Neutral Citation Number: [2020] EWHC 2416 (Ch)

Case No: 166 and 167 of 2015

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

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

Date: 8 September 2020

Before :

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

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Between :

DUNCAN KENRIC SWIFT (as trustee of the estates in bankruptcy of Nihal Brake and Andrew Brake)	**Applicant**
- and -	
(1) NIHAL MOHAMMED KAMAL BRAKE	**Respondents**
(2) ANDREW YOUNG BRAKE	
(3) LORRAINE BREHME	
(4) THE CHEDINGTON COURT ESTATE LIMITED	

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George Spalton (instructed by **Kennedys LLP**) for the **Applicant**
Daisy Brown (instructed by **Seddons LLP**) for the **First and Second Respondents**
The Third and Fourth Respondents did not appear and were not represented

Hearing date: 7 September 2020

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Approved Judgment

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

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 12 noon.

HHJ Paul Matthews :

1. This is my judgment, following a hearing conducted remotely on the MS Teams videoconferencing platform, concerning the costs of the so-called "Cottage Application". That application was commenced by an originating insolvency application issued on 22 January 2019, initially against the first three respondents only. The fourth respondent was joined by an order made by deputy judge Mr John Jarvis QC by consent on 10 April 2019. The Cottage Application is only a small part of the litigation involving these parties. Summaries of the background are to be found in earlier judgments, for example in *Brake and others v Swift and another* [2020] EWHC 1810 (Ch), [2] ff.

2. The Cottage Application was made in the context of the bankruptcies of the first and second respondents, of whose estates the applicant was the trustee, and sought relief under six heads. In summary these were (1) a declaration that the applicant was the sole beneficial owner of a property known as West Axnoller Cottage ("the cottage"), (2) an order that the applicant or a third party might be appointed to transfer the cottage to the fourth respondent, (3) an injunction to restrain the first two respondents from trespassing on or at the cottage, (4) a declaration that a purported declaration of trust made by the first and second respondents and dated 28 January 2015 was void or should be set aside as unlawful or a transaction to defraud creditors, (5) an order that the first two respondents pay the costs of the application, and (6) such other relief as the court might see fit.

3. The applicant was removed from office as trustee in bankruptcy of the estates of the first two respondents by an order also made by Mr John Jarvis QC by consent, on 6 June 2019. Substitute trustees in bankruptcy were thereafter appointed (again by consent) but they were never joined to the Cottage Application. They later indicated that they did not intend to seek to be joined to that application, and no application to that effect was ever made.

4. On 4 February 2020 the first and second respondents by application notice sought an order striking out the Cottage Application or alternatively awarding reverse summary judgment upon it ("the strike out application"). However, it was expressly made clear in the application notice that the first and second respondents did not seek to strike out the relief sought in paragraph 4 of that application, that is, alleging that the purported declaration of trust made by the first and second respondents and dated 28 January 2015 was void or should be set aside as unlawful or a transaction to defraud creditors. That part of the Cottage Application remained unaffected by the strike out application.

5. Other originating insolvency proceedings, known as the Bankruptcy Application and the Liquidation Application, were commenced by the first and second respondents against others including the applicant and the fourth respondent. The fourth respondent issued applications by notice to strike out parts of the Bankruptcy Application and all of the Liquidation Application, and these were listed to be heard together with strike out application in the Cottage Application. They were heard by me, together with certain other matters, during a two-day hearing on 2 and 3 March

2020. I gave extempore judgments in relation to these matters. For the reasons then given, I struck out the whole of the Liquidation Application, and the Cottage Application, except the relief sought in paragraph 4 (see [2020] EWHC 538 (Ch)), and most of the Bankruptcy Application (see [2020] EWHC 537 (Ch)).

