Neutral Citation Number: [2021] EWHC 2882 (Ch)

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

Case No: F00YE085
27 October 2021

Before

HHJ PAUL MATTHEWS

BETWEEN:

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(1) NIHAL MOHAMMED KAMAL BRAKE

(2) ANDREW YOUNG BRAKE

(3) TOM CONYERS D'ARCY

Claimants

-v-

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

Ms Nihal Brake appeared on behalf of the Claimants
Andrew Sutcliffe QC and William Day (Instructed by **Stewarts**) appeared on behalf of the Defendant

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RULING
(As Approved)

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(Official Shorthand Writers to the Court)

1. **JUDGE PAUL MATTHEWS:** This is an oral application by the defendant, Chedington Court Estate Limited, for permission to rely on a third witness statement by Sherryl Dagnoni. That application is opposed by the claimants. Ms Dagnoni has already made two witness statements so far, which have been served by the defendant on the claimants and indeed she is due to give evidence tomorrow in respect of these witness statements.

2. 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 therefore simply refer readers to the introduction which I gave in my judgment in the related 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].

3. 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.

4. In January 2019 Chedington did a deal with the trustee in bankruptcy of the Brakes, who had been bankrupt from 2015-2016. It is said that 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, to acquire the rights to the Cottage out of the assets of the partnership. 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.

5. The existing evidence from Ms Dagnoni shows that she holds the position of housekeeper at Axnoller. In her witness statements she gives evidence in particular of the movements that the Brakes made between the House and the Cottage, and back, and therefore evidence of the use which they made of the Cottage. That means not only Ms Brake but also Mr Brake and her son, Tom. It is apparent from the evidence I have heard already that they all made different use of the Cottage. There is also some evidence given of the events leading up to and including those of 18th January 2019, when the defendant took possession of the Cottage, although at a time when, as it happens, none of the claimants was inside the Cottage.

6. The third witness statement of Ms Dagnoni does not deal, so far as I can see, with any new subject matter (in a broad sense. Subject to one point, it simply provides further detail on existing matters. In particular, it deals with how much use Ms Brake's son, Tom, made of the Cottage, the presence of bed-linen and towels in the Cottage, the presence or absence of food in the Cottage and (the one point of exception referred to) the status of the shower in the Cottage.

7. The Brakes object to the application. They refer me to the decision of Mrs Justice Moulder in *PJSC Tatneft v Bogolyubov* [2020] EWHC 3250 (Comm). In that case there was an application to call a lawyer who was working for the claimant bank, Ms Savelova, to give evidence at the trial of that claim. However, no witness statement had been served in respect of this witness at the appropriate time in the preparation of that trial. It was therefore a straightforward application to call her under CPR rule 32.10, which reads:

> "If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence *unless the court gives permission*" (emphasis supplied).

8. The trial actually began in October 2020, and was due to continue until December 2020. The hearing of the application took place on 11 November 2020, so about halfway through. Ms Savelova had originally refused to give evidence at the trial, on the grounds of fears for her safety, but during the trial she appears to have

changed her mind. The claimant's witnesses had all already given their evidence, and the defendants' witnesses were part way through theirs. So this would have meant, as it were, interposing another witness for the claimants during the defendants' evidence. It was accepted that the consequence of allowing Ms Savelova to give evidence, in accordance with her witness statement, would be that the trial would have to be at the least extended into the next term, that is, into early 2021.

9. The question for the court in giving permission was agreed to be whether, in those circumstances, relief from sanctions should be given. This is because the sanction for not filing a witness statement in time is that you cannot rely on it at trial. At least where you could have done so but did not, you have to make an application for relief from sanctions under CPR rule 3.9. The claimant bank accepted that the failure to serve a witness statement in this case it was a serious and significant failure. Moreover, the judge went on to say that there was no credible evidence as to why Ms Savelova had changed her mind. She was not satisfied, therefore, that there was good reason for the failure to serve the witness statement in time.

