimants in a claim which is shortly to be tried by me, called the Eviction Claim. That application seeks the sum of £200,000 by way of security for the defendant's costs. Originally in the notice it was sought to be paid within 28 days of the order, although what was sought at the hearing was that it be paid within 14 days of the order.

2. The application is supported by a witness statement, specifically the second witness statement of Frances Baird, who is the defendant's solicitor, dated the same day, 29 July 2021, and is opposed by the witness statement of Mrs Brake, the first claimant, dated 16 August 2021. There was then a further witness statement in reply by Ms Baird, dated 19 August 2021. I was also asked to read a number of other witness statements which had previously been made, including one by Dr Guy, a director of the defendant Chedington, of 25 March 2020, which had been made in relation to an earlier application for security for costs. I was also asked to read another witness statement by Frances Baird, dated 25 June 2021, but limited to paragraphs 11 to 17, a witness statement by Mr Oliver Ingham of 8 August 2021, and lastly, another witness statement of Mrs Brake, dated 10 August 2021.

3. The background to the whole litigation between the parties to this application is lengthy and complex. I have set this out in a number of other judgments in cases between the same parties. I will simply therefore refer to the introduction which I gave in my judgment in the case of *Axnoller Events Limited v Brake*, on what was called the "Moratorium Application", dated 17 August 2021, under neutral citation [2021] EWHC 2308 (Ch), [3]-[5].

4. The background to this particular claim can be stated rather more shortly for present purposes. Mr and Mrs Brake, the first and second claimants, were employed by either Axnoller Events Limited or Chedington Court Estate, and for present purposes it does not matter which. Their employment was terminated in rather acrimonious circumstances in November 2018. Mr and Mrs Brake remained in a house at West Axnoller Farm, called Axnoller House. There was another property adjacent to

the estate, called West Axnoller Cottage, which presumably at one time had formed part of the same estate but was not then in the same ownership. It had belonged to a partnership including the Brakes, and they had made use of it.

5. In January 2019 Chedington did a deal with the trustee in bankruptcy of the Brakes, who had been bankrupt from 2015-2016. The trustee in bankruptcy did a "back to back" deal with the liquidators of the partnership in which the Brakes had formerly been together with an outside investor (Mrs Lorraine Brehme through her corporate vehicle), to acquire the rights to the Cottage out of the assets of the partnership. At least that is what is said to have happened. So, whilst the Brakes were staying in the house after their dismissal, in January 2019, as I say, this deal was done. But at the same time Chedington took possession of the Cottage. The Brakes say that this amounted to an unlawful eviction of them. They have therefore sued Chedington in respect of that eviction.

6. It is unfortunately necessary for the purposes of deciding this application to refer also to the history of the application itself. As I say, the application notice was issued on 29 July this year. There were a number of attempts to fix a date for the hearing of this application. Unfortunately at that time there were a number of other matters to be dealt with between the same parties. It had been suggested, I think, that the application could be dealt with at the pre-trial review for both this forthcoming claim and another claim (known as the Possession Claim), which I have just in fact finished trying, though judgment has not of course been delivered. That pre-trial review was held on 5 August 2021. However there was simply no time for the application to be heard on that day.

7. There was potentially time for the matter to be dealt with in the following week, except that there was another urgent application made on behalf of the subsidiary of Chedington, Axnoller Estates Ltd, as well as Chedington, for the cancellation of the mental health crisis moratorium into which Mr Brake, the second claimant, had entered in May. So it could not be heard in that week.

8. Now, Mrs Brake herself has been suffering for some years from certain medical conditions. She had medical reasons why it would not be possible for her to deal with

the application (the Brakes acting in person and she acting as advocate) before at least 16 August 2021. The problem was that from that point I was going to be on annual leave until 6 September this year. However, I did manage to find a judge in London who would be able to hear the matter in the week commencing 23 August. But there were a number of problems with that week, including the availability of counsel for Chedington. The Brakes themselves preferred to have the application heard in August. Chedington, however, preferred that it be heard between the Possession trial and the Eviction trial. The Possession trial ended last week and the Eviction trial is due to begin on 11 October.

9. I therefore had to consider what was best to be done and I did so on the basis of written submissions made to me. By a decision which I made and had sent to the parties by email on 19 August 2021 (by which time incidentally I was already on annual leave). I decided that the matter would have to be heard between the possession trial and the eviction trial and I gave a reasoned decision in relation to that. I will just read out the penultimate paragraph, which sets out the decision:

> "In my judgment, taking all the circumstances into account, the justice of the case now requires that I deal with the application myself after the Possession claim trial and not transfer it to London in the meantime. But I make clear that the Guy Parties themselves wish me to hear it then. Doing that, I will have to take account of the factual situation at that stage, which I cannot know now. That may include difficulties in liquidating assets and so on. The Guy Parties take that risk. But the advantages set out at 1 to 4 above are significant and in my judgment outweigh the advantage of hearing the matter sooner. I will therefore hear the Guy Parties' application on a suitable date between the two trials, perhaps one of 29 September and 1 October 2021, to be confirmed."

10. In fact it was all day yesterday, 29 September, that I heard the application, and I am giving judgment orally this morning, there not having been time yesterday.

11. The evidence in this case is rather complex, but it is right that I should say something about it. The witness statement of Frances Baird dated 25 June 2021, in paragraphs 11

to 17, said that there were certain difficulties with the disclosure that had been made by the Brakes as to their financial circumstances (in connection with an application for "unless" orders against them), so it set out a number of concerns. The second witness statement, that is the one made expressly in support of in application of 29 July 2021, went on to consider various aspects of those concerns. It dealt in particular with three matters.

12. The first of these was furniture. Now, there had been a valuable collection of antique furniture which had been present at Axnoller House before Chedington came on the scene and bought the share capital of the previous owner of the property, that is to say Sarafina Properties Limited ("SPL", which changed its name subsequently to Axnoller Events Limited, or "AEL"). That furniture was said to be worth a lot of money. The evidence of Ms Baird is that there were valuations placed on it of between £300,000 and £400,000. However, that furniture was removed from Axnoller House by the Brakes in February 2019, that is to say after the events complained of in the Eviction Claim in January 2019. There is also evidence that storage charges were paid to O&H Removals amounting to some £30,000 between February 2019 and December 2020. However, in December 2020 the payments to O&H Removals stopped, concluding with a large sum which Ms Baird said was to be inferred as representing a removal charge to an undisclosed location. Despite the fact that an explanation of these payments was requested from the Brakes, none was forthcoming.

13. There was then a question raised by Ms Baird as to who actually bought certain new furniture before the breakdown in relations. The Brakes say that it was a limited company, Loxley & Brake Limited, the share capital of which is owned by the trustees of a trust called the Brake Family Trust. The trustees of this trust are in fact Mr and Mrs Brake, and it is said that this is a trust for the benefit of Tom D'Arcy, Mrs Brake's son. The total value of the furniture said to have been bought amounts to some £98,000, which was paid for mostly out of the Brakes' own bank accounts and only £19,000 out of the Loxley & Brake account. The Brakes however paid all the storage costs for the removed furniture and do not appear to have claimed any reimbursement.

