Neutral Citation Number: [2022] EWHC 1911 (Ch)

Case No: BL-2019-BRS-000028

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR
Date: 20 July 2022

Before :

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

- -

BETWEEN:-

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

Claimants

-and-

(1) GEOFFREY WILLIAM GUY
(2) THE CHEDINGTON COURT ESTATE LIMITED
(3) AXNOLLER EVENTS LIMITED

Defendants

-and-

JAMES HAY PENSION TRUSTEES LIMITED

Third Party

- -

Mrs Nihal Brake for herself and Mr Andrew Brake, **Claimants**
Calum Mulderrig (instructed by **Stewarts Law LLP**) for the **Defendants**
Charlotte Pope-Williams (of **Pinsent Masons LLP)** for the **Third Party**

Consequential matters decided on paper

- -

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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This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 3:00 pm on Wednesday 20 July 2022.

HHJ Paul Matthews :

Introduction

1. This is my judgment on consequential matters (including costs) in relation to a third-party debt order ("TPDO") made originally on an interim basis by Lewison LJ on 4 April 2022, and made final by me on 11 July 2022. The Court of Appeal on 2 March 2022 dismissed an appeal by the claimants/appellants ("the Brakes") against a decision of my own: see [2022] EWCA Civ 235. The court ordered that the Brakes pay the costs of the appeal of the defendants/respondents ("the Guy Parties"), and ordered an interim payment on account of £70,000, which, as I understand it, has not been paid.

2. The TPDO was sought in relation to a pension fund held by the third party for the benefit of the second claimant, Mr Brake. On 20 May 2022, the Guy Parties made a further application by notice, seeking an injunction under section 37 of the Senior Courts Act 1981 requiring Mr Brake to seek payment from the third party of the whole fund then remaining to him. (It also sought to change the name of the third party, which the third party agreed to, and which the Brakes did not oppose.) In my written decision of 11 July 2022, I acceded to this application: see [2022] EWHC 1746 (Ch). I then invited written submissions from the parties as to consequential matters (including costs). I have received and considered such submissions from all parties.

The form of the order

3. So far as the court order itself is concerned, I understand that the Guy Parties and the third party have agreed a form of order between them. Mr Brake has not made any submissions about the form of the order. Mrs Brake originally confirmed on behalf of her husband that the timetable provided for was acceptable, but on Sunday 17 July 2022 she wrote directly to me to ask if the timetable could be delayed by three weeks, because of her husband's health. This is opposed by the Guy Parties. The third party is neutral about the dates being moved.

4. In support of her application, Mrs Brake says that her husband has taken my decision very badly and that his medication has had to be changed. He is therefore not now able to comply with the timetable which she originally agreed on his behalf. Moreover, she is unable to speak to their counsel (Mr Colclough) until Tuesday 19 July 2022. She suggests a delay of three weeks "to allow me to see if I can take over the process for him". She does not however say that Mr Brake no longer has mental capacity. Nor does she explain what steps she would be taking in the three extra weeks which would enable her to "take over the process". She has however provided a copy of a letter from Dr Suzanne Jeffries, a consultant in old age psychiatry in the Bridport Older Persons Community Mental Health Team. This states that Mr Brake is exhibiting symptoms of severe depression, which "directly impact on his ability to attend, concentrate and process information and as such significantly impairs his ability to be an appropriate and active participant in the court process". She goes on to say that this is likely to persist in the short to medium term.

5. The Guy Parties say that all that Mr Brake is required to do is (i) to obtain relevant information about his pension (which ought to be in his possession) and his applicable tax code (which can be obtained by telephoning HMRC), and (ii) to provide this information to the Guy Parties and to the third party. In fact, on the basis of the current proposed timetable, Mr Brake would not be required to provide any information to the Guy Parties or the third party until 28 July 2022. So, there is already sufficient time for these things to be done. To add a further three weeks would be simply disproportionate and unnecessary. In any event, the Guy Parties suggest that Mrs Brake could do these things for him.

6. I agree with the Guy Parties. I accept that Mr Brake is in poor health and finds even simple tasks difficult. But to suggest that he could *not* obtain the relevant information from his own files and his own tax code from HMRC by 28 July 2022, but *could* do so three weeks later is frankly ridiculous. If he had lost capacity, that would raise different considerations, but there is no suggestion of that, and certainly no evidence to support any such suggestion. If, however, Mr Brake wished to be relieved of the obligation to contact HMRC, and assuming no sufficient objection from the Guy Parties, then I would be willing to make an order requiring HMRC to disclose the information directly to the Guy Parties. But, in the meantime, I dismiss the application on the part of Mr Brake to extend the timetable by three weeks.