6. The applicant was not present or represented at this hearing. But the fourth respondent resisted the strike out application for reasons of its own. In my ruling on the application to strike out the Cottage Application, I said:

> "4. So the position is that Mr Swift is not here to defend his own application. He has indicated he does not want to, or he accepts that he has no power to continue with it. He certainly has no interest in the subject matter anymore, having been removed from office as trustee in bankruptcy, and his successors as trustees in bankruptcy have not unreasonably taken the view that they are not prepared to carry on the application at this stage. They perhaps seek time in order to consider their position. But the fact is that this application has been made and I must deal with it on the basis of the matters or the facts as they are today. I consider that enough is enough. We cannot have applications being dragged out to the crack of doom simply in order to put off the day when the court has to grapple with it.
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> 5. It appears the concern of Chedington has been the fear that there would be some kind of *res judicata* caused by the application being struck out. Mr Davies QC, on behalf of the Brakes, has made a number of comments which I think have gone some way towards assuaging those fears. For my part, I am doubtful that the successor trustees (not being parties) would be bound in the same way as Mr Swift would be bound by an order of the court putting an end to these proceedings. I think that the right course for the court to take in these circumstances, therefore, is to say that, since the applicant does not want to go on with them, has not appeared to defend them and his successors in title have not indicated that they wish to do so, I should therefore treat this as a case of want of prosecution. As Mr Davies QC reminded me towards the end of his submissions, where want of prosecution is made out, the appropriate course normally is to strike out such a claim. So I am striking it out, not deciding it on its merits."

7. The first and second respondents sought an order in respect of their costs of the strike out application against the fourth respondent (who had resisted it). I ordered that the fourth respondent should pay 60% of those costs. They also sought an order in respect of their costs of the underlying Cottage Application against the applicant (who was not present or represented). As to that, in my ruling on costs, I said:

> "1. Mr Davies QC applies for his costs of the Cottage Application against Mr Duncan Swift, who is not here. He says that this is a case where there has been a serious breach of duty by the trustee in bankruptcy. Accordingly, I should not only order Mr Swift to pay the Brakes' costs of the cottage application, but I should order them to be paid on the indemnity basis.
>
> 2. I have to say that, if the evidence which I have been taken to is true, as I have said in my main judgment, that would disclose a rather alarming state of affairs. I think it right, however, to give Mr Swift an opportunity to say why I should not make such an order against him. I will therefore order that I will consider any written representation that he makes which is lodged with the court within the

next three weeks, so 21 days from today at 4.00 pm. That will be Tuesday, the 24th. I will consider any such written representations. Alternatively, he can seek a hearing at which he can be represented or attend in person, and Mr Davies QC or his junior Ms Brown can appear, and I will deal with the question of costs then."

8. The order which was made following my rulings read so far as material as follows:

> "6. The Cottage Application be struck out save for paragraph 4 of the application notice dated 22 January 2019 which is adjourned generally, with liberty to restore.
>
> [..]
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> 13. Chedington shall pay 60% of the Brakes' costs of and occasioned by their application for the relief ordered at paragraph 6 above.
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> 14. By 4 pm on 24 March 2020, Mr Swift shall:
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> a. File and serve written submissions setting out why he should not pay the Brakes' remaining costs of the Cottage Application and, in that event, the Brakes may file and serve any submissions in response by 4 pm on 31 March 2020, whereupon the court shall determine the matter on paper;
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> b. Apply for an oral hearing to determine the question of the remaining costs of the Cottage Application."

9. In fact the matter was never dealt with in the way which I envisaged. Eventually, however, the present hearing was arranged, and George Spalton of counsel appeared for Mr Swift, to argue why he should not be liable for the remaining costs of the strike out application on the whole of the costs of the underlying Cottage Application. Daisy Brown of counsel appeared for the first and second respondents to put her clients' case that the applicant should be so liable. I am very grateful to both of them for their succinct and pertinent arguments.

10. So far as concerns the outstanding issue in the Cottage Application, it appears that there is ongoing correspondence between the relevant parties as to the resolution of this issue. From what I was told by counsel, it appears likely that the parties will be able to deal with the matter without the necessity of a contested hearing, and that a draft consent order will be placed before the court. Until that happens, however, the matter remains open, and I approach the question of costs in this case on that basis.

