



Neutral Citation Number: [2020] EWHC 1484 (Ch)

Case No: BL-2019-BRS-000028

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

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

Date: 11/06/2020

**Before :**

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

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**Between :**

**(1) NIHAL MOHAMMED KAMAL BRAKE**  
**(2) ANDREW YOUNG BRAKE**  
**- and -**  
**(1) GEOFFREY WILLIAM GUY**  
**(2) THE CHEDINGTON COURT ESTATE**  
**LIMITED**  
**(3) AXNOLLER EVENTS LIMITED**

**Claimants**

**Defendants**

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**Stephen Davies QC (instructed by Seddons Law LLP) for the Claimants**  
**Andrew Sutcliffe QC and William Day (instructed by Stewarts Law LLP) for the**  
**Defendants**

Hearing dates: 1 June 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.

.....

**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 10:30 am.**

**HHJ Paul Matthews :**

## **INTRODUCTION**

1. This is my judgment on an application by the defendants by notice dated 25 March 2020, which was originally for an order for security for their costs of this claim. The application was argued before me on 1 June 2020, remotely by means of a Zoom video conference call, curated by a third-party provider. For reasons that I will come on to, arising out of what happened at the hearing and after the hearing, the defendants accept that the application cannot now succeed. But they now say that in the circumstances they are entitled to their costs against the claimants, and on the indemnity basis. The claimants resist this. Essentially, therefore, this judgment is about the costs of the application. Nevertheless, it is unfortunately necessary to set out in some detail not only the background to the matter, but also the course of and the arguments involved in the application.
2. The claim itself was commenced by claim form issued on 2 September 2019. It alleges that the defendants have “unlawfully appropriated electronic and/or hard copy documents containing private, confidential and/or privileged information and personal data belonging to” the claimants. It seeks relief in respect of such documents and information, including disclosure, inspection of databases, an injunction to restrain use of the documents/information and destruction of copies of such documents/information within the defendants’ control. Particulars of claim were originally dated 2 September 2019, and amended on 23 March 2020. A defence was served on 29 May 2020.
3. On 28 November 2019 Mr John Jarvis QC, sitting as a deputy High Court judge, upon certain undertakings by the claimants, granted an interim injunction restraining the defendants until final determination of the claim or further order from disclosing or publishing certain documents within a certain email account. The judge also ordered by consent that the defendants provide the claimants with a full copy of the account and directed a procedure designed to identify private documents in that account, together with ancillary directions including the preparation by a named expert of a forensic IT report relating to the account. I will come back to the judge’s judgment on that occasion later in this judgment.

## **BACKGROUND**

### **Purchase of West Axnoller Farm**

4. The background to this claim is complex. I summarise it briefly here. In September 2004 the first claimant (“Mrs Brake”) acquired West Axnoller Farm from local landowners the Vickery family (who continued to have substantial landholdings locally). This property included a substantial dwelling-house known subsequently as Axnoller House. Mrs Brake began to operate a holiday letting business at the Farm, subsequently joined in partnership by the second claimant (“Mr Brake”).

### **‘Stay-in-Style’**

5. In February 2010 the claimants entered into a new partnership with a third person, a limited partnership called Patley Wood Farm LLP (“PWF”), whose principal was Lorraine Brehme (“Mrs Brehme”). The new partnership (known as “Stay in Style”) was to carry on the business of providing luxurious weekend and other breaks, and hosting events such as weddings. The first claimant contributed the Farm as partnership property, although it was charged to Adam & Co to secure borrowings. With funds contributed by Mrs Brehme, in 2010 the partnership acquired West Axnoller Cottage (“the cottage”), a matter of yards away from the main farmhouse at the Farm, but on the other side of the driveway leading to it. At first the cottage was used as accommodation for a housekeeper and then for a personal assistant (Simon Windus) and his family. After they left in 2012 it was used (inter alia) for the claimants to stay in when the main house was let. As I explain below, there is a separate dispute about whether it had become their principal residence by 2015.

### **Arbitration and bankruptcy**

6. Differences arose between the claimants on the one hand and PWF on the other, which were referred to arbitration. That arbitration had ended on 21 June 2013 with an award in favour of PWF, and the dissolution of the partnership. The claimants in the meantime asserted a claim in the High Court against Mrs Brehme and PWF, initially for damages, but later also for a proprietary estoppel equity relating to the cottage. As yet this claim has not been determined, and so the proprietary estoppel claim remains unvindicated. Following a failure to pay orders made against them for costs in the arbitration, the claimants were adjudicated bankrupt on 12 May 2015. The partnership itself had subsequently gone into administration (in 2016), and then into liquidation (in 2017).