14. There was then some discussion of the role of the family trust in all this. As I have said, the trust holds the shares in Loxley & Brake. It appears to have been set up in

June 2013, which is coincidentally the day before an award was made by the arbitrator in an arbitration brought by Mrs Brehme, the outside investor in the partnership that she was in with Mr and Mrs Brake, which award went in favour of Mrs Brehme and against Mr and Mrs Brake. There are questions raised in the witness evidence as to whether the trust is valid at all, or whether it holds the valuable furniture for the benefit of Tom D'Arcy, who is of course the third claimant in this Eviction Claim. I have myself in the past raised questions about this trust and whether what is said to be its effect can be squared with the objective evidence that I have seen, but it is not necessary for me to deal with any of those difficulties at this stage. I simply proceed for present purposes on the basis that it is a valid trust and that Tom D'Arcy is a beneficiary.

15. It is the case, according to Ms Baird, that no disclosure has been given in relation to the trust, although it is said to own hundreds of thousands of pounds worth of valuable furniture, Tom D'Arcy is said to be a beneficiary and the evidence is that Brakes seem to have autonomy to deal with it as they like. Indeed, they paid £30,000 to remove the furniture and store it without being reimbursed. It is alleged that the trust is a sham to disguise the Brakes' ownership of the property. There is also some further material in the confidential annex to Ms Baird's witness statement dealing with insurance and an insurance policy appears to be in the name of the trustees of the Brake Family Trust, ensuring assets which were later proposed to be sold by Sarafina Properties Limited (now AEL) to Chedington, including various contents of two of the holiday houses on the estate, and other chattels.

16. That is a summary of the evidence given in relation to the furniture, or rather a summary of some of it.

17. The second part of the evidence concerned horses. Mr and Mrs Brake are people who love horses, and Mr Brake indeed is a former top amateur showjumper. I hope he will not mind that description of him. He obviously prefers horses and the outdoor life to the bookish, indoor life of others.

18. The Brakes claimed that they had nine horses in September 2013, which they sold to Tulloch & Maslin Ltd, a company belonging to a friend of theirs, Jabeena Maslin. for

£12,000. This included a horse called Voss which had previously been valued at £800,000. So, by the time the Brakes became bankrupt in 2015, they said that they owned no horses. The £12,000 consideration was never apparently received in cash, but was said to be offset against livery charges. That is what the Brakes say.

19. Ms Baird says the reality was that the Brakes continued to own them. For example, Mrs Brake referred to the horses in conversations and communications with Dr Guy as hers. In the injunction proceedings brought by the Brakes in December 2018 to prevent the destruction of the horses, the Brakes' solicitor made a witness statement stating that the horses there belonged to the Brakes, or were the Brakes'. A witness statement made by the Honourable Saffron Foster on 28 February 2019 referred to housing the Brakes' horses, and a letter from the Brakes' solicitors of 2 September 2019 stated that the Brakes owned the majority of the horses at West Axnoller Farm. Another witness statement by Saffron Foster of 6 November 2019 stated that she was happy for the Brakes' horses to remain at West Axnoller Farm. (I should make clear that it was said that Mrs Foster was the beneficial owner of Sarafina Properties Limited, which had purchased the property at West Axnoller Farm.) Then there were some emails between Mrs Brake and Dr Guy regarding the moving of the horses from Axnoller in August 2018, where Mrs Brake says, "We have reduced our horses from 11 to 7".

20. On the first security for costs application I gave a judgment on 11 June 2020. At paragraph 49 I dealt with some allegations regarding the alleged use of Ms Maslin's name to cover the alleged beneficial ownership of the horses by the Brakes. That of course, was based only on the evidence given by Dr Guy in his witness statement on 25 March 2020 and was not, and obviously could not be, based on any other matters raised in paragraph 69 of Ms Baird's witness statement. At paragraphs 71 and 72 of her witness statement, Ms Baird refers to payments out of the Brakes's own bank accounts to horseriders and grooms totalling some £77,000 since 2017 and in two cases up to March 2021. The inference I am invited to draw is that you would not do that if you did not own the horses.

21. There is then discussion of a particular horse, Ulynesse Z (also known as “Elle”). This was a horse in which Mr and Mrs Brake bought a share, said later to have been

a 75 per cent share, for £100,000, partly out of the money that was said to have been given by Mrs Foster to the Brakes after the sale of SPL to Chedington. This horse was said to have been subject to veterinary procedures in 2018 when he was injured, and thereafter until at least October 2020. But on 30 August 2020 there was a video posted on Instagram which showed Ulynesse Z getting a clear round at a Grand Prix competition, with a written thank you to Mrs Brake for letting the rider ride what was called "this superstar". It appears that Ulynesse Z also competed in November and December. Mrs Brake has sought to amend her evidence by saying that Ulynesse Z was also operated on in January 2021, rather than October 2020, but this is not supported and I think the inference that I am invited to draw is that there would have been third party documentation to support it if that were so.

22. Then there is the witness statement of Mr Oliver Ingham of 8 August 2021. He refers to the evidence given by Mrs Brake that Mrs Brake's sister had taken over her Range Rover motorcar and also to the evidence given by Mrs Brake that there were only two horses left at Axnoller on permanent loan to them, but which did not belong to the Brakes.

23. So far as concerns the Range Rover, Mr Ingham gives evidence that he saw the Brakes using the Range Rover in August at the Bristol Civil Justice Centre where some of the hearings in this case were taking place. The evidence that he gives is that the Range Rover has only been used by the Brakes and not by anyone else, including Mrs Brake's sister, and the car remains at West Axnoller Farm. He further goes on to say that the estimate by the Brakes of the value of the Range Rover in June 2015, I think from Mr Brake, was £32,000 but that it was subject to a finance loan of £35,000. However, the evidence goes on that payments were made monthly to FCA Auto Services by Mr Brake until September 2017, when what was described in the bank statement as a “final payment” of £16,519 was made. The payment reference refers to a finance agreement for a Range Rover with the registration number A10 AYB, which is apparently registered to a 2013 Range Rover. I suppose that I am invited to infer that "A10" can be read as "Alo", which is the familiar name usually used for Mrs Brake, and "AYB" are the initials of Mr Brake.

24. Finally in Mr Ingham's witness statement there is a reference to Mrs Brake in court on 5 August 2021 saying that she was not able within the timescale available to sell the two horses loaned to them and raise £200,000. That is Mr Ingham's evidence in summary form.