10. The judge nevertheless then went on to consider all the circumstances, including the serious breach, the serious consequences of admitting the evidence, and the fact that in her view the application was not made promptly. The claimant’s legal team had known from the beginning that there would be adverse inferences potentially drawn if Ms Savelova did not give evidence. Crucially, or rather, as the judge said, fundamentally, the evidence of Ms Savelova would inevitably be framed to respond to the evidence of the other parties that had already been heard, because, of course, they were in the midst of hearing the defendants' witnesses. The result was that the application in that case was refused.

11. However, as I have already pointed out, during the course of the short argument that I heard, this is not really an application under rule 32.10 at all, even though it is framed in that way. This is because Ms Dagnoni is already a witness in this case. She has made and served witness statements, and she is being called in respect of them. In substance, and I think Mr Sutcliffe QC for Chedington accepted this, this is really an application under rule 32.5(3), (4), which provide that:

"(3) A witness giving oral evidence at trial may, with the permission of the court (a) amplify his witness statement and (b) give evidence in relation to new matters which have arisen since the witness statement was served on the other parties.

(4) The court will give permission under paragraph (3) only if it considers there is good reason not to confine the evidence of the witness to the contents of his witness statement."

Unlike rule 32.10, this is not a case where a sanction is imposed, and therefore not a case where relief from sanction must be sought.

12. Now, it is common enough these days for counsel who call witnesses to be cross-examined on their witness statements first to ask permission to ask one or two supplementary questions in chief, if there are further matters that need to be brought out. Usually this is not opposed, and usually permission is granted. That is so, in my experience, even if it relates to something quite different from what is in the witness statement. Here Chedington has gone further, and (helpfully) provided a witness statement setting out the new evidence. But in this case, first of all, the application *is* opposed, and therefore I have to decide it on principle, and, secondly, the third witness statement is attempting to supplement the *existing* witness statements rather than to move into new territory.

13. So Ms Brake, on behalf of the Brakes, says that Ms Dagnoni is simply responding to *existing* evidence that had been given by the Brakes and others, and that is not fair. She also says that, in fact, the overall substance of what Ms Dagnoni says has already been dealt with in the existing witness statements. Lastly, she says that this will not fit in the existing timetable. She will need more time to cross-examine Ms Dagnoni as a result.

14. As to that, I think the first point is expressly accepted by Mr Sutcliffe QC, in Chedington's Note to the Court of last night. As to the second point, I think that it is true that this is already dealt with, for the most part, in the existing witness statements, although, of course the level of detail is rather less. As to point three, about the distension of the existing timetables, it seems to me that it would not add very much, if

anything, overall. This is because it seems to me that, in practice, if Ms Brake cross-examines Ms Dagnoni on almost any part of her existing witness statements Ms Dagnoni would be entitled to answer in terms which replicated the new witness statement.

15. Nevertheless, I still have to make a decision on this point. It does seem to me, in all fairness to the Brakes, that there is substance in the point that is made, that what Chedington is trying to do is in effect to respond to witness evidence that has already been given at this trial. This however is not what rule 32.53 (b) is referring to when it speaks of

> "new matters which have arisen since the witness statement was served."

That in my judgment is referring to matters outside court, events which need to be incorporated in the evidence, rather than to *evidence* that has just been given. Of course, it is natural for litigants to want in some way to respond to evidence given in court by putting in further evidence. But that is not how the system works. We could not have a system in which parties were constantly serving further witness statements on each other, responding to evidence that had just been given. The thing would never end.

16. In my judgment, it is not appropriate for this kind of tactic to be indulged in. Instead, I look simply to see whether it is appropriate for Chedington to be given permission to ask Ms Dagnoni any further questions in chief, at the outset. Having done that, I have concluded that, of the matters which I identified, in broad terms, that the new evidence deals with, the only one which is not referred to in the existing evidence is the question of the state of the shower. Since that will take almost no time at all, I am perfectly happy to give permission to Mr Sutcliffe QC to ask one or two questions of Ms Dagnoni in chief at the outset about the state of the shower in the Cottage. The Brakes are forewarned, and there will be no prejudice to them. However, I do not see any basis for extending it beyond that. Of course, as I say, it may be that the other matters come out in the cross-examination anyway.

17. So I allow the application to that extent only, and otherwise dismiss it.

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