### **Sale to Sarafina Properties Ltd**

7. There were disputes between the claimants and the relevant insolvency officials about many aspects of the bankruptcies and the liquidation. In addition, in October 2014 Adam & Co, the bank which had lent money to the first claimant against the security of the Farm, appointed receivers who eventually sold it in July 2015 to a newly incorporated company, Sarafina Properties Limited, a corporate vehicle for the Hon Saffron Foster (“Mrs Foster”). Mrs Foster is apparently a daughter of Lord Vestey and a friend of the claimants. Sarafina Properties Limited permitted the claimants to continue to occupy the Farm and to use it for the purposes of a business similar to that of Stay in Style.

### **Purchase of Sarafina Properties Ltd by the second defendant**

8. In February 2017 Mrs Foster sold the company to the second defendant (“Chedington”), and its name was changed to Axnoller Events Limited, the third defendant (“AEL”). Chedington is an investment vehicle for the first defendant Geoffrey Guy (“Dr Guy”). Mrs Brake was employed by AEL to continue to run the wedding and rental accommodation business as before. There is a dispute as to the position of Mr Brake. Relations broke down however, and on 8 November 2018 notice was given to the claimants of termination of their contracts of employment. This has led to proceedings in the employment tribunal against AEL and others by each of the claimants (“the Employment Claims”), and proceedings in the High Court

by AEL against the claimants to recover possession of the Farm (“the Possession Claim”).

### **Transactions relating to the cottage**

9. Following this, in January 2019 the claimants’ trustee in bankruptcy, Duncan Swift (“Mr Swift”), entered into a transaction with the liquidators of the partnership in relation to the cottage, to acquire the liquidators’ rights in it. Chedington entered into back to back transactions with Mr Swift in order to acquire those rights. The Brakes allege that Chedington and Mr Swift acted collusively, implementing “unlawful arrangements to create the false appearance that Chedington had acquired title to the cottage”. Chedington subsequently took possession of the cottage, the Brakes say unlawfully. They therefore commenced eviction proceedings against Chedington (“the Eviction Claim”). So the position on the ground currently is that the claimants are in occupation of the House, but seek possession of the cottage, whereas Chedington is in occupation of the cottage, but seeks possession of the House.

### **Insolvency proceedings**

10. In addition, on 12 February 2019 the Brakes commenced insolvency proceedings (the “Liquidation Application” and the “Bankruptcy Application”) against both the liquidators of the partnership and their trustee in bankruptcy. The first purpose of these insolvency proceedings was to unwind the disputed transactions. The second purpose was (as against the trustee) to establish that the Brakes’ pre-existing interests in the cottage and the two adjacent parcels of land revested in them on 12 May 2018 under the Insolvency Act 1986, section 283A, on the basis that they were the Brakes’ sole or principal residence at the date of bankruptcy, and Mr Swift had not sold them three years later. In April 2019, by consent, Chedington was joined as second respondent to the proceedings against Mr Swift, because it claimed to be a successor in title to him. In June 2019 Mr Jarvis QC made an order by consent removing Mr Swift from office, and another appointing his successors. In December 2019 Mr Jarvis QC gave directions for the trial of these insolvency proceedings before me in May this year.

### *Strike-out applications and trial*

11. In January this year Chedington applied to strike out the proceedings against the liquidators and most of those against Mr Swift and itself, on the basis that the Brakes lacked standing to bring them. I heard those applications in early March 2020, and acceded to them: I struck out the whole of the Liquidation Application, and most of the Bankruptcy Application, for lack of standing (on application, I gave permission to appeal; those appeals are still outstanding, with ‘hear-by’ dates in November 2020). The main matter left still to be tried in May, against the trustee and Chedington, was the reversion issue under section 283A. That was tried by me on 14, 15, 18, 19 May 2020, when I reserved judgment, which is still in preparation.

## **THE PRESENT CLAIM**

### **The disputed email account**

12. Meanwhile, in September 2019 the claimants had issued the present proceedings, the “Documents Claim”. Although phrased in terms of documents, information and data, it really concerns ownership of certain email accounts and internet domain names, and in particular [enquiries@axnoller.co.uk](mailto:enquiries@axnoller.co.uk) (“the Account”). During the time that the claimants were employed, until their dismissal in November 2018, this email address was the main email account used in the business carried on by AEL. The claimants say that the Account belonged to Mrs Brake, although it was also used for AEL business whilst she was acting as AEL’s agent. AEL says it belonged to AEL, although the claimants sometimes used it for personal matters. Each side accepts that, notwithstanding the claim to ownership of the Account, some emails in it will have “belonged to” the other side, in the sense of being related to AEL business (on the claimants’ case) or personal to the claimants (on AEL’s case).

