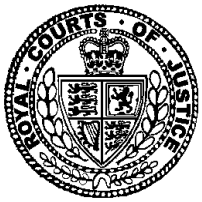

Neutral Citation Number: [2021] EWHC 1500 (Ch)

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: 04/06/2021

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**) for the **Guy parties**
Ashfords LLP for the **Brakes**

Decision on written submissions, without a hearing

- -

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.

.....

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 7:30 pm.

HHJ Paul Matthews :

Introduction

1. This further short written judgment follows that which I handed down on 17 May 2021, available under neutral citation [2021] EWHC 1282 (Ch). It deals with a final point arising out of post-trial proceedings in *Brake v Guy* [2021] EWHC 671 (Ch) (the "Documents Claim"), in which I handed down judgment on 25 March 2021. On 13 April 2021 I refused an application by the Brakes and Mr Tom D'Arcy (together hereafter "the Brakes" for convenience) for me to recuse myself from presiding over two trials in further litigation between (in substance) the same parties. My written reasons for that decision are available under neutral citation [2021] EWHC 949 (Ch). The outstanding point relates to the costs of that recusal application.

2. In relation to that, I decided on 2 May 2021 that the Brakes should pay the Guy parties' costs of the recusal application on the indemnity basis, to be the subject of detailed assessment if not agreed. I did not then have a costs schedule, and so I was not then in a position to decide about ordering a payment on account, as provided for by CPR rule 44.2(8). A costs schedule was subsequently sent to the court and to the Brakes. It showed a total of costs claimed in the sum of £21,988.50. But there was some confusion (at least on my part) as to what submissions were being made on each side. That confusion has now been resolved. I have received written submissions from both sides on the question whether a payment on account should be ordered, and if so in what amount. This judgment deals with those questions.

3. However, I should make clear that, after I had circulated this judgment in what I thought would be final form to the parties (but before it was published on BAILII), Mrs Brake sent me an email saying that she had been unable to contact her solicitor and so wished to raise directly with me a further issue which had not previously been the subject of submissions. Rather than have this dealt with as a ground of appeal from my decision, I considered that the better course was to deal with the matter in this judgment, after inviting submissions from the Guy parties. That is what I have done, and reference is made to it at the appropriate point.

The law

4. First of all, CPR rule 44.2(8), provides that:

> "Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so".

Secondly, in *Culliford v Thorpe* [2018] EWHC 2532 (Ch), I held that an application could be made for an interim payment on account even after the formal order had been drawn up and entered.

5. Thirdly, in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), Christopher Clarke LJ said:

> "22. It is clear that the question, at any rate now, is what is a 'reasonable sum on account of costs'…
>
> 23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad."

The costs claimed

6. The sum of £21,988.50 claimed in the costs statement breaks down as follows. So far as the solicitors are concerned, there were a small number of attendances on counsel and a small amount of work done on documents. In addition, both the partner (grade A) and an associate (grade B) attended at the hearing of the recusal application. A small amount of costs were incurred in the preparation of the statement of costs itself. The total of the costs for the solicitors is £4,113.50.

7. Unusually, two teams of counsel were engaged in this application, because one team had conducted the trial of the documents claim and would conduct one of the trials in relation to which the recusal application was made, and the other team would conduct the other trial. Mr Sutcliffe QC, dealt with the advocacy at the hearing had a single fee for preparation and attendance of £10,000. His junior, Mr Day had a fee for preparation and attendance of £3,500. The other counsel team had much less to do, and incurred proportionately lower fees, totalling £4,375. The total for counsel is therefore £17,875.

8. Adding together figures for solicitors and counsel, that makes the grand total of £21,988.50, which will go for detailed assessment. The Guy parties now seek a payment on account in the sum of £17,500, that is, approximately 80% of the total of the costs claimed. They rely on my own decision in *Brake v Lowes* [2020] EWHC 1324 (Ch), [33]-[34], where I referred to and applied the decision of Christopher Clarke LJ in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), [22]-[23] (set out above).

The Brakes' submissions

Mental Health Crisis Moratorium

9. The Brakes resist this application on a number of bases. The first is that it appears that on 6 May 2021 Mr Andrew Brake, the second defendant, entered what was described in an email of 7 May 2021 addressed to Mrs Alo Brake, the first defendant, as "Mental Health Breathing Space". This appears to be a reference to the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium)(England and Wales) Regulations 2020 ("the regulations"), made under the Financial Guidance and Claims Act 2018.

10. However, I have not been able to find in the regulations any such concept as "Mental Health Breathing Space". The regulations provide for two types of moratorium available for debtors, the Breathing Space Moratorium and the Mental Health Crisis Moratorium. In the circumstances, and especially the reference to mental health, I assume, and proceed on the basis that, that Mr Brake is now subject to the latter, under Part 3 of the regulations, rather than the former, under Part 2.