Costs: liability

7. So far as costs are concerned, the Guy Parties seek their costs of the TPDO and the further application of 20 May from the third party, and on the indemnity basis. Alternatively, the Guy Parties seek their costs from Mr Brake, on the standard basis, in light of the formal opposition by him, and also in light of communications between the Brakes and the third party which I shall refer to later on. Mr Brake seeks an order that the Guy Parties pay his (and the third party's) costs. The third party submits that there should be no order as to costs. As all the parties to this litigation know, costs are in the discretion of the court (CPR rule 44.2(1)). However, if the court decides to make an order about costs, the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2(2)(a). But the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order and if so what, the court will have regard to all the circumstances, including the conduct of all the parties: CPR rule 44.2(4).

8. The only costs rule expressly applicable to a TPDO is that contained in CPR rule 72.11, which provides:

> "If the judgment creditor is awarded costs on an application for an order under rule 72.2 or 72.10 –
>
> > (a) he shall, unless the court otherwise directs, retain those costs out of the money recovered by him under the order; and
> >
> > (b) the costs shall be deemed to be paid first out of the money he recovers, in priority to the judgment debt."

But that rule tells me nothing about when costs should be paid by the judgment debtor or the third party.

9. I am satisfied that the court should make an order about the costs of these applications. The general rule under rule 44.2(2)(a) requires the court to ascertain which is the "successful party". In this context, it is clear that the court is normally not looking for the successful party *on each of the issues* which the court has dealt with. Issue-based costs orders are exceptional. Indeed, the rules make clear that, before considering any issue-based costs order, the court must first consider the practicability of making a proportion of costs order or a time-limited order: CPR rule 44.2(7). In the present case, there are in fact two separate applications, that of 17 March 2022 and that of 20 May 2022. But in my judgment they form part of a single enforcement proceeding, directed at satisfying the Court of Appeal costs liability by taking the remainder of Mr Brake's pension fund. The second application was not made at the same time as the first application because it was a response to an objection subsequently made by the third party. In the first instance, therefore, I am looking for the successful party overall.

Who is the successful party?

10. Here the Guy Parties say that they are the successful parties. They succeeded in obtaining an order that Mr Brake seek payment to him of the rest of his pension fund, and that a final TPDO be made in respect of that pension entitlement once liquidated. Mrs Brake on behalf of her husband accepts that the Guy Parties were the "winner". The third party says that Mr Brake was the unsuccessful party, and that the Guy Parties obtained the relief which they sought. Accordingly, I infer that the third party accepts that the Guy Parties were the successful parties. However, the third party also says that it was "not an unsuccessful party", and did not deny the Guy Parties the relief that they sought.

11. In my judgment the Guy Parties were indeed the successful parties overall, and both Mr Brake and the third party, who each resisted the Guy Parties' applications, were the unsuccessful. Contrary to its submission, the third party did indeed oppose the relief sought by the Guy Parties, saying they had sued the third party under an incorrect name, had not joined the correct person, had sued when no debt was due and moreover could *never* be made due, because the third party had a discretion to exercise. But, as I have said, all that opposition does not conclude the matter, because the court "may make a different order".

Should the court make "a different order"?

12. The Brakes say that it was not until the hearing on 30 May 2022 that the Guy Parties accepted that there was in fact no current debt owed by the third party to Mr Brake. Accordingly, all costs up to that point should be paid by the Guy Parties. It is not clear what the Brakes say about the costs of the further application. Mrs Brake's email contains the slightly enigmatic statement that

> "from the outset [the Guy Parties] should have applied for a different order which, if they had perhaps no one would have resisted it".

But the Brakes had the opportunity to concede the application for an injunction in the further application, and yet they did not. They resisted it.

13. With a somewhat less aggressive focus, the third party says that there should be no order as to costs. It makes a number of submissions, which I summarise as follows. First, it says that no party's conduct has been "a counsel of perfection". Secondly, the third party is not seeking its costs from anyone else. Thirdly, the Guy Parties would have made the application in any event. Fourthly, the application to change the name of the third party would have been needed in any event. Fifthly, there was no debt due or accruing due as at the date of the interim TPDO,

14. In ordinary circumstances, where an interim TPDO is made, and is subsequently made final, the third party who takes a neutral stance would not be ordered to pay the successful judgment creditor's costs. Indeed, it may be that the third party playing an entirely neutral role would be able to obtain an order for the payment of any costs to which it was put in taking part in the application and in complying with the order of the court. In *Miller Brewing Co v Mersey Docks and Harbour Co* [2004] FSR 5, goods bearing an infringing mark were ordered to be delivered up, but they were in the custody of an innocent third party. Neuberger J ordered that the trademark proprietor should pay both the third party's costs of compliance, and also its costs of the litigation itself.