### **The alleged asset protection scheme**

13. Why this claim matters at all is that the defendants allege that there are emails in the Account which evidence an unlawful asset protection scheme by the claimants. According to the defendants, this is said to be a scheme by which the claimants

“acquired Partnership property ... through a nominee, Mrs Saffron Foster, at an undervalue and in breach of Court orders and the fiduciary duties owed by [the claimants] to PWF” (skeleton, [9]).

The defendants say that they wish to share these emails with PWF, the trustees in bankruptcy and the liquidators, so that appropriate action can be taken. The claimants deny the existence of any such unlawful scheme. They also say that these emails are private and confidential to them.

### **Progress of the claim**

14. The claim is not yet very far advanced, and the first CCMC has not yet taken place. Instead, time has been taken up with other of the legal proceedings between the parties, and (in this claim) interlocutory applications concerning the interim injunction to which I referred in para [3] above. As I said there, the order of 28 November 2019 gave directions for a review of documents in the account. The defendants complain about the way in which that review has been conducted, but none of that was before me on this application, which was simply for security for costs.

### **Requests for information regarding assets**

15. At the hearing, I was taken to correspondence passing between the defendants’ solicitors and the claimants’ solicitors in January and May 2020, in which the defendants’ solicitors asked for certain information and assurances about the claimants’ assets. However, none, or at any rate insufficient, was forthcoming. On 15 January 2020, Stewarts Law LLP (the defendants’ solicitors) wrote to Seddons Law LLP (the claimants’ solicitors) to inform them that they were contemplating an application for security for costs, and therefore asking for information about the claimants’ assets, income, transfers of assets and trusts settled, as well as information about the application of the sums received from Mrs Foster. Seddons responded by letter dated 16 January 2020 taking issue with many of the comments made in Stewarts’ letter, which they called “a dressed up fishing exercise”, and refusing to

give the information sought. On 17 January 2020 Stewarts replied to the letter of 16 January 2020 and repeated their requests for information. Seddons replied by letter dated 22 January 2020 saying that the “starting point is that your clients have no entitlement to the information requested”. They accordingly declined to give any.

16. As I have said, the application notice with which I am concerned was issued on 25 March 2020. In relation to the correspondence between solicitors, Stewarts returned to this theme by letter dated 20 May 2020 to Seddons, referring to paragraph 31 of Mrs Brake’s fifth witness statement and enclosing a copy of a bank statement which appeared to be that referred to in that paragraph. They asked for further, more recent bank statements. By letter dated 26 May 2020 Seddons once again called this a “fishing expedition” and declined to supply the bank statements sought. Stewarts wrote a final letter dated 27 May 2020 saying that the claimants’ refusal to answer their requests left them “with no option but to invite the court to draw adverse inferences”.

## **EVIDENCE ON THIS APPLICATION**

### **Form of evidence**

17. This was an application made before the trial, and evidence in relation to it was given in the form of written statements, as required by CPR rule 32.1(1)(b), rather than by oral evidence in public. The defendants’ application was supported by the fifth witness statement of the first defendant, Geoffrey Guy, dated 25 March 2020. It was opposed by three witness statements of the first claimant, Mrs Brake, and in particular her fifth, dated 12 May 2020. I record here that I was not asked to order cross-examination of any witness, and none was tendered for cross-examination. In the absence of such cross-examination, the court is not entitled to disbelieve any written evidence, *unless* on the basis of all the evidence before the court it considers that that written evidence is simply incredible. Because of its importance to what follows, I will refer to authority for these propositions.
18. In *Long v Farrer & Co* [2004] BPIR 1218, Rimer J said:

“57 ... It is, I believe, by now familiar law that, subject to limited exceptions, the court cannot and should not disbelieve the evidence of a witness given on paper in the absence of the cross-examination of that witness. The principle has traditionally been stated in relation to statements made under oath or affirmation, but it was not suggested to me that it does not apply equally to a witness statement.”

Rimer J then cited three authorities, and continued:

“61. The basic principle is, therefore, not an unqualified one. In particular, paper evidence which is manifestly incredible can be disregarded or disbelieved. But it will require a fairly extreme case for untested paper evidence to be rejected on that basis.”

This has been applied in subsequent cases, such as *Shierson v Vlieland-Boddy* [2005] 1 WLR 3966, CA, [56], and *Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488,

[58], both of which are binding on me. I should say that I was not invited to disregard any of the written evidence on the basis that it was manifestly incredible.