25. There is then the witness statement of Mrs Brake of 10 August 2021. This deals in part with the allegations made in Ms Baird's second witness statement. It goes on to say that the horses that were sold in 2013 to Tulloch & Maslin are now either dead or very aged (so they are worthless). So far as concerns Ulynesse Z, she exhibits certain text messages in 2021 with the rider, Danielle Ryder. However, she does not exhibit anything by way of written evidence from any veterinary services in relation to the alleged injury in 2021. The text messages from Danielle Ryder are relatively anodyne. She goes on to reiterate that she does not own any horses, but that she has been loaned two horses by Ms Maslin.

26. As far as concerns the payments to riders and grooms, Mrs Brake asserts that these are payments made for shopping which these people did for her. Apparently there are WhatsApp messages, but I was not taken to them. She also confirms they no longer have a horse groom. The final groom, Claudio, was last paid in August 2020.

27. Mrs Brake then goes on to deal with questions related to the furniture, but her evidence here is noticeably directed to the question of the *value* of the furniture and not at all to the main points which were made against the Brakes, namely that it had been taken away to an undisclosed location, and that this was a step within the scope of the security for costs jurisdiction. She explains the fact that only £19,000 worth of the new furniture used money from Loxley & Brake, because she says that Loxley & Brake did not have its own bank account before 1 August 2017, so they used the Brakes' own bank accounts. She also says that the items which were proposed to be sold or sold under its sale and purchase agreement in 2017 were not trust assets.

28. As far as concerns the NFU insurance policy, she says they were all in a state of disarray. She gives no coherent explanation as to why they referred to trust assets.

29. Then she exhibits what she says is evidence of having sold her Range Rover to her sister. This includes an insurance policy in the sister's name from 2 August 2021, and a registration certificate in her name dated 13 April 2021.

30. There is a further witness statement by Mrs Brake of 16 August 2021, and she gives some more information about Ulynesse Z. She also 0gives some further evidence in relation to the sale, as she says, of the Range Rover to her sister and exhibits a text message exchange between them. But this does not refer to the car, any documents relating to it, any gift or any sale. She also refers to the fact that Chedington or AEL made an arrangement with the trustee in bankruptcy of the Brakes and the liquidator of the partnership to buy the horses and the furniture from them. She, finally, refers to a delay that she has in realising the pension funds that she had previously disclosed and gives some evidence that it has proved very difficult to realise the funds.

31. Frances Baird made a further witness statement on 19 August 2021, in which she refers to two payments which were made on insurance claims which had been paid on the NFU insurance policy, which was apparently in relation to family trust assets. These were £10,750 in relation to a marquee that was damaged, and £1,150 in relation to a chandelier that was damaged. These sums were paid into Mrs Brake's personal bank account on 11 March 2018 and 11 June 2018 respectively, and thereafter appear to have been subsumed in general expenditure. Ms Baird goes on to say in this witness statement that the original trust deed of 20 June 2013 showed not only Mr Tom D'Arcy, Mrs Brake's son, but also Ms Alice Wyatt, who is the niece of Mr Brake, as beneficiaries of the Trust. Yet a copy of the trust deed provided to Barclays in order to open a bank account for the trust in 2015 did *not* include Ms Wyatt as a beneficiary. I myself saw the original document as signed on, I think, 3 March 2020 when I was hearing the Liquidation Application, and that *did* include Ms Wyatt as a beneficiary. The copy which appears to have been provided to Barclays, which is not signed, does not include Ms Wyatt as a beneficiary. That is obviously a matter of some curiosity. But I need not take it further for present purposes.

32. As far as concerns all these witness statements, which I have read in their entirety but of which I have given here the merest summary, Mrs Brake reminded me of the

principle which was enunciated by Mr Justice Rimer, as he then was, in *Long v Farrer* [2004] BPIR 1218, [57] which I set out in my earlier security for costs judgment in 2020 at paragraph 18 and which was applied in the case of *Coyne v DRC Distribution Limited* [2008] EWCA Civ 488, [58]:

> "57 … It is, I believe, by now familiar law that, subject to limited exceptions, the court cannot and should not disbelieve the evidence of a witness given on paper in the absence of the cross-examination of that witness. The principle has traditionally been stated in relation to statements made under oath or affirmation, but it was not suggested to me that it does not apply equally to a witness statement."

33. Whis that means is that I cannot disbelieve written evidence which has not been subject to cross-examination (and in this case none of it has been subject to cross-examination) unless it is either inherently incredible or it is incredible by reference to other admitted or reliable facts or documents. I emphasise that that does not mean that I must therefore treat written evidence as conclusive, and especially not when it is hearsay. It is just that I must not *disbelieve* it, unless it is incredible.

34. As far as concerns the law relating to security for costs, I set this out in some detail in my first judgment on security for costs, *Brake v Guy* [2020] EWHC 1484 (Ch) on 11 June 2020 at paragraphs 35 to 38:

> **"THE LAW**
>
> **Civil Procedure Rules**
>
> 35. I therefore consider the law first of all. CPR rule 25.13 relevantly provides:
>
> "(1) The court may make an order for security for costs under rule 25.12 if –
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b) (i) one or more of the conditions in paragraph (2) applies, or
>
> […]

(2) The conditions are –

[…]

(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him."

Case law

36. This provision has been the subject of a number of decisions. In *Ackerman v Ackerman* [2011] EWHC 2183 (Ch), the claimant and his late brother had run a successful property business together ("the Group"). He brought proceedings against his brother's widow and son, and also against a barrister who had been engaged by the parties to give effect to a division of the Group, alleging breaches of the agreement by which the division was to be effected. The widow and son (and a company to be used as a vehicle in the division) sought security for their costs of the claim, on the basis of rule 25.13(2)(g). Roth J considered earlier decisions, and said:

"15. Thus the making of an order for security (and therefore if any, its amount) is discretionary and for such an order here to be made:

a. the condition in sub-para (g) must apply; and

b. the court must be satisfied that it is just in all the circumstances to make such an order.

16. The general principles that govern the making of an order for security and the application of CPR 25.13(2)(g) are well-recognised. They include the following:

i) The requirement is that the claimant has taken in relation to his assets steps which, if he loses the case and a costs order is made against him, will make that order difficult to enforce. It is not sufficient that the claimant has engaged in other conduct that may be dishonest or reprehensible: *Chandler v Brown* [2001] CP Rep 103 at [19]-[20];

ii) The test in that regard is objective: it is not concerned with the claimant's motivation but with the effect of steps which he has taken in relation to his assets: *Aoun v Bahri* [2002] EWHC 29 (Comm), [2002] CLC 776, at [25]-[26];

iii) If it is reasonable to infer on all the evidence that a claimant has undisclosed assets, then his failure to disclose them could itself, although it might not necessarily, lead to the inference that he had put them out of reach of his creditors, including a potential creditor for costs: *Dubai Islamic Bank v PSI Energy Holding Co* [2011] EWCA Civ 761 at [26];

iv) There is no temporal limitation as to when the steps were taken: they may have been taken before proceedings had been commenced or were in contemplation: *Harris v Wallis* [2006] EWHC 630 (Ch) at [24]-[25];

v) However, motive, intention and the time when steps were taken are all relevant to the exercise of the court's discretion: *Aoun v Bahri*, ibid; *Harris v Wallis*, ibid.