15. He said:

> "30. … The logic behind that general rule is that, where an innocent third party has reasonably incurred legal costs to enable a claimant to obtain relief, then, as between the innocent third party and the innocent claimant, it is more unjust if the innocent third party has to bear his own legal cost than it is for the innocent claimant to pay them. After all, it is the claimant who is invoking the legal process to obtain a benefit, and the fact that the benefit is one to which he is legally entitled is not enough to justify an innocent third party having to be out of pocket."

This statement was cited with apparent approval by Lord Sumption (with whom the rest of the Supreme Court agreed) in *Cartier International AG v British Telecommunications plc* [2018] 1 WLR 3259, SC, a case about website-blocking injunctions. The principle as stated seems wide enough to cover the case of a TPDO.

16. It may also be noted that a third party which is a lawful UK deposit taker (but no other third party) is entitled to deduct a prescribed sum, currently £55, from the relevant debt by way of administrative expenses: Senior Courts Act 1981, section 40A. And, where an interim TPDO is made, but subsequently is *not* made final, and instead is discharged, the third party who made a proper objection (*eg* because it was not a debtor at all) would normally expect a costs order in its favour against the judgment creditor, in accordance with the general rule under CPR rule 44.2(2)(a).

17. Here, however, the Guy Parties say that they were misled into making the application by the benefit statement for Mr Brake's pension supplied to the Guy Parties on 26 September 2021 by email sent by Mrs Brake. This showed the pension as fully "crystallised", which they interpreted as meaning "in cash which could be drawn".

They also understood that the third party was not opposing the application. They were not disabused of these misapprehensions until receipt of the third party's position statement on 9 May 2022. Once they realised the position, they applied for an adjournment, and made the further application of 20 May 2022 for an injunction. That application also sought a change in the name of the third party, from "James Hay Partnership" to "James Hay Pension Trustee Ltd".

18. So far as concerns the latter part of this application, that was the result of the use by the third party of "James Hay Partnership" as a trading name for *inter alia* "James Hay Pension Trustee Ltd", which appears also to have led Mrs Brake into referring to the third party by the trading name. Indeed, the third party actually acknowledged receipt of the interim TPDO using this trading name. The use by the Guy Parties of the trading name caused no prejudice to anyone, cost very little to clarify, and was dealt with effectively by consent. In the context of the costs of these applications, it is frankly insignificant, and I find it difficult to understand why the third party sought to make it a ground of objection..

19. However, the injunction part of the application is much more important. The third party did not at any time after receipt of the interim TPDO on 4 April 2022 until the position statement of 9 May 2022 indicate that in its view there was *not* a debt due from itself to Mr Brake. In particular, it did not comply with CPR rule 72.6(4) (which is expressly designed to deal with this kind of objection) or CPR rule 72.8(1) (dealing with evidence to support any objection). Instead, it waited until the day before the hearing (which had been listed for only 30 minutes on the basis that there would be no objection from the third party) to put forward a number of substantive arguments as to why the interim order should not be made final. The third party was far from neutral. The further application for an injunction was an obvious (and indeed successful) response to the only real objection belatedly made to the TPDO. The objections on the basis that the third party's name was incorrect and needed to be changed, and that the pension administrator should have been joined, were weak by comparison.

20. In all the circumstances, I do not think it would be right for the court to "make a different order" under CPR rule 44.2(2)(b). In principle, therefore, I will order the third party to pay the Guy Parties' costs of the TPDO, including those of the further application of 20 May 2022. For the avoidance of any doubt, and response to a submission made by the third party, I make clear that it is irrelevant to my decision to make the third party liable for the Guy Parties' costs that the Brakes may not be able on their own to pay those costs. My decision is based entirely on the third party's own position.

A costs-proportion order?

21. Having reached that position, I ask myself whether I should reduce the proportion of costs to be paid to the Guy Parties from 100% to reflect their failure on the debt issue. The Guy Parties say they were misled by the use of the word "crystallised" in the benefit statement sent to Mr Brake which was disclosed to the Guy Parties last September. To my mind, however, it is not obvious that the use of the word "crystallised" signifies the existence of a cash sum. It could signify that specific non-cash (but still fungible) assets were now held for the benefit of Mr Brake. I consider that the Guy Parties took a chance in making the application, and must bear some

responsibility for their difficulties on the debt issue. On the other hand, once the pension fund is liquidated, the TPDO for which the Guy Parties applied will attach to the resultant cash sum. So, to that extent the first application also succeeds. I will nonetheless reduce the proportion of their costs to be paid by the third party and Mr Brake by 10 %, down to 90%.