11. The costs rules are well known. So far as relevant, CPR rule 44.2 provides:

> "(1) The court has discretion as to –
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> (a) whether costs are payable by one party to another;
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> (b) the amount of those costs; and
>
> (c) when they are to be paid.

> (2) If the court decides to make an order about costs –
>
> > (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
> >
> > (b) the court may make a different order.
>
> […]
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –
>
> > (a) the conduct of all the parties;
> >
> > (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
> >
> > (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
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> (5) The conduct of the parties includes –
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> > (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
> >
> > (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
> >
> > (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
> >
> > (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.
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> […]
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> (8) 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."

12. I begin with consideration of the remaining 40% of the costs of the strike out application (that is, the part for which the fourth respondent was not held liable). I consider it appropriate to make an order for costs, and the general rule applies. I did not understand the applicant to resist liability in principle for these costs. I will therefore order the applicant to pay those costs to the first and second respondents, to be subject to detailed assessment if not agreed. I will come back to the question of the basis of assessment and order for a payment on account of costs later.

13. So far as concerns the costs of the underlying Cottage Application, the applicant says that it be wrong in principle to make an order that he pay those costs at this stage.

Instead, he says that I should reserve those costs until the final resolution of paragraph 4 of the Cottage Application. If that part of the application were resolved in the applicant's favour, then that would be a relevant consideration in exercising the discretion to make an order for costs. The first and second respondents point out that no more hearings are anticipated in this matter, and it would not be so much *reserving* costs as *adjourning* the application for costs to a further hearing which may never take place. They also say that the costs attributable to paragraph 4 of the Cottage Application are negligible, and that in substance this part of the litigation between the parties is over.

14. For my part, I can see no good reason for waiting for the outcome of paragraph 4 before deciding what to do about the costs incurred in the underlying proceedings in relation to all matters other than paragraph 4. That is a discrete point. The first and second respondents have succeeded in their application and therefore (apart from paragraph 4) have defeated the applicant's own proceedings. They have waited long enough for a costs order. In my judgment it is appropriate to make one. I will therefore order that the costs of the underlying proceedings (the Cottage Application), except for any costs incurred in relation to paragraph 4, be paid by the applicant to the first and second respondents, to be the subject of detailed assessment of not agreed. No one is making an application in respect of costs incurred in relation to paragraph 4, and I therefore make no such order.

15. I turn to the question of the basis of assessment. The first and second respondents submit that costs should be assessed on the indemnity basis. They refer me to the decision of the Court of Appeal in *Excelsior Commercial & Industrial Holdings Limited v Salisbury Hammer Aspden & Johnson* [2002] CP Rep 67, which discussed earlier authorities on the subject. In that case Lord Woolf CJ (with whom Laws LJ agreed) said:

> "32. … before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."

Waller LJ (with whom Laws LJ also agreed) said almost exactly the same thing:

> "39. The question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?"

16. The first and second respondents emphasise the conduct of the applicant in relation to the Cottage Application. In particular, he did not send any pre-action correspondence to the first and second respondents, did not comply with some of the directions made by the court, did not discontinue the application once he was removed from office and had no further interest in the claim, and did not respond to the strike out application, neither informing the court that he did not intend to take part to resist it, nor consenting to that application, so that a hearing was necessary. Ultimately, the Cottage Application was struck out effectively for want of prosecution (and, as I made clear in my ruling, not on the merits). The provisions of CPR rule 44.2 make clear that in considering what order to make about costs the court will have regard to all the circumstances of the case, including the conduct of the parties.