vi) In the exercise of its discretion, the court may take into account whether the claimant's want of means has been brought about by any conduct of the defendant: *Sir Lindsay Parkinson & Co v Triplan* [1973] QB 609 per Lord Denning MR at 626; *Spy Academy Ltd v Sakar International Inc* [2009] EWCA Civ 985 at [14].

vii) Impecuniosity is not a ground for ordering security; on the contrary, security should not be ordered where the court is satisfied that, in all the circumstances, this would probably have the effect of stifling a genuine claim: *Keary Developments Ltd v Tarmac Construction* [1995] 3 All ER 534 at 540, para 6. Thus the court must not order security in a sum which it knows the claimant cannot afford: *Al-Koronky v Time-Life Entertainment* [2006] CP Rep 47 at [25]-[26] (where this was referred to as 'the principle of affordability');

viii) The court can order any amount (other than a simply nominal amount) by way of security up to the full amount claimed: it is not bound to order a substantial amount: *Keary* at 540, para 5.

ix) The burden is on the claimant to show that he is unable to provide security not only from his own resources but by way of raising the amount needed from others who could assist him in pursuing his claim, such as relatives and friends: *Keary* at 540, para 6. However, the court should evaluate the evidence as regards third party funders with recognition of the difficulty for the claimant in proving a negative: *Brimko Holdings Ltd v Eastman Kodak Co* [2004] EWHC 1343 (Ch) at [12].

x) When a party seeks to ensure that any security that may be required is within his resources, he must be full and candid as to his means: the court should scrutinise what it is told with a critical eye and may draw adverse inferences from any unexplained gaps in the evidence: *Al-Koronky* at [27]."

37. In that case, it was accepted by the claimant that the condition in sub-para (g) was satisfied. But he asserted that he had no significant assets or income beyond some £80,000 in his bank accounts. The judge therefore considered what the claim should properly cost, what the defendants' recoverable costs were likely to be, and the resources to which the claimant had access. The judge said:

"39. The difficulty as to what the court should do in a case such as this where it considers that a claimant has access to more funds than he is prepared to reveal but cannot determine how much, was addressed by the Court of Appeal in *Al-Koronky* as follows:

> '28. … the court, once satisfied that the case is one in which the claimant ought to put up security for the defendant's costs before continuing with his action, is going to find itself in one of two situations. Either it will be satisfied that it probably has a full account of the resources available to the claimant, in which case it can calculate with reasonable confidence how much the claimant can afford to put up; or it will not be satisfied that it has a full account, and so cannot make the calculation. Does it follow in the latter situation that the court must go straight to the amount sought by the defendant and, having pruned it of anything which appears excessive or disproportionate, fix that as the security? Or is there a middle way - for example to set an amount which represents the court's best estimate of what the claimant, despite having been insufficiently candid, can afford?
>
> 29.In our judgment there is such a power, but it resides in the court's discretion rather than in legal principle. In the second situation we have postulated, the requirements of the law have been exhausted: what remains is to set a suitable sum. This classically is where discretion fills the space left by judgment: the court has a choice of courses, none of which it can be criticised for taking provided it makes its election on a proper factual basis uninfluenced by extraneous considerations'."

In the end the judge concluded that the claimant and his family could produce security in a total of £600,000, and so ordered.

38. The summary of the law in para [16] of the judgment in *Ackerman v Ackerman* has been cited with approval in other cases since, including *Kolyada v Yurov* [2014] EWHC 2575 (Comm), [27], *Al Jaber v Al Ibrahim* [2019] EWHC 1136 (Comm), [4], and *Wojakovski v Tonstate Group Ltd* [2020] EWHC (Ch) 328, [11]. Neither side in the present case suggested that this summary of the law was wrong or that I should not follow it. The claimants also specifically drew attention to *Al Jaber v Al Ibrahim*, where Sir Ross Cranston, sitting as a High Court judge, said:

> "16. The fact that, in the past, enforcement proceedings have been difficult does not assist with the issue as to whether the claimant has taken the steps in relation to his assets and whether those steps would make it difficult to enforce an order of costs against him. As the authorities establish, this is a backward looking provision. Park J in *Chandler v Brown* pointed out in [2001] CP Rep at 103 the word 'would' in the rule cannot be used as a springboard for an argument that the paragraph can be used in relation to steps which the claimant

had not taken, but which, if he did take them before judgment with costs given against him, would make it difficult to enforce a costs order."

35. It has not been suggested, I think, that the law has changed since I gave that judgment. I was referred to *Wojakovski v Tonstate Group Limited* [2020] EWHC (Ch) 328, but I did refer to that at paragraph 38 of my earlier judgment and I do not see any need to refer more specifically to it.

36. The test is in CPR rule 25.13(2)(g). (2) begins, "The conditions are ..." Then (g) is:

> "The claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him. "

It is clear that the test under that condition is not the intention with which the steps are taken but the objective effect of those steps on the defendant's ability to enforce any subsequent costs judgment": see the case of *Aoun v Bahri* [2002] EWHC 29 (Comm) paragraphs 25 to 26. But that intention, if ascertained, obviously would be relevant to the exercise of the court's discretion.

37. It is also important to note the extent of the effect of the steps taken by the respondent upon the ability of the applicant to enforce the following or subsequent cost judgment, because that effect is relevant to the exercise of the discretion. For example, if the steps taken have a minimal effect on the ability of the applicant subsequently to enforce a judgment, then the court is much less likely to make an order. That appears from the decision of Master Bowles in *Stavrinides v Cyprus Popular Bank* [2018] EWHC 313 (Ch), paragraphs 58 to 60.

38. I was also referred to cases which deal with the effect of delay in applying for security. Mrs Brake referred me to the decision of Mr Justice Hildyard in *RBS Rights Litigation* [2017] EWHC 1217 (Ch), on 23 May 2017. At paragraphs 43 to 44 the judge set out his understanding of the law relating to the effect of delay:

> "43. It also means that the Court will consider, in the context of delay, cases such as Re Bennet Invest Ltd [2015] EWHC 1582, where per Richard Millett QC (sitting as a Deputy High Court Judge):

'28. Delay in making the application is one of the circumstances to which the court will have regard when exercising its discretion to order security. The court may refuse to order security where delay has deprived the claimant of the time to collect the security, or led the claimant to act to his detriment or may cause hardship in the future costs of the action. The court may deprive a tardy applicant of security for some or all of his past costs or restrict the security to future costs (see CPR 25.12.6). The question of delay must be assessed at moment when the application is made, although of course the court must take into account the impact of an order at the time it is made. That is because, as the Court of Appeal said in Prince Radu of Hohernzollern v Houston [2006] EWCA Civ 1575 (cited at White Book p 823–4), the order for security for costs comes with a sanction which gives a claimant a choice whether to put up security and go on or to withdraw his claim; that choice is meant to be a proper choice, and the claimant is to have a generous time with which to comply with it. As Waller LJ pointed out (at [18]), the making of an order for security for costs is not intended to be a weapon whereby a defendant can obtain a speedy summary judgment without a trial.