Costs: basis of assessment

22. The next question is the basis of assessment of those costs. The Guy Parties ask for assessment as against the third party on the indemnity basis. The third party resists this, and implicitly asks for it to be on the standard basis. The difference between the two is well known. CPR rules 44.3(1), (2) provide that, where the court assesses the amount of costs on the *standard* basis it will not allow costs which have been *unreasonably incurred* or are *unreasonable in amount*, and will only allow costs which are *proportionate* to the matters in issue. CPR rules 44.3(1), (3) provide that, where the court assesses the amount of costs on the *indemnity* basis it will do the same, except that the test of proportionality will not apply. Moreover, it will resolve in favour of the receiving party any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount.

23. The indemnity basis of costs assessment was discussed by Hildyard J in *Hosking v Apax Partners Ltd* [2019] 1 WLR 3347, [42], [43]. There, the judge said:

> "42. The emphasis is thus on whether the behaviour of the paying party or the circumstances of the case take it out of the norm. The merits of the case are relevant in determining the incidence of costs: but, outside the context of an entirely hopeless case, they are of much less, if any, relevance in determining the basis of assessment.
>
> 43. The cases cited show that amongst the factors which might lead to an indemnity basis of costs are (1) the making of serious allegations which are unwarranted and calculated to tarnish the commercial reputation of the defendant; (2) the making of grossly exaggerated claims; (3) the speculative pursuit of large-scale and expensive litigation with a high risk of failure, particularly without documentary support, in circumstances calculated to exert commercial pressure on a defendant; (4) the courting of publicity designed to drive a party to settlement notwithstanding perceived or unaddressed weaknesses in the claims."

The Guy Parties

24. In support of its submission for indemnity costs against the third party, the Guy Parties rely on a number of matters. First, the third party did not raise its grounds of opposition within seven days of service, as required by CPR rule 72.6(4). Instead, it took over a month to do so. Second, the third party had led the Guy Parties believe that it was neutral, on 22 April 2022 stating that it is "primary concern is to ensure that the wording of any final order is such that James Hay can comply with it without being liable in any way directly for any possible shortfall in the sums realised from the SIPP…" However, the third party's position statement dated 3 May 2022, but only filed and served on 9 May 2022, made clear that the third party objected *in principle*

to the application, as well as taking other points, such as the correct name of the third party.

25. The difference between the date of the making and the date of the filing and service of the position statement was not (and has not been) explained. Nonetheless, Mrs Brake had indicated on 2 May 2022 that the third party wished to make a position statement, and also that she understood that the third party did "not believe that they owe my husband a debt". It therefore appears that, by 2 May 2022, the third party had decided to object, which is consistent with the date of the position statement, and yet for unexplained reasons did not inform the Guy Parties. Indeed, on 4 May 2022, the Guy Parties expressly asked the third party about the form of the order, but the third party did not reply. On 5 May 2022, the Guy Parties sought confirmation that the third party remained neutral. In an email dated 6 May 2022 the third party so confirmed, but also stated that its position would be set out in a position statement. The consequence of serving the position statement the day before the hearing was that the Guy Parties were forced to apply for an adjournment of the hearing of 10 May, so that they could consider the objections being made. That led to costs being thrown away.

26. Thirdly, although the third party has claimed to be neutral, it has taken a non-neutral stance. The evidence of Nicola Chatten of the third party made a number of inaccurate statements. One was that Mr Brake did not have "ready access" to his pension. Yet his pension was already in "flexi-access drawdown", which meant that it had *already* been made available to him to draw down when he wanted: he had only to ask. Another was that the pension administrator had a discretion to exercise as to whether drawdown would be permitted. But this stage had already been passed. There was no more discretion. A third was that Mr Brake would need to submit a new Benefit Payment Form to draw down the remainder of his pension. This too was incorrect, as was a further point that the third party would have a discretion whether to permit drawdown even after that form had been completed. All of these points had to be dealt with by the Guy Parties, causing further costs.

27. Fourthly, the Guy Parties rely on what they call an "obfuscatory approach to correspondence which is inconsistent with the stance of a neutral third party, and instead indicates coordination with the [Brakes] to oppose the applications". They set out some examples. One is the initial reliance by the third party on the Data Protection Act 2018 to justify not disclosing correspondence between the Brakes and the third party since 4 April 2022. Eventually, the third party disclosed two email chains between itself and Mrs Brake. One of these concerns a note being sent by Mrs Brake to the third party concerning the case of *Blight v Brewster*, which Mrs Brake said showed that

> "the trustees may well have the discretion and should exercise it in favour of the beneficiary to protect his pension from a judgment creditor … or James Hay could purchase an annuity with the funds on Mr Brake's behalf. That piece I sent is really helpful".