11. The Brakes submit that the effect of this under the regulations is that the Guy parties are unable to enforce any debt payable to them by Mr Brake, and these protections apply to all *joint* debtors (that is, the first and third defendants, Mrs Brake and her son Tom D'Arcy). They further submit that accordingly the making of an order for a payment on account of costs would not benefit any party, "and quite conversely risks a further impact/deterioration in Mr Brake's mental health". They say that this alone constitutes a "good reason", within CPR rule 44.2(8), not to make an order on this application.

Other grounds of resistance

12. In any event, however, the Brakes submit that the fees for the first counsel team were not reasonable in amount, and those for the second team neither reasonably incurred nor reasonable in amount. As to the former, they say, firstly, that only a quarter of the hearing time was devoted to the application, and only nine pages of the Guy parties' 53 page skeleton argument were concerned with it.

13. As to the latter, they say that Mr Sutcliffe QC undertook all the advocacy, and the first counsel team were the authors of the entirety of that part of skeleton argument which was concerned with the application. Moreover, the second counsel team "had no meaningful knowledge of the matters complained of nor addressed during the course of the Guy parties' submissions".

14. Accordingly, the Brakes submit that the court should disregard the fees of the second counsel team. They refer to the decision of Birss J in *Fenty v Arcadia Group Brands Ltd* [2013] EWHC 2310, where, they say, "the judge took the position that he would simply deduct any costs which were not recoverable and then make a costs order from that readjusted starting point". They also refer to the decision of Norris J in *Group Seven Ltd v Sultana* [2013] EWHC 2444 (Ch).

The Guy parties' submissions

Mental Health Crisis Moratorium

15. The Guy parties submit that there is no evidence before me of Mr Brake's mental health. Nevertheless, they accept that, for present purposes, I must proceed on the basis that a moratorium under the regulations began on 7 May 2021. I agree with this concession. However, they say it is irrelevant, for two reasons. The first is because the debt that would be created by an interim payment order cannot be a "moratorium debt" within reg 6 and hence protected by reg 7.

16. The second reason is that, even if it were such a debt, the Guy parties say that they are not seeking to take any of the various steps prohibited during the moratorium by reg 7(6), (7). The making of the order would not result in any enforcement action being

taken against Mr Brake. Hence, there is no prohibition on the making of the interim payment order, and therefore no good reason not to make the order within CPR rule 44.2(8).

Assessment

17. As to the question of assessment itself, the Guy parties say that because they seek only about 80% of the costs incurred on the recusal application by way of interim payment, that meets any objection regarding the fees of the two counsel teams.

The new point

18. Mrs Brake in the email referred to above (at [3]) raised a further point. She submitted that under reg 15 of the regulations a debt becomes a moratorium debt once notified under the additional debts provisions made by that regulation.

19. It is fair to say that reg 15 was referred to in passing in the Brakes' written submissions, but not in this context, and the submission now made was not made to me then. Mr Day made a short written submission on the point, which I have also taken into account. I discuss the point below.

Discussion

The impact of the regulations

20. The regulations are designed to prevent creditors taking steps to enforce debts against debtors in certain circumstances, by imposing a moratorium. The effect of a moratorium under the regulations is set out by reg 7. But this applies only to what is called a "moratorium debt". According to reg 6, a "moratorium debt" is any "qualifying debt" which satisfies three conditions. A "qualifying debt" includes "any amount which a debtor is liable to pay under or in relation to … a court judgment" (reg 5(3)(a)(ii)). The word "debt" itself is not defined.

21. The first of the three conditions for a qualifying debt to be a moratorium debt is that the debt "was incurred by a debtor in relation to whom a moratorium is in place". The second is that it was owed by the debtor when the application for the moratorium was made. The third is that a debt advice provider gave information about the debt to the Secretary of State. Each of these three conditions is not satisfied in relation to a debt incurred *after* the moratorium was put in place, and means that it cannot be a "moratorium debt". When the court makes an order requiring a person to pay a sum of money, that creates a debt. But it does not arise until the court makes the order.

22. In the present case I made an order on 2 May 2021 that the Brakes pay the costs, to be assessed, if not agreed. That was a few days before the moratorium for Mr Brake began on 6 May. 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 "debt" 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.

23. The other point made by the Guy parties is that they are not seeking to take any of the various steps prohibited during the moratorium. The making of the order would not result in any enforcement action being taken against Mr Brake. I accept this submission also. So, the regulations do not prohibit the making of the order. Nevertheless, the Brakes say that, since it cannot be enforced, there is no benefit in making it at all, and that is a good reason within rule 44.2(8) not to make it. I do not accept this. There is still a benefit to the Guy parties in having the order made, even if it cannot be enforced at this stage. The court not uncommonly makes orders not to be enforced without the permission of the court. It expresses the court's view of the situation at a time when the court has all the necessary information, and saves time later. In my judgment, there is no good reason not to make the order.