…

36 … The later the order for security is made and the more a claimant has spent on legal costs before that date (or in any case before the application) the smaller the opportunity to the claimant to have a real choice. Here the Claimant had already invested over £150,000 in his claim even before D3 was joined, and doubtless a great deal more since, and his choice would therefore not be between putting up security as the price of continuing or else giving up, but doing so as the price of not only continuing but saving his past investment. That is inevitable when the order sought is being made so close to trial. Each case will always turn on its own facts but the absence of evidence about his means would not persuade me, if I were exercising my

discretion to order security myself, that it was just to do so in all the circumstances.'

44. Once again, however, there are no hard and fast rules. An order for security for costs can be made at any stage of the proceedings. For example, in Warren v Marsden [2014] EWHC 4410 (Comm) an application for security against a claimant was made three months before the date fixed for the trial, in an action which had commenced 2 years and 3 months before the hearing of the application. Teare J held that the material being relied upon to support the application had been available for "a very long time" and that the application could have been made at the commencement of the action rather than shortly before trial. However he nevertheless granted security (albeit limited to future costs). Thus the balance may be struck in the context of delay by fashioning the order so as to restrict it in its application to costs from and after a later point."

39. As he says in paragraph 45, all this serves to emphasise and illustrate that the only immutable principle is that the discretion must be exercised justly. There was also some reference in the judgment to the need for proportionality in making an order, and on quantum, which I have borne in mind.

40. I was referred by Mr Day, on behalf of Chedington, to the later decision of Mrs Justice Cockerill in *Everwarm Limited v BN Rendering Limited* [2019] EWHC 1985 (TCC), decided on 13 June 2019. At paragraphs 15 to 16, Mrs Justice Cockerill also sets out her understanding of the effect of delay in making an application:

"15. Therefore, overall I have come to the conclusion that the condition for exercise of the jurisdiction is met. I am going to have to consider whether I should exercise my discretion to order security. The first question is the timing; on its face this application comes very late in the day, five weeks before trial. There are authorities where the court has refused to grant security simply on the basis that an application was made late. Those were however, applications in which I consider it is probably correct that, as Mr Quirk says, the objection was really that all the costs had by then been incurred. However,

there are, nonetheless, authorities which state very clearly that lateness may be acceptable? Allowed? [sic] in this context, and those authorities were helpfully highlighted by Ms Lee.

16. In her skeleton argument she referred me to *Accident Exchange Ltd & Anor v. McClean & Ors* [2018] 4 Costs LR 713, where Teare J provided a survey of the principles to be applied, and said that delay in making the application is a circumstance to which the court will have regard when exercising its discretion in order security, and that it may refuse to order security where delay has deprived the claimant of the time to collect security, or led the claimant to act to his detriment or may cause hardship in the future costs of the action. Equally so where the material relied upon in support of an application has been available for a long time, it is a relevant matter weighing against security or limiting security to future costs."

41. In paragraph 21 Mrs Justice Cockerill comments that this was not a case where the defendant could have been said to be deprived of the opportunity to collect security, because there is no evidence before her of that which she also said linked into the stifling argument. She also says it is not a case where all the costs have already been incurred and somebody has been lulled into a false sense of security. She then is recorded in the transcript as saying:

"Therefore I do not regard this as a case where the lateness of the application would make it in and of itself appropriate to use security."

But the very next sentence says:

"The net result is that were I minded to grant security, it could only be in respect of the costs of the counterclaim and only going forward."

I think she must mean "inappropriate to use security", but there we are. The general sense of what she is saying is clear, even if I am not entirely sure about the words.

42. Then in paragraph 31 there is a further reference to the fact that this is a late application. She says:

> "There is a concern about timing and I should say that the application was made some, I think, five weeks before trial. There is a concern about timing, on any analysis this is a late application, it is not, as I said, quite as late as the applications where the application for security has been refused on that ground alone. Late applications are not a good thing and I think it must follow that the security which I am prepared to grant should only be from the time of the application which has been made."

43. That is all I want to say in general terms about the law.

44. The submissions on behalf of the claimant, Chedington, rely on three steps which are said to have been taken by the Brakes to put assets beyond the reach of their creditors or rather to make it more difficult for costs of all this to be enforced in the future. These relate to furniture, horses and the motorcar.

45. As far as concerns the furniture, the submission is that Mrs Brake had valued the furniture at some £300,000 or £400,000 for their replacement costs. They were in fact insured by the Brakes, according to the evidence, for £217,000, which presumably must refer to the interest that they thought they had, whether beneficially or as trustees. After their dismissal, the Brakes removed those chattels and stored them, paying some £30,000. This shows that they could not have been cheap and cheerful furniture. They then removed the furniture to an unknown location in December 2020. It is the removal to the unknown location in December 2020 that is relied on and not the removal from the house in February 2019. It is said that this amounts to a step within rule 25.13(2)(g), because it is now more difficult to enforce the costs order against the furniture.

46. Chedington goes on to submit that the Brakes have previously said that the furniture belongs either to the family trust or to Loxley & Brake. But of course Loxley & Brake itself belongs to the trust and, and this is important, the Brakes also sue in this eviction claim in the capacity as trustees of that trust. So it is submitted that the trust assets, if

that is what they are, are equally within the reach of the security for costs jurisdiction and there is no need to distinguish. In any event, Chedington submits that there is no evidence before the court which would allow any distinction to be drawn between the different entities and what furniture belongs to who. Only the Brakes would have such evidence and they have not put it forward. In a sense it is their problem, they have caused it and they must live with the consequences.

47. Then it is also submitted that there was no further evidence from the Brakes as to the value of the furniture of any use. The only values were the valuations placed on the furniture by Mrs Brake herself for replacement value and also the insurance value, which I have referred to. It was submitted that the sum of £40,000, which was paid by Chedington to the trustee in bankruptcy, was not for the furniture as, as it were, full title owner, but for a claim only to such rights as the trustee in bankruptcy might have. So it was entirely speculative, and could not possibly amount to a valuation of the open market value of the chattels.

48. As far as concerns the horses, it was argued that the 2013 sale was effectively a sham, that the horses were loaned back, and again a sham, to the Brakes with the result that they never left West Axnoller Farm. In 2018 the Brakes referred to the horses as their own and indeed referred to them as valuable. In an email from Mrs Brake to Dr Guy on 11 August 2018 she referred to their horses as “very good and valuable”. In her witness statement of 8 January 2019 at paragraph 60, she says, "We owned ten horses at the time of the sale in February 2017". Then, in another witness statement of 3 February 2019 at paragraph 23, she said, "We have six horses". It was further submitted that the Brakes obtained an injunction in December 2019 on the basis that the horses which were said to be potentially at risk were the Brakes' horses and the Brakes' solicitors at the time wrote a letter expressly stating that.

