Neutral Citation Number: [2022] EWHC 2907 (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: 16 November 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**
William Day (instructed by **Stewarts Law LLP**) for the **Defendants**
Charlotte Pope-Williams (of **Pinsent Masons LLP**) for the **Third Party**

Application dealt with 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 or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 3:45 pm on 16 November 2022

HHJ Paul Matthews :

Introduction

1. On 4 November 2022 I handed down judgment on an application by the defendants ("the Guy Parties") by notice dated 12 September 2022, for an order under regulation 7(2)(b) of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 ("the 2020 Regulations"): see [2022] EWHC 2797 (Ch).

2. In essence I decided that the application succeeded, and that the parties should comply with an earlier order which I made on 20 July 2022 in relation to a third-party debt order ("TPDO"), notwithstanding the entry of the first claimant into a mental health crisis moratorium under the 2020 Regulations in late August or early September 2022. Any reader requiring to know more of the background to this procedurally complex litigation should refer to my judgment, at [2]-[12].

3. The present judgment is concerned with the costs of the application of 12 September. I directed that written submissions on consequential matters be filed and served in the first instance by 8 November 2022, and reply submissions by 10 October 2022. Both the Guy Parties and the claimants ("the Brakes") filed and served two sets of submissions. The third party took no substantive part in the application and has made no submissions in relation to its costs. Nor is any order sought against it.

4. As I have said, the application was successful, and the applicant Guy Parties have asked for an order that the claimants ("the Brakes") pay their costs of that application. The Guy Parties also served a statement of costs dated 8 November 2022, showing a total of £9,551.98 (no VAT). They seek a summary assessment of the costs, but limited to £6,500. The Brakes do not resist a costs order in principle, but they submit that the costs should be subject to detailed rather than summary assessment, and they also challenge the amount of the costs claimed, as excessive.

Mode of assessment

5. The first question is therefore whether I should order a detailed assessment, or whether I should assess them summarily. CPR PD 44 paragraph 9 relevantly provides:

> "9.2. The general rule is that the court should make a summary assessment of the costs –
>
> > […]
> >
> > (b) at the conclusion of any other hearing, which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim,
>
> unless there is good reason not to do so, for example where the paying party shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily".
>
> […]

9.5(4). The statement of costs must be filed at court and copies of it must be served on any party against whom an order for payment of those costs is intended to be sought as soon as possible and in any event –

[…]

(b) for all other hearings, not less than 24 hours before the time fixed for the hearing."

6. The Brakes submit that I should not summarily assess the costs because the Guy Parties did not file or serve their statement of costs in accordance with paragraph 9.5(4), *ie* 24 hours before the hearing. They also rely on the decision of the Court of Appeal in *Tomlinson v Radiocom Systems Ltd* [2011] EWCA Civ 1832, where the court held that the judge had been wrong summarily to assess the costs in a case where the paying party was a litigant in person.

7. The Guy Parties submit that paragraph 9.5(4) applies only where there is actually a hearing, and not to matters which are dealt with on paper. In any event, they say that the Brakes, having received the statement of costs on 8 November 2022, had until 10 November 2022 (approximately 48 hours) to comment on it, so that they have not been prejudiced by any failure to comply with that paragraph. They also seek to distinguish the decision in *Tomlinson v Radiocom Systems Ltd*, saying that it is "nothing like this case".

Late filing and service of statement of costs

8. So far as concerns the first point, it has become relatively common, since the coronavirus pandemic, for costs and other consequential applications to be dealt with on paper. As a general proposition, the courts have for procedural purposes usually sought to equate dealing with the matter on paper with a hearing in the conventional sense.

9. But, of course, there will be procedural rules that which do not lend themselves to this process. Paragraph 9.2(b), dealing with the general rule as to when there should be a summary assessment, is an example of this. Dealing with a matter on paper cannot be regarded as a hearing that has a particular length. In the context of paragraph 9.5(4)(b), however, it seems to me that the judge cannot begin consideration of the paper application until he has received the written submissions on both sides, time-limited for lodging such submissions has expired. It is only then that the "hearing" can begin.

10. In the present case, therefore, lodging the statement of costs some 48 hours before the reply submissions of the paying party are due amounts to compliance with that paragraph. Even if it did not, it is not uncommon for the court to proceed to a summary assessment even where less than 24 hours' notice of the statement of costs has been given. The court has a discretion, which it exercises on a fact sensitive basis.

