Neutral Citation Number: [2023] EWHC 3179 (Ch)

Cases Nos: 166 and 167 of 2015 and 21 of 2019, E00YE350, F00YE085, BL-2019-BRS-000028

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

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

Date: 14 December 2023

Before :

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

B E T W E E N:

(1) GEOFFREY WILLIAM GUY

(2) THE CHEDINGTON COURT ESTATE LIMITED

(3) CHEDINGTON EVENTS LIMITED

Applicants

and

(1) MRS NIHAL MOHAMMED BRAKE

(2) RETHINK MENTAL ILLNESS T/A MENTAL HEALTH AND MONEY ADVICE (ENGLAND)

(3) DORSET HEALTHCARE UNIVERSITY NHS FOUNDATION TRUST

Respondents

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- -

Stewarts Law LLP for the **Applicants**
The First Respondent in person
Bláthnaid Breslin (instructed by **Kennedys Law LLP**) for the **Second Respondent**
DAC Beachcroft LLP for the Third Respondent

Application dealt with on paper

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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 revised 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 10:30 am on 14 December 2023.

HHJ Paul Matthews:

Introduction

1. On 14 October 2022, the applicants applied by notice for an order to cancel the mental health crisis moratorium ("moratorium") into which the first respondent had been entered at about the end of August 2022, under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 ("the 2020 regulations"). I set out the structure and some of the relevant provisions of those regulations in an earlier judgment (*Axnoller Events Ltd v Brake* [2021] 1 WLR 6218) relating to a similar moratorium for the first respondent's husband, Mr Andrew Brake, and I will not repeat them here.

Background

2. The background to this matter is set out in summary form at paragraph 3 of the judgment in *Axnoller Events Ltd v Brake*. For present purposes, however, it will be sufficient to say this. The applicants and the first respondent and her husband have been locked in fierce large-scale litigation following the breakdown in November 2018 of an employment relationship between them. In most of this litigation, the applicants have been successful, and the first respondent and her husband unsuccessful. Significant costs orders have been made in favour of the former and against the latter.

3. The applicants have sought to enforce these orders. As I say, at about the end of August 2022, the first respondent entered into her moratorium, which meant that no further enforcement action could be taken against her assets in respect of the unsatisfied orders. For the purposes of the first respondent's moratorium, the second respondent was her debt adviser, and the third respondent was to provide the relevant mental health crisis treatment.

The application of 14 October 2022

4. The progress of the application of 14 October 2022 was for various reasons delayed. Those reasons are set out in my judgment of 23 June 2023, under neutral citation number [2023] EWHC 1560 (Ch). That judgment was concerned with what directions ought to be given to lead to the hearing of the substantive application. However, quite coincidentally on the same day, 23 June 2023, the third respondent confirmed that the first respondent was not then receiving mental health crisis treatment satisfying the criteria for the moratorium. Because of the terms of the 2020 regulations, that meant that the moratorium came to an end one month later, on 22 July 2023. I was informed of this development, and considered what in the circumstances ought to be done.

5. In directions which were sent to the parties on 20 July 2023, I said this:

> "2. Given that the moratorium will come to an end on 22 July 2023, it makes no sense to hold a four half-day hearing to decide whether to make

an order cancelling it. Accordingly, it makes no sense either to require compliance with the directions intended to lead to that hearing.

3. On the other hand, serious questions remain to be decided as between the parties. These include the questions whether the application was properly served on the NHS Trust and whether it became a party, and also costs. It would not be proportionate to continue with the originally listed hearing for those purposes alone. Instead, the court must give directions to deal with the outstanding issues.

4. My provisional view is that it should be possible for the court to deal with those outstanding issues on paper, without the need for a formal hearing … "

6. I therefore give directions for all the parties to attempt to agree directions leading to a paper decision by me on the outstanding issues (principally costs), but in default of such agreement to make written submissions as to what those directions should be, which I would then determine. Unfortunately, the parties could not agree, and accordingly filed the written submissions which I have considered. These were not passed to me until September, though, since I was away on leave for much of August, that would have made little difference. As it happened, I then had sitting commitments away from Bristol in September and in October. The consequence is that this matter has, I regret, been rather put on the back burner. I am sorry for the delay. This judgment now expresses my conclusions as a result of my consideration of those submissions.