49. As far as concerns Ulynesse Z, in which a 75 per cent share had been brought for £100,000, it was said by Mrs Brake that she had been injured in 2018, then was competing in 2020 and then became injured again. Chedington submitted that there was no documentary evidence to support the second alleged injury in 2021. There were no notes of visits by vets or invoices from vets, and the horse itself had been transferred abroad in April 2021, which was coincidentally just after the documents

claim judgment had been circulated. Moreover, fees were still paid to riders until March 2021.

50. Now, Ulynesse Z went to Holland, and two other horses went to Ireland in 2020, including one called Jackman for which the Brakes had paid £12,000. Other horses were unaccounted for. It was submitted that this clearly made the enforcement of costs orders more difficult and that was a step within condition (2)(g).

51. In relation to the car, Chedington submitted that Mrs Brake had admitted that the car was worth about £10,000 in her witness statement of 9 April, although the defendant's own evidence suggests that this is actually a significant undervalue and the proper value second hand of such a motorcar of this age would be £15,000 to £20,000.

52. Originally, it was submitted, Mrs Brake claimed that the Range Rover had been given to her sister, for example in her witness statement of 22 July. In support of that Mrs Brake produced a text, but this text does not show the nature of the transaction that is referred to. The registration document is dated April 2021.

53. It was suggested, or it was said, that the gift was made in return for payment for surgery for Mrs Brake. Chedington submitted that this was a wholly inadequate explanation. There was no explanation of what the surgery was. There was no explanation of why this was not covered by the NHS and, I would add, nor by the medical insurance, which I understand the Brakes still to have, and there was no explanation of how much the fees would be and when they would be incurred. So it was submitted in effect that this was not credible. So far as concerns the timing, the gift was made apparently after the costs orders had been made in the documents claim. Yet, this Range Rover, it is said, has never left West Axnoller Farm, except when the Brakes are driving it. In relation to this, Mrs Brake says that is because her sister is still abroad and cannot use it yet. It is submitted that that is another step within condition (2)(g).

54. Rather later in the day Mrs Brake said that the car had actually been sold for £10,000. She exhibited screenshots which showed apparently a payment of £10,000 from her sister into her account on 23 August.

55. Those are the submissions in relation to the car.

56. Then in relation to the total value of assets said to have been put into places where they are more difficult for costs orders to be enforced against them, Chedington says the total of these assets is somewhere between £510,000 and £613,000. However, Chedington seeks an order for security only in the sum of £200,000. That is not referring in any way to the so-called pension funds. It is based on these other assets.

57. As far as concerns the question of discretion, Chedington says this is a new application based on matters and information which have only recently come to light in June and July of this year and led to an immediate application being made. The assets involved have a substantial value, so the question of causation is satisfied on the facts. As far as concerns any suggestion of stifling of this claim, the burden of proof is on the Brakes to show the claim would be stifled. It was submitted that the Brakes have a history of crying wolf and yet they have now paid almost all of the £98,000 or so required by the various unless orders that I have made. The Brakes had submitted that there was only some £186,000 left of post-tax value in the pension funds, but Chedington said this was a miscalculation and wrong, because the tax had been over-allowed for.

58. On the other side, the Brakes' submission was that this was simply a rehash of the application which failed for security for costs in June 2020 and was now effectively *res judicata*.

59. There were also some submissions about the moratorium as a "step", but I do not need to go there because that has fallen away.

60. Mrs Brake was at pains to say that non-disclosure of assets did not amount to a step taken and I may say that in principle I agree with that, but that is not what Chedington is relying on in this case.

61. As far as concerns the Range Rover, Mrs Brake said that her sister did pay £10,000 for the Range Rover, and that the Brakes have used that money in order to make the first "unless" order payment.

62. As far as concerns the nine horses sold to Ms Maslin in 2013, that was before the bankruptcy, and therefore any residual rights which the Brakes must have would have gone to the trustee in bankruptcy. Of course if there were any residual rights they have been bought out of the bankruptcy by Chedington, but more to the point Mrs Brake's witness statement of 16 August 2021 said that in 2018 at West Axnoller Farm there were seven horses, two of whom are now dead, two of whom have been given away and three belonged to Ms Maslin, of whom two have now been sold. The two given away appear to have been sent to Ireland on 12 and 16 July 2020. One it was said belonged to the Brakes and one to Ms Maslin. It was said that they were given away because they were injured. One of them is called Peter Williams and the other is called Jackman.

63. Documents in the bundle which appear to come from Showjumping Ireland show Peter Williams as "inactive" and Jackman as "active". Mrs Brake told me that "inactive" meant "broken" or worthless.

64. As far as concerns Ulynesse 2, Mrs Brake submitted that that horse had been injured in 2018, although she recovered and competed in 2020. But there was a recurrence of the same injury in 2021 and so she was sent back to Holland in April 2021. They had also given up their share of ownership to Willem van Hoef, and therefore it was no longer theirs. Mr van Hoef was looking after her and in some way was "earning out" their share by paying all the livery costs. No documentation however was put forward in support of this.

65. Turning then to the question of the furniture, Ms Brake first of all said that the Brakes did not sue in this eviction claim as trustees. However, I referred Mrs Brake to the amended particulars of claim, paragraph 1, which were amended pursuant to my permission given in September 2020. Here it clearly states that the Brakes sue personally *and as trustees*. Mrs Brake pointed out (correctly) that the defence denied that the Brakes were suing as trustees. She also referred me to an email which she sent to Stewarts on 16 August this year in which she said she had decided that she would not join Loxley & Brake Limited or the Brake Family Trust, and she also referred me to a letter from Stewarts replying to that email on 17 August 2021, in which it was said that Stewarts would treat the Brakes as suing only in their personal capacity. She said

that, whatever the formal position, they were not suing as trustees and therefore the furniture belonging to the trust could not be counted as included in any step within the meaning of condition (2)(g).

66. She also referred to the fact that there had been an agreement between the trustee in bankruptcy and Dr Guy or Chedington in which Dr Guy had agreed to pay £40,000 for the furniture, not the £400,000 which it was said to be valued at.

67. There was then the question of the further £98,000 spent by the Brakes on furniture, £78,000 of which was paid out of Mrs Brake's account and only £19,000 was paid out the Loxley & Brake account. The explanation for that given was that the Loxley & Brake company did not have a bank account until quite late on and so the Brakes were paying for the furniture for Loxley & Brake out of their own bank accounts. Of that £98,000 worth of furniture, some £53,000 was resold to the Guy Parties, leaving £45,000 worth of stock in Loxley & Brake.