11. In the present case, as the Guy Parties say, the Brakes had the statement of costs for 48 hours before their reply submissions were due to be lodged. I take account of the fact that Mrs Brake is unwell at present, but she has produced a set of entirely coherent submissions taking into account the costs schedule. Accordingly, the Brakes

therefore would not have not suffered any material prejudice. In my judgment there is nothing in this objection.

Tomlinson v Radiocom Systems Ltd

12. As for *Tomlinson v Radiocom Systems Ltd*, that was a case where the claimants, represented by counsel and solicitors, successfully applied for an interlocutory injunction, but failed on an application for summary judgment. They claimed costs amounting to some £68,000, of which £4750 were counsel's fees, and the remainder were solicitors' fees. The defendant was a litigant in person. Given that the application had taken less than a day, the judge at first instance summarily assessed the costs. However, he did not explain to the litigant in person that there was the option of detailed assessment, and neither did he question the claimant's counsel on the costs schedule, although he reduced the cost claimed by 25% without giving any explanation.

13. The Court of Appeal considered that the litigant in person had not understood that there was another option, and had been deprived of the possibility of asking for it. It also considered that there were a number of "remarkable items" in the costs schedule, and that in the circumstances the judge should have gone into the schedule of costs. As a result, the court set aside the judge's order, and directed a detailed assessment, and a payment on account of costs.

14. Although the Brakes are right to point out that the paying party in that case was a litigant in person, all the other significant elements of that case are different from the elements of this. The amount of costs claimed was much higher there than here (more than ten times), the Brakes are experienced litigants in person and know about the difference between summary and detailed assessment costs (indeed, that is precisely the point of their objection), and in their written submissions they have challenged various items in the statement costs and also the overall figure.

Conclusion on mode of assessment

15. In my judgment, this is just the sort of case in which the court should assess the costs summarily. It concerns a short piece of satellite litigation, which might have been dealt with in court in a few minutes after judgment was given on the main application, and will cause a great deal more trouble and incur disproportionate costs if it is sent off for a detailed assessment. I will therefore make a summary assessment of the costs.

Hourly rates

16. The hourly rates claimed by the Guy Parties are £736 for a grade A partner, £550 for a grade A senior associate, £403 for a grade C associate, and £350 for a grade C costs draughtsman. Their solicitors are based in the City of London, so that there are two guideline rates prescribed, London 1 and London 2. The former is for "very heavy commercial and corporate work", and the other is for "other work". Mrs Brake challenges the use of London solicitors. In an earlier instalment of this litigation, I held that it was not unreasonable for the Guy Parties to instruct these same London solicitors in the litigation: [2022] EWHC 1911 (Ch), [43]-[46]. Most of the reasons that I gave there are equally applicable here.

17. This application was made in the context of long-running heavy commercial litigation. On the other hand, Mrs Brake says it was not complex, international or urgent. I accept that there is no international element. But the 2020 Regulations *are* complex and this was the first such application of this kind so far as I am aware under them. So, there were no easy paths to follow. Moreover, the process of enforcement of the TPDO should not be held in suspension unnecessarily. Accordingly, if such an application were to be made, it would have to be made timeously.

18. As a result, I consider that the appropriate guideline for this work is London 1 rather than London 2. The applicable guideline hourly rates are therefore £512 for grade A and £270 for grade C. The rates claimed by the Guy Parties in the statement of costs are thus in excess of the guidelines. Of course, they are just that, guidelines, and are not set in stone. But, as the Court of Appeal said in *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466 (and reiterated in *Athena Capital Services SICAV v Secretariat of State for the Holy See* [2022] EWCA Civ 1061), if a rate in excess of the guideline rate for solicitors' fees is to be charged to the paying party, a clear and compelling justification must be provided.

19. The Guy Parties say that they have pre-empted this argument, and also any argument about non-delegation to more junior fee earners, by voluntarily limiting their claim to £6,500, approximately two-thirds of the total figure shown in the schedule. However, Mrs Brake has made a number of challenges to the costs claimed, including the amount of time spent. I accept that, if the recorded hours were charged at guideline rates, the resultant figure would still be more than the £6,500 claimed, but I cannot simply brush the challenges aside and fail to deal with them, on the basis that a global figure of £6,500 is bound to deal adequately with any such challenge.

Challenges to the statement of costs

20. The schedule records time spent on documents by the two grade A fee earners amounting to 8.6 hours in total, spent in considering the law, drafting the application notice, order and written submissions and revising them following counsel's input. There was further time of 1.6 hours recorded as spent on documents for reviewing directions from the court, the application for extension of time from the Brakes, and considering their evidence.