17. The applicant's solicitors have already written to the court to apologise for failing to make clear that he was not intending to appear or take part in the hearing of the strike out application. His view was that it was for his successors to deal with the Cottage Application and the application to strike it out. I accept that the applicant intended no discourtesy to the court, but his actions nevertheless resulted in an inefficient resolution of this part of the litigation. The applicant relies on the decision of the Court of Appeal in *Burgess v Lejonvarn* [2020] 4 WLR 43, where Coulson LJ (with whom Rose LJ and Sir Jack Beatson agreed) went through the same cases again, including *Excelsior*, and said:

> "43. … if the claimant's refusal to accept the offer comes against the background of a speculative, weak, opportunistic or thin claim, then an order for indemnity costs may very well be made."

18. In the present case, the applicant submits that there was nothing to show that this was a "speculative, weak, opportunistic or thin claim", and that therefore an order for costs on the indemnity basis should not be made. The strike-out was not on the merits. The allegations made againt the applicant have not been the subject of adjudication. But, as the Court of Appeal in both *Excelsior* and in *Burgess* made clear, it is not just the strength or weakness of the claim, or its other characteristics, which may lead to such an order being made. It is also a question of the conduct of the proceedings by the relevant party. The first and second respondents correctly point out that the applicant agreed to submit to an order for indemnity costs in consenting to an order for his removal from his trusteeship. But I do not think I can infer anything relevant from that in the context of the present question, which arises in different proceedings. I have no explanation as to why the applicant submitted to an order for indemnity costs in that context.

19. Looking at the matter in the round, although I regard the applicant's conduct the proceedings as far from ideal, and indeed deserving of some criticism, I do not think that it goes so far as to justify an order for costs on the indemnity basis. It is simply sloppy conduct, which in these days is sadly more and more common. I do not say that sloppy conduct on its own can never justify an order for indemnity costs. But it does have to be such as to push the case out of the norm. So I will order costs to be paid on the standard basis, to be subject to detailed assessment if not agreed.

20. There is then the question of an order for a payment on account of costs, pending detailed assessment. This is dealt with by CPR rule 44.2(8), set out above. In an earlier decision in the litigation between these parties (*Brake and others v Lowe and others* [2020] EWHC 1324 (Ch)), I commented on this rule as follows:

> "33. In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), Christopher Clarke LJ disagreed with the statement of Birss J in *Hospira UK Ltd v Genentech Inc* [2014] EWHC 1688, that 'the task of the court is to ensure that it finds the irreducible minimum, which could be recovered'. He 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.'

In that case, the judge regarded 80% of the sum claimed as a reasonable figure to take in the case. It was litigation on a large scale which required a lot of work and where the judge had awarded costs on the indemnity basis.

> 34. It is therefore clear that I am not to carry out even a summary assessment of the costs. I am instead to find what is 'a reasonable sum on account of costs', which will inevitably be an estimate, potentially formulated in one of several possible ways. I am afraid that the approach taken by the Brakes and also by the Liquidation Creditors on the question of the quantum of any interim payment cuts across the policy behind this rule. If I were to investigate every criticism made by the costs defendants of the costs claimed (some of which, I regret to say, are frankly petty) I would end up carrying out something like a summary assessment of costs."

21. In the present case, there has been no costs budgeting to assist me. I have however been provided with two statements of costs from the first and second respondents. The first relates to the costs of the application to strike out the Cottage Application, and the other relates to the costs of the Cottage Application itself. The first of these sets out those amounts certified by a partner in the first and second respondents' solicitors to have been actually incurred by them in relation to the strike out application (as I was informed by counsel for the first and second respondents in an email after the hearing, correcting a small error in a submission made to me at the time). I see no reason not to take 40% (the proportion of costs for which the applicant is liable) of that as the base figure. A reasonable sum on account of those costs must reflect the fact that there is no budget and that there is no detailed bill to consider. I shall therefore order a payment on account of 65% of the base figure.

22. The second of these statements of costs relates to the costs of the underlying Cottage Application, and is calculated on the basis of a one third equal share of the total costs of the three applications known as the Bankruptcy Application, the Liquidation Application, and the Cottage Application certified to have been spent. I am told that it is calculated in this very broad brush way on the basis that it would be practically impossible, at least at this stage, to separate the costs incurred in the three underlying claims from each other.