28. The third party denies that there was any collusion between itself and the Brakes. But I am bound to say that I regard as highly suggestive the fact that Mrs Brake put forward to the third party the idea that it had a discretion and could so exercise it as to prevent the *Blight v Brewster* argument being successfully deployed against Mr

Brake. It is equally suggestive that Mrs Brake knew on 2 May 2022 about the third party's view expressed in the position statement which was signed the next day, and that it was to the effect that there was no debt owed.

29. The third party submits that there

> "is no evidence to suggest, or from which to infer, that [Mr Brake] resisted the Applications as a result of the third party's involvement."

That may well be so. However, in the absence of any plausible explanation from the third party, I draw the inference that there was indeed at least a degree of coordination and sharing of information between the Brakes and the third party. This is not unlawful. But it is quite inconsistent with the third party's claim to be neutral as between the judgment creditor and the judgment debtor.

30. Fifthly, the Guy Parties rely on a number of the points taken by the third party by way of objection to the applications. One was that the third party argued that the pension administrator was also required to be a party to the proceedings, despite the fact that the third party had had an opportunity right from the outset to tell the Guy Parties that other or different parties needed to be joined, but did not do so. Another was rapid changes in the arguments put forward by the third party at the hearing as to which parties did or did not need to be joined. Yet another was the submission that the third party retained a general discretion not to follow Mr Brake's instructions to drawdown the remainder of his pension, a submission which I described in my judgment as "a commercial nonsense, indeed, probably commercial suicide". A further point was the allegation that Mr Brake's tax liability on drawdown would be as high as 55%, when it was clear that he did not have sufficient income for that rate to apply, and moreover there had been no such concerns when Mrs Brake did exactly the same thing, and (because she did not supply a tax code) an emergency code was applied, requiring a 55% deduction.

31. There are also a number of legal arguments which the third party put forward and which I dismissed in my judgment. I do not see the need to discuss them in any detail. As I have said on earlier occasions, getting the law wrong, even badly, is not a good reason for indemnity costs. Their only relevance here is that, at the time, they struck me as rather "scraping the barrel" to find reasons not to pay. They were (at the least) not inconsistent with the coordination thesis put forward by the Guy Parties. But, in the present context, I do not think they add anything to the other complaints made by the Guy Parties, and I do not place any weight on them.

The third party

32. On the other side, the third party says that the default position in relation to costs in the context of a TPDO is contained in CPR rule 72.11, set out above. As I have already said, that deals only with the costs of the successful judgment creditor. But the third party submits that the

> "costs of the application are deemed to be paid first out of that money that person [*ie* the judgment creditor] recovers priority to the judgment debt".

In other words, the judgment creditor obtains an order that the third party should pay him the amount of the debt, but the judgment creditor's costs *come out of that sum*, necessarily leaving him with a partially unsatisfied debt.

33. I do not accept this construction of the rule. A note at paragraph 72.11.1 of vol 1 of the White Book says:

> "The effect of the rule is to reduce the judgment debt by the net amount received after deducting costs of the third party debt proceedings."

In my judgment, rule 72.11 provides in effect that, as long as the third party debt is sufficient for the purpose, the debt and the judgment creditor's costs added together, and ordered to be paid by the third party to the judgment creditor, come out of the third party debt. But the *judgment debt* is only reduced by the amount received after deducting the costs.

34. The third party says that the Guy Parties are asking the court to depart from that rule in this case. I do not agree. If the funds held by the third party were sufficient, not only the judgment debt of more than £70,000 would be taken from those funds, but so also would the judgment creditor's costs. It seems, however, that is unlikely to be the case, as the fund is not large enough. But that is nothing to do with rule 72.11. Moreover, an order that the third party pay the judgment creditor's costs itself is plainly a direction "otherwise" within rule 72.11(a). So the rule is not infringed.

35. The third party also refers to the decision of the Court of Appeal in *Widlake v BAA plc* [2009] EWCA Civ 1256. There, the claimant had failed to tell the truth about existing back pain before an accident, and had exaggerated that suffered following the accident. In the context of CPR rule 44.2(a), referring to the taking into account of the parties' conduct, Ward LJ (with whom Smith and Wilson LJJ agreed) said:

> "39. The way in which regard is to be had to that conduct is principally to enquire into its causative effect: to what extent did her lies and gross exaggeration cause the incurring or wasting of costs?"

As I have already said, the conduct of the third party in the present case has significantly added to the costs of the applications.