The service issue

7. I must however mention one additional question which arose only after I had given my directions of 20 July 2023. This was the question, raised by solicitors for the third respondent, as to whether the third respondent had been regularly served with the application, and thus was properly a party to it, and hence amenable to the jurisdiction of the court (for example) to order it to pay costs to another party. This question arose from the fact that service on the third respondent was purportedly effected on it by email to the email address of one of its clinical staff and at one of its hospitals, rather than at its head office. For present purposes I do not need to say any more about this at this stage.

The parties' submissions in summary

8. In their written submissions, the applicants submitted that, assuming that the respondents had been properly served, the applicants should obtain their costs from the respondents, on the basis that the first respondent had never met the criteria for the moratorium in the first place. If, however, the first respondent did meet the criteria on entry into the moratorium and thereafter up to 21 June 2023, then they would not seek their costs from the respondents (with a reservation in respect of the costs of certain of the submissions which they had made). Accordingly, the applicants sought directions leading to the resolution of the questions (i) whether the third respondent had been properly served with the application, and (ii) whether the first respondent had met the criteria for

the moratorium at the outset and thereafter up to 22 June 2023. That would include a direction for disclosure of documents by the third respondent on the second of these issues.

9. The first respondent submitted that the service issue should be decided before any question of costs was dealt with, and that disclosure was not necessary for the latter. Her view was that "the legal landscape changed as did guidance given by the Treasury as you noted in your judgment of 23 June 2023. That should [be] an end to the matter". She said she did "not understand why the Guy Parties' desire to recoup costs for an appli[c]ation that became otiose as a result of the passage of time and changes in the law and guidance should be entertained at all."

10. The second respondent's primary position was that there should be no order as to costs, the substantive basis for the application having been superseded by the moratorium's coming to an end on 22 July 2023. It submitted that, as the court had not reached a conclusion on the substantive issues, it lacked the "compass" to guide the exercise of its discretion. Alternatively, the second respondent submitted that the respondents should be given more time to file detailed submissions on costs.

11. The third respondent submitted at the outset that it was never a party to the application, because it had not been properly served. Hence it could not be ordered to pay the applicants' costs. Even if it could, in the circumstances the actions of the applicants in issuing the application were unnecessary and excessive. Therefore, the applicants should not be entitled to their costs. Lastly, the applicants should not be entitled to disclosure for the purposes of deciding costs issues.

12. Despite permission being given for them to do so, none of the respondents filed any submissions in answer to those of the applicants, although the second respondent took the opportunity to correct a minor error in its original submission. However, the applicants filed submissions in answer to those of the second and third respondents. Those submissions fall under three heads: (i) the service issue, (ii) the disclosure issue, and (iii) the question of directions. The applicants now argued that, as the second and third respondents had made full substantive submissions, the court was now in a position to determine the first two issues, and need not invite any further submissions.

Should the court make no order as to costs?

13. The first question is whether, as submitted by the second respondent, the court should simply make no order as to costs. In that case there would be no need to consider whether the third respondent was properly served or not, and neither would it be necessary to decide whether disclosure should be ordered on the factual issues put forward by the applicants in order to support their claim for costs against the respondents. It is only if that is not the appropriate response on these facts that the court would need to go on to consider those matters.

14. In *BCT Software Solutions Ltd v C Brewer & Sons Ltd* [2003] EWCA Civ 939, a claim for copyright infringement went to trial, but settled after the first day of the hearing, except for the question of costs. There was then an argument about costs, which resulted in the trial judge making a complex order. The claimant was aggrieved by the costs order and appealed. The Court of Appeal dismissed the appeal. A general theme in the two judgments which were given, by Mummery and Chadwick LJJ respectively) was that the appellate court should not interfere in a costs order save in cases of manifest injustice, which this was not.

15. In his judgment, however, Chadwick LJ also made a number of important comments on the basic rules concerning costs, with which Brooke LJ expressly agreed, and there is nothing inconsistent with them in the judgment of Mummery LJ. Chadwick LJ said this:

> "22. The power to make an order as to the costs of civil proceedings is conferred by section 51(1) of the Supreme Court Act 1981. It is in the discretion of the court whether, in any particular case, that power should be exercised. That is made clear by CPR 44.3(1)(a). It finds expression in the opening words of CPR 44.3(2) – '*If the court decides to make an order about costs –*'. The first question for the court – in every case – is whether it is satisfied that it is in a position to make an order about costs at all.
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> 23. In addressing that question the court must have regard to the need (if an order about costs is to be made) to have a proper basis of agreed or determined facts upon which to decide, in the light of the principles set out under the other provisions in CPR 44, what order should be made. The general rule, if the court decides to make an order about costs, is that the unsuccessful party will be ordered to pay the costs of the successful party – CPR 44.3(2)(a). But the court may make a different order – CPR 44.3(2)(b). Unless the court is satisfied that it has a proper basis of agreed or determined facts upon which to decide whether the case is one in which it should give effect to 'the general rule' - or should make 'a different order' (and, if so, what order) – it must accept that it is not in a position to make an order about costs at all. That is not an abdication of the court's function in relation to costs. It is a proper recognition that the course which the parties have adopted in the litigation has led to the position in which the right way in which to discharge that function is to decide not to make an order about costs.
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> 24. In a case where there has been a judgment after trial, the judge may be expected to be in a position to decide whether one party or the other has been successful overall; whether one party or the other has been successful on discrete issues; whether the fact that the party who has been successful overall but unsuccessful on some issues calls for an order which reflects his lack of success on those issues; and whether – having regard to all the circumstances (including conduct) as CPR 44.3(4) requires – the order for costs should be limited in one or more of the respects set out in CPR 44.3(6). But where there has been no trial – or no judgment – the judge may well not be in a position to reach a decision on

> those matters. He will not be in a position to decide those matters if they turn on facts which have not been agreed or determined. In such a case he should accept that the right course is to decide that he should not make an order about costs. …
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> 25. It does not, of course, follow that there will be no cases in which (absent a judgment after trial) the judge will be in a position to make an order about costs. There will be cases (perhaps many cases) in which it will be clear that there was only one issue, that one party has been successful on that issue, and that conduct is not a factor which could displace the general rule. But, in such cases, the answer to the question which party should bear the costs of the litigation is likely to be so obvious that, as Lord Justice Mummery has pointed out, the judge will not be asked to decide that question. It will be agreed as one of the terms of compromise.
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> 26. The cases in which the judge will be asked to decide questions of costs – following a compromise of the substantive issues – are likely to be those in which the answer is not obvious. And it may well be that, in many such cases, the answer is not obvious because it turns on facts which are not agreed between the parties and which have not been determined. The judge should be slow to embark on the determination of disputed facts solely in order to put himself in a position to make a decision about costs. … ”

16. The second respondent cited the decision in *Coyne v DRC Distribution Ltd* [2008] BCC 612, CA. There, the respondent creditor of a company in administration had made an application to remove the administrators. But this became pointless once the company was placed in compulsory liquidation. The creditor asked for its costs, and the judge duly made a costs order against the administrators. They appealed, but the Court of Appeal dismissed the appeal.

17. Rimer LJ (with whom Ward and Jacob LJJ agreed) said:

> "68. I accept Mr Alexander's submission that, although the administrators' successful application to Judge Purle had the consequence of removing the substantive basis of DRC's application, DRC was still entitled to ask the court to rule on its application for costs against Mr Foster and the administrators. This is shown by the *Brawley* case [*Brawley v Marczynski* [2003] 1 WLR 813, CA], which also shows that the administrators had no right to insist that, before deciding the costs question, the judge should hear oral evidence from, and cross-examination of, the witnesses. He was in principle entitled to embark on an assessment of the incidence of costs in a more summary way than Mr Ashworth submitted. He was not required to adopt the sort of procedure that might perhaps have been appropriate if he had been deciding the substantive issues in DRC's application. The judge had read the evidence and heard full argument from counsel; and his conclusion was that all he had read and heard pointed to the conclusion that he should make the costs order he did."

18. The second respondent also cited *Powles v Reeves* [2016] EWCA Civ 1375. In that case, the parties settled the substantive claims in a boundary dispute shortly before trial. But the parties could not agree the costs aspects. The judge was asked to, and did, make a costs order against the defendant, on the basis that the claimants had obtained a declaration in the terms they were originally seeking, and were therefore the successful parties for the purposes of the "general rule" on costs.