The further point taken by the Brakes

24. The Brakes say that a debt becomes a moratorium debt once notified under the additional debts provisions in reg 15. So far as relevant, this provides:

> **"15.**—(1) This regulation applies where a debt advice provider has initiated a moratorium under these Regulations and subsequently—
>
> > (a) receives details under regulation 14(2) of a debt not specified as a moratorium debt in a notification from the Secretary of State referred to in regulation 14(1), or
> >
> > (b) otherwise becomes aware of a debt that is owed by a debtor in relation to whom a moratorium is in place but which was not included in the information provided to the Secretary of State under regulations 25(1)(b) or (c) or 31(1)(b) or (d),
>
> (an "additional debt").
>
> (2) Where this regulation applies, a debt advice provider must consider whether an additional debt is a qualifying debt.
>
> (3) Subject to paragraph (4), if a debt advice provider considers that an additional debt is a qualifying debt, the debt advice provider must provide to the Secretary of State details of the additional debt, including contact details of the creditor to whom the debt is owed.
>
> […]
>
> (5) Where the Secretary of State receives information under paragraphs (3) or (4), the Secretary of State must, by the end of the following business day, provide a notification of the moratorium to those creditors whose contact details have been provided to the Secretary of State in accordance with those paragraphs.
>
> […]

> (7) A moratorium has the effect specified in regulation 7 in relation to an additional debt from the earliest of the date that the creditor to whom the additional debt is owed—
>
> (a) received a notification of the moratorium under paragraph (5), or
>
> (b) is deemed under regulation 37(4) to receive the notification under paragraph (5).
>
> […]"

25. Certainly that regulation creates a procedure whereby other debts not previously known to the debt advice provider can become a moratorium debt. It is not clear to me whether, in order to become so, it needs actually to be a "qualifying debt", or whether it is enough that the debt advice provider so considers it to be. The scheme of the regulations seems to require the former. It is also not clear to me whether the procedure is intended to cover debts incurred in the future, or is restricted to debts incurred before the moratorium was put in place, but not then known to the debt advice provider or the Secretary of State. It appears from the parties' submissions that they consider that it does extend to future debts.

26. But I need not decide either point in this case, because, as the Guy parties point out, the debt created by the order will not come into existence until the order is made, and, even if a subsequent debt can become a moratorium debt under reg 15, that process *ex hypothesi* will not yet have happened. Hence making the order cannot be a prohibited step under the regulations, even taking reg 15 into account.

Quantification

27. The Brakes object to the fees for the first counsel team as unreasonable in amount. Those fees are significant, but the Guy parties ask for 80%, thus providing a buffer against lower assessment. The quantification exercise is not purely arithmetical, by prorating the fees to the amount of time spent at the hearing or to the number of pages in the skeleton devoted to the particular application. In any event those two exercises in this case would produce different answers.

28. The Brakes also object to the fees for the second counsel team. They rely on two decisions, that of Birss J in *Fenty v Arcadia Group Brands Ltd* [2013] EWHC 2444, and that of Norris J in *Group Seven Ltd v Sultana* [2013] EWHC 2310 (Ch). I have looked at both. So far as I can see, the first of them does not deal with costs at all. Certainly there is nothing there to justify the statement made about the case by the Brakes in their submissions (at [13] above). The second decision, which was a case of an interim payment on account of costs, makes clear that where counsel's fees may be unreasonably high the court can still order a payment on account, but will take that into account in fixing the amount.

29. I do not accept that I should exclude any counsel's fees purely because another counsel performed the entire advocacy role, or because one counsel had more knowledge of the background than another. Every case turns on its own facts. Here the second counsel team was charged with the presentation of the Guy parties' case at one of the forthcoming trials. They would be far more familiar with the issues arising

in that case than the first counsel team, and could properly have input into the recusal application.

30. It is not a question of whether in other circumstances it could have been done at lower cost. The question at assessment will be whether the costs were reasonably incurred at reasonable cost, leaving out of account the question of proportionality. In my judgment, there should be an order for a payment on account, but there is sufficient uncertainty in my mind as to the likely recovery as to make it appropriate to order a payment of 70% of the claimed costs, rather than the 80% sought.

Conclusion

31. For the reasons given above, I will make an order that the Brakes pay the sum of £15,391.95 (70% of £21,988.50) by 4 pm on 18 June 2021. I should be grateful to receive a minute of order to give effect to this judgment for approval.