36. The third party however also complains about the Guy Parties' conduct. It says that, having served the interim TPDO on 4 April 2022, they did not serve their injunction application until 20 May 2022, and their evidence in support of that application on 23 May 2022. Yet it was not until the hearing on 30 May 2022 that they conceded that no debt was due. The third party accordingly was obliged to make submissions, with evidence in support, that no debt was due. The Guy Parties also sought all correspondence between the third party and the Brakes from 4 April 2022 without explaining why and on what basis it was sought. They went on to make allegations about collusion between the third party and the Brakes.

37. There is nothing of substance in these complaints. The injunction application was the direct result of the position statement served by the third party only on 9 May 2022. Until that point, the Guy Parties had understood that there would be no objection in principle on the part of the third party. In that respect they were misled by

communications from the third party. By the time they had understood the objections, and formulated their response (including the injunction application, issued on 20 May 2022) the third party had already filed its evidence, on 13 and 18 May 2022. So far as concerns the request for correspondence between the third party and the Brakes, there was an obvious interest for the Guy Parties in knowing how far the third party's opposition was the result of encouragement by the Brakes, and I do not blame the Guy Parties for seeking it. Indeed, some of the documents eventually disclosed have enabled me to draw the inference that there was at least coordination and sharing of information between the third party and the Brakes.

38. The third party also complains about the conduct of the litigation by the Brakes themselves. In particular, the third party complaints that they

> "filed evidence and authorities right up to an hour before 30 May 2022 hearing".

The reason for this complaint is that the Guy Parties are seeking their costs against the third party on the indemnity basis, but alternatively against Mr Brake only on the standard basis. The third party says that this

> "would infer that [Mr Brake's] conduct was better than that of the third party and did not cause costs to be incurred by the Guy Parties. However, this is not the case … "

Decision on basis of assessment

39. Overall, I am entirely satisfied that the conduct of the third party in these applications has been "out of the norm" and justifies the assessment of costs on the indemnity basis. A normal third party would not have behaved in this way. A normal third party would have pointed out any inaccuracy in the name of the third party on receipt of the order, and would have immediately (and certainly within seven days) have taken the points that there was another company which needed to be joined, and that there was no cash held to the order of Mr Brake, but only investments which would have to be sold. A normal third party would not have co-ordinated its response with the judgment debtor, would have stated its objections as soon as it had formulated them, and would not have misled the judgment creditor into thinking it was neutral when it plainly was not. In these circumstances, it is not necessary for me to consider the alternative submission that Mr Brake to pay the costs on the standard basis.

Costs: assessment

Mode of assessment

40. I turn therefore to the question of assessment. This was an application which lasted less than one day. Therefore, the general rule is that the court should assess the costs summarily: CPR rule 44.6, PD 44 para 9.2. The Guy Parties however invite the court to order a *detailed* assessment of their costs, and to order an interim payment on account in the sum of £29,173.78, that is, 65% of the total claimed of £44,882.74. (I note however that the statement of costs applied to the court says it was "prepared for the purposes of Summary Assessment".) On the other side, the third party says that this was a "fairly standard application" and that the costs are "clearly broken down" in their costs statement. No good reason not to assess summarily was suggested to me by

the Guy Parties, and I can see none. Summary assessment saves both time and money, even if it is more "broad brush" than detailed assessment (*Football Association Premier League v The Lord Chancellor* [2021] EWHC 1001 (QB), [20]). I will therefore assess them summarily.

41. The Guy Parties seek the sum of £24,336. 44 solicitors' fees (including £16,801.94 in respect of work done on documents) and the sum of £6,187.50 counsel's fees in relation to the original application of 17 March 2022. This makes a sub-total of £30,523.94. They further seek the sum of £6,636.23 solicitors' costs (including £5,027.10 in respect of work done on documents) and the sum of £1,275 counsel's fees, making a subtotal of £7,911.23. Finally, they seek the sum of £3,760.08 solicitors' costs (including £2447.58 in respect of work done on documents) and the sum of £2687.50 counsel's fees, making a subtotal of £6,447.58. The three subtotals add up to £44,882.74.

42. In the present case, the third party says that the applications were not sufficiently complex to justify specialist London based commercial solicitors. This was simply a TPDO application, in relation to a debt of £70,000. The third party says it was not impracticable, let alone impossible, to instruct suitable specialist regional solicitors. Moreover, the costs which they seek greatly exceed the guideline hourly rates for "London 1" solicitors. In addition, the third party says that it did not cause the Guy Parties to incur costs which they would have incurred in any event. That means (it says) that (i) it is not liable for the costs of the application of 17 March 2022, because the Guy Parties opted to make that application and would have attended a hearing in any event; (ii) it is not liable for the costs of the application of 20 May 2022 because the Guy Parties would have been obliged to make the application in any event as it was opposed by Mr Brake; and (iii) it is not liable for the post hearing costs because the Guy Parties would have incurred them in any event.