23. The first and second respondents remind me that at an earlier stage in the litigation between some of the same parties I had taken a similar view to the division of costs between two applications made by the fourth respondent, where I had decided, on an application for payment on account of costs, to divide them equally between two

applications, namely the Bankruptcy Application and the Liquidation Application. In *Brake and others v Lowes and others* [2020] EWHC 1324 (Ch), I said:

> "39. So far as concerns apportionment between different applications, at the time of making the issue-based order, I commented that I hoped that modern solicitor accounting systems would have the ability to distinguish the different sets of costs. If they do not, then apportionment of this kind is the only way forward. Unless it is obviously wrong (and I see nothing which for now so persuades me), I can see no reason at this early stage for not accepting what has been done for the purposes of deciding in what sum to order payment on account."

24. In that case, there were only two applications of a similar nature and extent, referring to the same disputed transactions between which to divide the costs. I could see no good basis for deciding to divide them other than equally. The present is not quite the same case. Here there are two applications of a similar nature (as it happens, the same two), together with a third application brought by a *different* applicant for *different* relief and relating to some matters which are different and some which are the same (albeit with different emphases). I cannot so easily accept that it is right for the purposes of the present application for a payment on account of costs simply to divide by three the total costs incurred by the first and second respondents in relation to these applications. I do not have the same reason for supposing that the work done on each of the applications is approximately equal to that which I had in relation to the earlier case. The first and second respondents on the other hand say that I can properly rely on the one third division for the purpose of ascertaining a basis for the payment on account of costs, because I can then discount the base figure to an appropriate percentage as a payment on account, in order to protect the interests of the paying party (the applicant).

25. I do not think that the matter is a simple as that. It is for the applicant for a payment on account to satisfy me as to the reasonable sum within the meaning of CPR rule 44.2(8). On the different facts of this case, I am unhappy to proceed on the basis that the way to reach the basis for a reasonable sum for the purposes of rule 44.2(8) is simply to divide the total costs by the number of applications made, that is, three, when there are significant differences between the applications. In that connection, the applicant reminds me that in the statement of costs for the strike out application, the first and second respondents referred to a *one fourth* share of the transcript costs, thus evidencing an agreement between the parties that, for the purposes of sharing the transcript of the hearing of the application, one fourth of the total costs of the transcription should be attributed to the Cottage Application. This of course is a limited agreement, in relation simply to the hearing rather than the preparation for the hearing. Moreover, it is simply an agreement, and not by any means conclusive that the parties then considered that the Cottage Application represented one fourth of the total work done on the three main applications. On the other hand, given that it is relied upon by the applicant, I think I may fairly take it as a floor below which the base ought not to descend.

26. At this stage, notwithstanding the very limited material that the parties have chosen to put before me, I think it would be an abdication of the judicial functions simply to say that I was not satisfied on the material that there was *any* reasonable sum to award by way of payment on account of costs. In all the circumstances, I will approach the matter on the basis that the base figure ought to be one quarter of the total amount

spent by the first and second respondents on the three applications together. I then have to consider what would be an appropriate fraction of that base figure for the purposes of calculating an amount to be paid on account. Here too I am in some difficulty, because there is no clear evidence to guide me. I do not think this is the kind of case where an 80 or 90% figure of the base should be awarded. I do not have so much confidence in the base figure itself as I would have if, say, there were a certificate of the actual costs spent, let alone an approved or agreed budget. I must therefore build in a sufficient margin to allow for the possibility that when a detailed assessment takes place, it turns out that the total amount spent on the matter was significantly less. Accordingly, I think the right amount to award in this case by way of payment on account of the costs of the underlying Cottage Application is 50%.

27. I should be grateful if counsel would agree a minute of order to give effect to my decision and submit it to me for approval. If there are any consequential matters, I will consider written submissions in the first instance, to be filed and served by 4 pm on 10 September 2020, with any submissions in reply by 4 pm on 11 September 2020.