68. Turning then to the question of discretion, Mrs Brake submitted that this was a very late application. She said that Chedington should have applied back in February 2019 when the furniture was first taken away. The position in 2019 was that Chedington did not know where the furniture went then and the fact that it does not know now where it has gone means that they are in no worse position that they were then.

69. Mrs Brake submitted that the only funds that they had available were in pensions and amounted to something like £186,000 after tax. She also submitted that her sister, Iman Hill, had provided the money to pay the “unless” order and, as I say, showed me the screenshot of the bank account. The Brakes had no other funds than their pensions, as I say £186,000 or so after tax. Chedington was asking for £200,000, but Mrs Brake said the budget for trial preparation and trial phases amounted to about £200,000. Yet they must have spent some of that already, so that in effect they were asking for more than 100 per cent of the trial costs.

70. With those short summaries of the submissions, I turn now to my discussion of the position.

71. The first point is this, that there is no *res judicata* in this case. The earlier application was made in different circumstances, and on the basis of different evidence. It is clear law that an application for an interlocutory remedy, such as security for costs, can be made more than once, so long as the circumstances have changed as to make it just to grant the relief. In this case I am entirely satisfied that the basis of this application is quite different from the earlier one.

72. The first question I have to answer is whether any steps have been taken within condition (2)(g), have the claimants taken steps in relation to their assets which would make it difficult to enforce any costs judgment against them? Chedington says Yes, in relation to the furniture, the horses and the car.

73. In relation to the furniture, there is no substantive evidence from the Brakes relating to the disappearance of the furniture from the house, the storage charges, the end of the storage charges and the refusal to answer questions about those payments. This means that the evidence put forward by the defendant, Chedington, on these matters is in effect not challenged. In my judgment what has happened here in removing the furniture to an unknown location is plainly a step within condition (2)(g).

74. Of course the furniture is said to belong variously to the Brakes themselves, the family trust and the company Loxley & Brake. I am not going to distinguish between the trust and the company, because the trust actually owns the company. Formally I do not distinguish the trust and the Brakes personally, because they are also the trustees of the trust, and they are stated in paragraph 1 of the particulars of claim, as amended, to be suing not only on their own account but also as trustees of that trust. I have looked at the documents to which I was taken, and it is clear to me that, on the pleadings as they stand, the Brakes are suing as trustees. I know that Mrs Brake has recently, and I mean very recently, last month, decided that she does not want the Brakes to sue as trustees. But for present purposes it is too late. The application has been made and, as at today's date, when I am giving judgment, they remain formally claimants, both in their personal capacity and in their trustee capacity.

75. The question then is what is the value of the furniture. The replacement costs which were estimated by Mrs Brake herself for Dr Guy ranged between £300,000 and

£400,000. I accept, of course, that that is not necessarily the value of the actual pieces that were there. That is her estimate of the costs to replace the furniture with furniture of equivalent quality in order to furnish the house to the same standard as it was furnished before for the purpose of the weddings an events business. The value for which it was insured was rather less, that is £217,000. Again, that was wholly within the control of the Brakes.

76. The third piece of evidence which is available to me is that Dr Guy bought the trustee in bankruptcy's claim for £40,000. However, as I have already said, I cannot regard the claim being sold for £40,000 as in any way amounting to an objective valuation of the market value, the open market value, of the pieces of furniture themselves, but I think that the value is or certainly was plainly in excess of £200,000 and it may well have been as high as £250,000 or more, even though it might only have been insured for £217,000.

77. In relation to the horses, Mrs Brake does put forward evidence to challenge the view that the export of the horses and the disappearance of the horses amount to steps within condition (2)(g). The problem is that there is obfuscation and inconsistent evidence being given right from day 1. There is the evidence which was given of the sale in 2013 with what amounted to an immediate loanback, which itself was not easy to accept at the beginning, especially given the timing of this transaction and the litigation with Mrs Brehme going on at that time. More particularly, it is very difficult to square the truth of that statement with the subsequent and very recent references which I have referred to in the evidence here, and in particular the evidence given by Mrs Brake herself of the horses being the Brakes' own horses.

78. Although there is also evidence given by Mrs Brake that they own *none* of the horses now and that they mostly belong to Ms Maslin, I am afraid that, in the light of all the evidence as I now have to consider it, which was not the evidence I had last year, I have come to the conclusion that the evidence of the sale in 2013 is simply not credible, and therefore I am not going to accept it.

79. However, the horses of 2013 have obviously become older and they will become less valuable, indeed some of them will have died. Horses do not live for a very long time.

Moreover, we are talking about a group of horses, the members of which will change from time to time. It is clear on the evidence that the Brakes have acquired further horses from time to time, including Ulynesse Z and Jackman. The question is where are the horses now, and in particular where is Voss? He was valued at one time at £800,000 and, even if he now is no longer able to compete, and is out to stud, that does not mean he has no value. The horse Voss has simply disappeared: we do not know where he is. There is evidence that Ulynesse Z has returned to Holland and that the share that the Brakes had has been given up in return for some kind of vague "earnout". There is evidence that Jackman has been given away, that Peter Williams has been given away, and that both of them have gone to Ireland.

80. In my judgment, all of this evidence satisfies me that there is a strong claim by any creditor of the Brakes that these horses (or some share in them) still belong to them, and that by putting them in foreign countries, even if they are easily identifiable in those foreign countries, is a step which, objectively viewed, does make it more difficult to enforce a costs order against them. I say that particularly in light of the fact that the United Kingdom has now left the European Union and it is no longer possible to pray in aid the various regulations relating to the enforcement of judgments elsewhere in the EU.

81. Accordingly, the answer I give to the question: is there a step satisfying condition (2)(g) in relation to the horses, is Yes.

82. In relation to the car, Mrs Brake challenges the submission that this is a step within condition (2)(g). Her own evidence was originally that it was a gift to her sister, but it now seems to me that she is trying to rewrite history and say that it has been sold to her. To my mind, her original story simply did not stack up. Why would she give away her car, which the Brakes undoubtedly need living in the middle of the countryside, to her sister who presumably has her own, living in a more urban environment, I infer near Epsom (because of the witness's address in the deed by which she lent money to Mrs Brake or bought some of her pension rights)? There is no explanation why this lady living in outer London would want to buy a second-hand used car that had been all around the countryside. There is no explanation then as to why the operation that Mrs Brake foresees (and I quite accept that she may well need

an operation in the future), would not be covered by their medical insurance or by the NHS. Moreover, suddenly the story has changed from a gift to a sale for £10,000 (which on the evidence appears to be an undervalue anyway), which is being used not for an operation but to pay towards the unless order. I regard this evidence as simply incredible. It is inherently incredible, but it is also incredible by reference to the other evidence which we have, such as the registration certaificate of April 2021, the car's continued use by the Brakes, and the payment of £10000 only once money was needed for the "unless" orders. I accept that the purported transfer of the car to the sister is a step within condition (2)(g).