London solicitors

43. I begin with the use of specialist London based commercial solicitors. In an earlier instalment of a different branch of the already mammoth litigation between these parties (*Axnoller Events Ltd v Brake* [2021] EWHC 2362 (Ch)), I was referred to the decision of the Court of Appeal in *Wraith v Sheffield Forgemasters Ltd* [1998] 1 WLR 132. That case shows that, by itself, the fact that London solicitors are more expensive than provincial solicitors does not make their retainer unreasonable when it comes to assessing the costs as between the parties. In that case Mr Truscott had instructed a small firm of London solicitors (ATC) to act for him in a county court case after he became dissatisfied with his previous solicitors (MFC). The judge in the county court said it was unreasonable for him to do so because their charging rates were higher than those of local solicitors. The Court of Appeal allowed an appeal by Mr Truscott.

44. Kennedy LJ (with whom Waite and Auld LJJ agreed) said, at 141:

> "The following are matters which, as it seems to me, the judge should have regarded as relevant when considering the reasonableness of Mr. Truscott's decision to instruct A.T.C. (1) The importance of the matter to him. It was obviously of great importance. It threatened his home. (2) The legal and factual

> complexities, in so far as he might reasonably be expected to understand them. Due to the incompetence of M.F.C. the matter had taken on an appearance of some complexity. (3) The location of his home, his place of work and the location of the court in which the relevant proceedings had been commenced. (4) Mr. Truscott's possibly well-founded dissatisfaction with the solicitors he had originally instructed, which may well have resulted in a natural desire to instruct solicitors further afield, who would not be inhibited in representing his interests. (5) The fact that he had sought advice as to whom to consult, and had been recommended to consult A.T.C. (6) The location of A.T.C., including their accessibility to him, and their readiness to attend at the relevant court. (7) What, if anything, he might reasonably be expected to know of the fees likely to be charged by A.T.C. as compared with the fees of other solicitors whom he might reasonably be expected to have considered."

45. In the present case, the litigation was of great importance to the Guy Parties. They had invested some £7 million in a business and estate which had unfortunately ended in disputes with the Brakes, which in turn threatened that investment. This claim was one of several, of potentially high value, brought by the Brakes against them. So they had to deal with them. The Guy Parties were and are also sophisticated consumers of legal services, having been involved in launching a number of businesses, including one involving the first commercial exploitation of the medical properties of cannabis in the UK. They were and are used to instructing professional advisers in London, with the expertise necessary to deal with their concerns. However, although the documentation relating to Mr Brake's pension is complex, the applications themselves were not. One (TPDO) was an everyday occurrence. The other (injunction) was a little more difficult, though not groundbreaking.

46. Nevertheless I bear in mind that, in the present case, the so-called "documents claim", the same solicitors have represented the Guy Parties all the way through, first to trial, and then in the Court of Appeal, in both cases successfully. They are obviously very familiar indeed with the background to the case, and indeed with the wider "baggage" associated with the litigation between the parties more generally. They also have the confidence of their clients. To get another, less expensive, provincial firm up to speed simply for the purpose of making an application for a TPDO (and then the injunction application) would cost a great deal of money and take considerable extra time. In bringing enforcement proceedings after a court order has been made, it is nearly always essential to act quickly. In the circumstances, I do not think it was unreasonable for the same solicitors to continue to act.

Hourly rates

47. The second point concerns the hourly rates sought to be applied by the Guy Parties' solicitors. The 2021 *Guide to the Summary Assessment of Costs*, in force since last October, provides for different figures for central London (where the Guy Parties' solicitors are based) depending on whether it is (i) very heavy commercial and corporate work by centrally based London firms ("London 1"), or (ii) other work in the City or central London ("London 2"). The figures for London 1 are £512 (grade A), £348 (grade B), £270 (grade C) and £186 (grade D). The figures for London 2 are £373 (grade A), £289 (grade B), £244 (grade C) and £139 (grade D).

48. The Guy Parties' solicitors are based in the City, and so fall within one or other of these two scales. It seems to me which of these two applies depends on the nature of the work being done in the particular case, rather than on some special attribute of the law firm concerned. In other words, the mere fact that a central London law firm does predominantly very heavy commercial and corporate work does not mean that when it does a piece of work which is not such work the same "London 1" guideline rates still apply. In my judgment, work done by such a firm which is not "very heavy commercial and corporate work" will fall under "London 2" rather than "London 1", as "other work".