19. David Richards LJ said:

> "18. Before going to the grounds of appeal, it is appropriate to consider first the approach to be taken to an order for costs made in the circumstances of this case. Generally, judges are called upon to decide issues of costs after they have heard an application or tried an action, and the conclusions which they have reached on the substantive issues will usually determine or have a very important bearing on the appropriate order for costs. So much is stated in the Civil Procedure Rules. It does, however, sometimes occur that, as in this case, the parties reach a settlement of the substantive issues between them but are unable to agree the appropriate order for costs, and as part of their settlement invite the court to determine the question of costs.
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> 19. I think it is fair to say that, deprived of the compass normally provided by the outcome of the case, judges often find this to be a difficult exercise. It is neither desirable nor generally practical for the whole case to be heard solely for the purpose of determining costs and it would usually be an unacceptable waste of the court's resources, as well as the parties' resources, to do so. The judge instead has to look for other factors to determine the appropriate order for costs, prominent amongst them being the result of the settlement, the conduct of the parties in the course of the litigation, any reasonable offers of settlement that may have been made and, in any case where it is tolerably clear, which party would have succeeded at trial."

20. Longmore LJ delivered a short concurring judgment.

Discussion

21. As a result of these authorities, I consider that my starting point must be to ask whether, having decided that there is no longer any point in dealing with the substantive application, I am in a position to make an order as to costs. As Chadwick LJ said in the *BCT* case,

> "23. … Unless the court is satisfied that it has a proper basis of agreed or determined facts upon which to decide whether the case is one in which it should give effect to 'the general rule' - or should make 'a different order' (and, if so, what order) – it must accept that it is not in a position to make an order about costs at all."

22. As things stand, I do not think I am in that position. I have no basis on which to say who (if anyone) is the successful party. Indeed, that is exactly why the

applicants have asked that I deal with the service issue and the disclosure issue. Unless I resolve the first in a particular sense, I have no power to make a costs order against the third respondent. Without my determination on the question whether the first respondent met the criteria for the moratorium at the outset, and continued to meet them thereafter (whether or not disclosure is ordered), I have no basis for making one against any of the respondents, because without it I cannot know whether the applicants would have been the successful party had the application proceeded.

23. I appreciate that the applicants now seek more restricted disclosure from the third respondent in order to resolve the costs issue than they sought for the substantive application. But the fact is that the applicants are still looking to demonstrate that the first respondent did not meet the criteria for the moratorium when she entered it, and then to use that as the basis for saying that they should have their costs. Yet this was the heart of the original application, and, as David Richards LJ said, it is undesirable, impractical and a waste of the court's resources for the whole case to be heard solely for the purpose of determining costs.

24. Having reached that point, I accept, as Rimer LJ said in the *Coyne* case, that it is still open to the parties to ask the judge to rule on the question of costs, and for this purpose to conduct a more summary procedure to decide the question of costs than would have been appropriate for the substantive application. There would be, for example, no obligation to permit oral evidence and cross-examination. The same must be true of disclosure. And in this connection I bear in mind that cases where disclosure is ordered in support of a contested application, rather than an entire claim, are likely to be rare anyway. But in my judgment the judge is entitled to conclude, in a case where it is pointless to continue to pursue the substantive relief sought, that the interests of justice do not require the further investment of legal and judicial resources in determining the factual basis upon which a costs order could properly be made, and that, instead, the right answer is to make no order as to costs.

Conclusion

25. In my judgment, this is such a case. It is not one of the "clear" cases referred to by Chadwick LJ in *BCT*. Nor is it a case of settlement, where the terms of settlement may assist the court in deciding that one party or the other was probably in the right. I accept that the service issue would not require disclosure, as the basic facts are clear. That issue could certainly be resolved summarily, and the submissions have already been made. But resolving it would not help to deal with the most important dispute of all, namely whether the first respondent was ever eligible for a moratorium at all. Resolving that would be resolving the major part of the substantive application, and I see no proper justification for that now.

26. The sprawling litigation between the applicants and the Brakes has been going on now for five years, in several different sets of proceedings and in different *fora*, all fought with great intensity and at great expense. I have conducted and decided four full-scale trials and one quantum trial between the parties, of which two decisions went to the Court of Appeal (and that in the quantum trial

may yet do so). I have also dealt with two Insolvency Act applications between them, the decisions in both of which went to the Court of Appeal, and one of them then on to the Supreme Court. I do not know how many decisions I have made in this litigation as a whole, but more than 40 of them have been published on BAILII under neutral citation numbers. In addition, there have been full scale employment tribunal proceedings.

27. In my judgment, the parties have had more than their fair share of the limited judicial and court resources available. I am not inclined to allow this kind of further, satellite litigation unless it is really necessary. With the benefit of hindsight, I think I went too far, too fast, in paragraph 3 of my directions of 20 July 2023, when I said that important questions still had to be answered. I did not then have in mind the authorities that I have cited here. Accordingly, I will make no order as to costs.