83. On the other hand, it seems to me that the impact of that step on the ability of the creditors to enforce costs judgments is limited because, if £10,000 has been paid, it is only the difference between that and the true market value of a second-hand Range Rover which has been taken out of the assets of the Brakes. That may be £5,000 or £10,000 at most. It is not nothing, but it is not significant by comparison with the value of the furniture and potentially of the horses.

84. In my judgment the gateway is established on all three heads but of course, as I have just said, the principle is, as exemplified in the *Stavrinides* case, that I must look at the impact of the step taken. Therefore I look to the value of the assets which have been diverted. It seems to me that the furniture, as I have already said, is probably worth rather than more the £200,000. The share in Ulynesse Z and the value of Jackman must be significant, even if it is not as high as it was when it was paid for when they were bought and, as for Voss, well, we do not know where he is and it is difficult to put any value on him. But I cannot see the total current value of those three horses as being less than five figures and probably significantly more. The original value was hundreds of thousands of pounds in total, and there is no satisfactory explanation of reduction, apart from mere aging (but unsupported by any valuation evidence).

85. I pass therefore to questions of discretion. There is, unfortunately, a recent track record in this case of the Brakes not paying costs orders. I do of course acknowledge that they have paid earlier costs orders, but in recent times the pattern has changed and so that does leave the defendant exposed in this litigation.

86. I note also the use of what I would call obnubilating factors, the use of companies and trusts to try and confuse and in my judgment obscure the truth, but I do not place much weight upon this. After all, it is quite clear that it is not sufficient to justify a security for costs order that a respondent engages in dishonest or reprehensible conduct.

87. I consider then whether the case will be stifled if I order any security. Here the burden is on the Brakes to show this. I have already mentioned the pension funds and value available to them, which in my judgment probably amount to about £200,000 after deducting what has already been had, and potential liability for tax.

88. There is also the possibility of the Brakes borrowing. An issue had been raised in the papers as to whether, because Mr Brake was subject to a Mental Health Crisis Moratorium, it was lawful for Mrs Brake to borrow any money at this stage: see eg Mrs Brake's statement of 16 August 2021, [55]. In regulation 16(2)(c) of the 2020 Regulations there is a prohibition on a debtor within a breathing space moratorium obtaining credit exceeding £500, whether alone or jointly with anyone else. However, first of all that does not apply to a mental health crisis moratorium, and nor of course does it apply to *Mrs* Brake, because she is not the debtor for the purpose of the regulations.

89. So the short answer is that both Mr and Mrs Brake can borrow if anyone will lend them the money. I accept that they will not be an attractive proposition from the point of view of commercial lenders, but Mrs Brake is fortunate to have a family which is, as she has put in evidence in the past, comfortably off. It appears that her sister has not only paid £10,000 to her towards the unless order but has also either lent money or bought rights amounting to £66,000 out of her pension funds, which Mrs Brake has used to pay further sums under the unless orders. This will no doubt be recovered from the pension funds once the application that she has made to the pension fund providers to liquidate her pensions is acted upon.

90. Now, it is therefore for Mrs Brake to show that she simply cannot raise the money and, despite the claims of impecuniosity which the Brakes have made, they seem to have managed so far to find money for everything that they needed to to keep the litigation going. They have paid for the transcript, they have paid for the bundle, they have paid

for the unless orders and so on. Moreover, it still appears on the evidence that there is some £17,000 in the bank account of Tom D'Arcy, who is Mrs Brake's son and is the third claimant in this claim.

91. So far as the position of the sister is concerned, as I say, she has already very generously paid a significant amount of money which no doubt will be reimbursed to her. I note in passing that Lord Justice Nugee in his order of 8 September 2021 dealing with the stay on costs orders pending the appeal in the Documents Claim said that he understood why the sister might not want to be involved. That is as may be, but the fact is that the sister *has* got involved and has helped her sister out, and I can see no reason why history should not repeat itself, considering that the money will be forthcoming from the pension funds in due course. The burden is on the Brakes to show that it will not.

92. I turn then to the question of the lateness of the application. I have already referred to the authorities which have been put before me in that respect. The application notice, as I say, is dated 29 July 2021 and it is based, according to the defendant, on disclosure made by the claimants only in June and July, and on documents which had previously been redacted becoming unredacted at that time. I can see that, certainly from my own reading of the case, that assertion appears to be borne out. What has been exhibited in evidence is documentation only recently disclosed, in particular in relation to the payments to O&H Removals, the cessation of those payments, and what appears to be the cost of a removal from O&H Removals' store to an unknown location. So far as the payments to the grooms are concerned, which relate to the horses, they have been revealed by bank statements going up to March 2021 and of course it would be reasonable for Chedington to at least ask questions of the Brakes first before launching an application. I think that in all the circumstances 29 July 2021, with copious evidence in support, is the earliest that they could have made this application and therefore I do not think that the lateness, if that is what it is, should properly count against the applicant.

93. So in the exercise of my discretion, I think it is appropriate for me to make an order for security to be given for the costs of this action.

94. The question then is on the amount of security. The amount sought is £200,000. This is less than the value of the furniture estimated by Mrs Brake, certainly in the insurance policy as well as of course the estimates of cost of replacement. It is also less than the value of the pension funds, even after paying the unless order costs. £200,000 is about 46 per cent of the budgeted costs in the claim, so if Chedington were successful in defending this claim it would be likely to recover all of that. I am satisfied on the evidence that, given enough time, the Brakes would be able to raise this sum.

95. Now, if the application had been heard in August, I think I probably would have awarded £200,000. But I did warn the parties in the email decision I made on 19 August that ,in dealing with the matter after the Possession trial, I would have to deal with the practical position that we found ourselves in, where there were less than two weeks now before the trial began. I therefore have to balance the interests of Chedington, the need of Chedington for security in respect of its costs which it may not otherwise recover (and I would say on present evidence there is quite a high risk of that) against the likelihood of the Brakes raising £200,000 in a short time.

96. So, taking those two matters into account, I consider that justice requires that I award of sum of £100,000 in security to Chedington, of which £50,000 is to be paid in 14 days and £50,000 in 21 days. Now, I realise that these two payments will fall due during the trial, but I do not think in justice I can require the Brakes to produce all the money before the trial begins. So, as to timing: 14 days will take us to 13 October 2021 and that is two days after the start of the trial and 21 days to 20 October 2021, which is nine days after the start of the trial.

97. That is my decision. I have of course taken into account the general position of the parties and in particular the position of the Brakes. I leave this application with just one thought. If, as the Brakes firmly believe, they win this litigation, then (quite apart from any damages award) they may well get a costs order in their own favour. They will then get the security money back, they will get their costs at the litigant in person rate and perhaps also their solicitors' costs before the date when their solicitors came off the record. That is an expectation which may or may not be fulfilled, but I say that as simply saying, from the Brakes' point of view, that things may not be so bad as they think, so long as they are right and they win this case at trial.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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