49. I do however make clear that I see no reason why a piece of *litigation* may not qualify in an appropriate case as "very heavy commercial and corporate work". I do not think that that expression is restricted purely to transactional matters. However, in my judgment the work done on these two applications is simply not heavy enough to fall into that category. Indeed, the first of the two applications was straightforward, the kind of thing which is given to a junior solicitor or even a trainee. The injunction application was more difficult, but still not "heavy", let alone "very heavy". In my judgment these two applications constitute "other work in the City or central London", and therefore fall within "London 2".

50. Of course, as the Guide says, the guideline figures are intended only to provide a *starting point* for those faced with summary assessment. As the Guide then goes on to say,

> "29. In substantial and complex litigation an hourly rate in excess of the guideline figures may be appropriate for grade A, B and C fee earners where other factors, for example the value of the litigation, the level of the complexity, the urgency or importance of the matter, as well as any international element, would justify a significantly higher rate. … "

I bear all that in mind. Nevertheless, I cannot see that there are any factors involved in *these* applications which would justify hourly rates significantly in excess of the guideline figures. When I come to assess the costs, therefore, I will be looking at hourly rates in the region of the figures given in "London 2".

Delegation

51. The third party does not address questions relating to delegation of work to more junior colleagues in its submissions. This is nevertheless a question for the court. It is even referred to in the *Guide*, at Appendix 2, in the context of solicitors sitting behind counsel during hearings. But in my judgment the point arises in other contexts also, such as attendances on others and work on documents. I have therefore looked at the breakdown of the figures on the statement of costs. I do not see any obvious case of failure by the Guy Parties' solicitors to delegate work appropriately.

Counsels' fees

52. These are not addressed by the third party, and I assume that they are not challenged as to the amounts involved.

Causation

53. As stated above, the third party says that it did not cause the Guy Parties to incur costs which they would have incurred in any event. In relation to the costs of the 17 March application, the problem for the third party is that it opposed the application, and in a non-neutral way, after having stated that it was neutral as between the parties and not having served the notice of grounds of opposition required by the rules. I agree that the Guy Parties would still have had to issue the application and present it in court, but the costs of doing so would have been far less than they actually were. And ultimately, because of the ancillary injunction application, the Guy Parties' application has been successful. In all the circumstances, I think the third party should pay the Guy Parties' costs of the 17 March 2022 application.

54. In relation to the costs of the 20 May application, the problem for the third party is the same, *ie* that it opposed the application in a non-neutral way. Again, I agree that the Guy Parties would have had to make the application in order to get over the problem that Mr Brake's pension fund was not in cash, but the costs were made far greater by the third party's opposition, putting forward a number of factual and legal points which I held to be without substance. The third party having opposed the application unsuccessfully, I think it should pay the costs of it.

55. Finally, there are the post-hearing costs. From the descriptions given in Part 3 of the schedule of documents, and from my own experience, I infer that these costs arise from the settling of the form of order and the preparation of the costs schedule and the costs submissions. These costs are part of the costs of the two applications, even if they post-date the hearing of those applications, and whoever pays the costs of the applications pays them too.

Quantum

56. In assessing the costs of the Guy Parties on the indemnity basis, I must disallow costs which have been *unreasonably incurred* or are *unreasonable in amount*, but I do not need to consider proportionality. If I have any doubt as to reasonableness, I must exercise it in favour of the receiving party. I am satisfied that the time spent and the delegation of work carried out were reasonable. However, I am also satisfied that the hourly rates being applied, taking into account the 2021 *Guide*, were not. They are far in excess of 'London 2', which I have held is the appropriate level for the work done. Lastly, I am satisfied that the fees for counsel were reasonable.

57. I have therefore gone back to the Schedule of Costs. As I have said, the total claimed is £44,882.74, of which £34,732.74 is solicitors' costs, £9,875 is counsels' fees, and £275 is an application fee. Reworking the solicitors' costs on the basis of London 2 produces a total of a little under £20,000, to which counsels' fees and the application fee must be added. I will therefore assess the costs of these applications as £30,000 in total, plus any applicable VAT (though I imagine that the Guy Parties are able to recover that).

Conclusion

58. I have dismissed the Brakes' application for a variation in the terms of the order to be made on the applications of 17 March and 20 May 2022. I will order the third party to pay 90% of the Guy Parties' costs of the two applications, summarily assessed on the

indemnity basis. I have assessed the costs at £30,000. The order will therefore be that the third party pay the Guy Parties £27,000 (*ie* 90% of £30,000) by 4 pm on 3 August 2022. I should be grateful to be told as soon as possible whether the parties wish me to take up the option set out in paragraph 6 above, and also to have a redrafted minute of order which takes account of this ruling too.