21. That is a total of 10.2 hours, to which must be added 4.2 hours of fee earner time (grades A and C) for attendances on the parties and others, and 1.5 hours (also grades A and C) for preparing the statement of costs. There is also the sum of £1,172.50 for counsel's fees (counsel gave advice, but also drafted the reply).

22. Mrs Brake criticises all this on the basis that the witness statement drafted was seven pages long (of which only six were original work). She considers that the work done in preparing the application should not have taken longer than two hours. She challenges the time spent by the solicitors on the reply that counsel drafted. She further challenges the time spent in relation to the Brakes' application for an extension of time, on the basis that they lost that application. She also refers to the fact that she made offers (ultimately one of £2,500) to attempt to settle the costs question without the necessity of troubling the court or incurring further costs.

Discussion

23. I do not accept that the documents for this application could be prepared in two hours. This was a novel application. Nor do I accept that the Guy Parties should not charge for reviewing documents drafted by counsel. Solicitors are not – or, at any rate, should not be – a postbox. At the same time, I regard the total of 10.2 hours as excessive, and in any event should have involved more delegation by grade A fee earners to a lower level. About 7 hours, split between grade A and C fee-earners at a firm charging London 1 rates, should have been enough.

24. I do not however accept that the costs of this application can be broken down to granular level, and then each grain can be allocated to one side or another depending on who might be thought to have "won" that grain. Overall, the Guy Parties clearly succeeded on this application, and though a proportionate reduction might be made in an appropriate case to reflect less than 100% success, that is a matter of appreciation and discretion. In the present case the time involved was small, and I do not think it appropriate to do so.

25. I do however take full account (as required by CPR rule 44.2(4)(c)) of the offers made by the Brakes to settle the cost question. I do not quarrel with the *range* of attendances which had to be made, but I consider that the 3 hours spent by grade A fee earners on attendances on counsel, the third party and the court is excessive, both in time and in level of fee earner. Two hours or so, split between grade A and grade C fee-earners, should have been enough. Mrs Brake does not challenge counsel's fees, and I do not consider them further.

Conclusion on assessment

26. As I said in my judgment of 23 August 2021, in *Axnoller Events Ltd v Brake* [2021] EWHC 2362 (Ch) (another part of this multi-headed litigation),

> "15. Summary assessment of costs is not expected to be a line-by-line billing exercise, like detailed assessment. It is intended to be a broad brush approach: see *eg Football Association Premier League v The Lord Chancellor* [2021] EWHC 1001 (QB), [20]. … "

27. Accordingly, I do not attempt to recalculate the schedules of costs, but stand back and weigh the criticisms of the costs claimed that I consider are justified against the overall figure. There was simply too much time spent, by too senior levels of lawyer, at charge-out rates exceeding the guidelines without sufficient justification. Taking everything into account, in my judgment the appropriate overall figure at which summarily to assess these costs (including counsel's fees and the court fee) is £5,500.

Time to pay

28. Finally, Mrs Brake asks for time to pay any costs which I summarily assess. She does this on the basis of the decision of the Court of Appeal (given on 10 October 2022) in the Eviction Proceedings, that the Guy Parties had no right at common law to interfere with the Brakes' exclusive possession of the Cottage without a court order. She says that "consequential matters arising from the decision including obtaining possession of the Cottage have yet to be determined and will not be determined before December". However, she says that they expect to regain possession and access the

Cottage in order to release assets held there so that they can be sold to pay this costs order.

29. Accordingly, she asks for one of two things. The first is that payment is held over to a date after the consequential matters have been determined in the Court of Appeal, and the Brakes have access to items they can sell. The second is that the Brakes be permitted to go to the Cottage, and retrieve the items that they need to retrieve to sell, so that they can comply with the costs order.

30. I do not think that I can make a summary order requiring the Guy Parties to give access to the Brakes to retrieve items when (as I understand the matter) there is no – or no sufficient – agreement between the parties as to what items in the Cottage belong to whom. On the other hand, I have some sympathy with the notion that debtors may have the means of paying a debt yet not be able to exercise that means simply because it is not in their possession, but that of their creditor.

31. Accordingly, before I reach a conclusion on the question of time to pay, I invite the Guy Parties to send to me (with a copy to the Brakes) by 4 PM on Friday, 18 November 2022 any written submissions on this point that they wish me to consider. Mrs Brake may send me any submissions she wishes to make in reply by 4 PM on Monday, 21 November 2022, again with a copy to the other side. I hope then be in a position to decide what to do.