### **Dr Guy's evidence**

19. In his witness statement, Dr Guy gave evidence about a number of factual matters. One was that, on 21 May 2013 Mr Brake was said to have assigned two life policies to a third party, who later surrendered them for sums in excess of £35,000, before going into insolvency (at [46]). Another was that, on the day before the arbitration award of 20 June 2013 was made (which went against the claimants), the claimants established the Brake Family Trust, settling a valuable furniture collection on discretionary trust for the benefit of a class including members of their family and further persons to be added to the class (at para [23]). A further matter was that in September and October 2013 further assets of the claimants (horses and horse semen) were purportedly sold to their friend Susan Maslin for what the defendants say was a gross undervalue, and which itself was never paid, being instead set off against livery fees purportedly owed by them to Ms Maslin (although the Farm had sufficient facilities of its own) (at paras [36], [42] and [44]). A fourth was that on 25 January 2015 the claimants purported to transfer their damages claim (but not their proprietary estoppel claim) against PWF into a second trust (at para [32]). The defendants said this was a breach of the freezing injunctions obtained by PWF, and also an unlawful preference or a transaction to defraud creditors (at paras [50]-[52]).

### **Mrs Brake's evidence**

#### *Fifth witness statement*

20. In her fifth witness statement, made about seven weeks after that of Dr Guy, Mrs Brake dealt with the two trusts. She did not challenge the facts relating to their creation, though she gave explanations for their creation. However, so far as I can see, in this witness statement she does not refer at all to the two life policies and to the purported sale of horses and semen to Ms Maslin. Accordingly, Dr Guy's evidence on all these matters was not challenged by this witness statement. What Mrs Brake did say in her fifth witness statement was:

“28. ... I categorically deny that Andy or I have taken any steps in relation to our assets designed to make enforcement of costs orders difficult.

[ ... ]

31. Andy and I continue to hold the balance of the funds we received from the Honourable Saffron Foster in our UK bank accounts which we use to meet the costs of the litigation and of living. Those funds are not subject to any trust or scheme to protect them from enforcement. ... ”

I will need to come back to this.

21. What Mrs Brake said about the Brake Family Trust was that it was set up because her ex-husband, Mr Julian William D'Arcy,

“was concerned that furniture that his father had gifted our son Tom should remain with Tom and not become muddled with Partnership chattels or other furniture”.

Mr D’Arcy

“was concerned that I would sell his father’s furniture” (both quotations at [37]).

A copy of this trust was in the papers before me at the hearing, although I also discussed it at an earlier stage in the insolvency litigation between these parties: see [2020] EWHC 538 (Ch), [9]-[10]. But in any event, a point which I raised at the hearing (and which I still do not understand) is how furniture gifted *to Tom* by his grandfather can have been settled by *the claimants*, and (Tom still being then a minor) there is no attempt to explain how Tom can be bound by this.

22. As for the trust of the damages claim in relation to the cottage, Mrs Brake says that

“this was set up to protect our creditors and was designed to protect not dissipate our assets. We were seeking to ensure that any incoming trustee in bankruptcy appointed by Mrs Brehme would not simply turn round and sell the cause of action to her for a nominal sum to the detriment of our creditors” (at [38]).

Once again, a copy of this trust was in the papers before me. I note that the beneficiaries of this trust are stated to be certain named creditors of the claimants’ bankruptcy, but (notably) not Mrs Brehme, who claims to be the largest creditor. Mr Davies QC told me at the hearing that Mrs Brake is content for this trust to be set aside if her trustees in bankruptcy so request.

*Sixth witness statement*

23. On Sunday, 31 May 2020, the day before the hearing of this application, Mrs Brake’s sixth witness statement was made and served on the defendants and sent by email to the court. It was made to respond to “many factual statements with which I disagree” in the defendants’ skeleton argument dated 28 May 2020. Since the evidence was already complete, the date for serving further evidence had passed, and the defendants’ skeleton argument could not give any admissible evidence to the court, I did not see the point of this witness statement, other than perhaps to respond to matters in Dr Guy’s fifth witness statement that could and should have been dealt with earlier. But the defendants did not object to its being admitted, and so it was. In relation to the transactions with Ms Maslin in September 2013 Mrs Brake said it was not true to allege that “money did not change hands back then”. On the contrary, she said, “Money did change hands. This was clearly described in [Ms Maslin’s] witness statement dated 8 April 2015...” She also said that there was “no offset against livery fees”. It was a genuine transaction, and she referred to documents in the bundles for the trial of the re-vesting question.

24. In relation to Mr Brake’s life assurance policies, Mrs Brake stated that her husband

“assigned his policies with Prudential to Acorn [Agricultural Finance Ltd, a company belonging to Des Phillips]. ... The money was used to pay



Michelmores’ fees in the sum of around £35,000 because we had no other source of payment.”

She exhibited documents relating to this transaction. In relation to the company Loxley & Brake Ltd, Mrs Brake stated that this was incorporated on 22 July 2016. She also said that its published accounts showed that there are no net assets and that its creditors comprise mainly herself and her husband. In relation to the bid made by the Brakes for the cottage through the family trust, she said that the loan that they agreed to make to the Trust for this purpose was not taken up because the Trust’s bid for the cottage was unsuccessful. Finally, Mrs Brake stated that she did not have and never had had any control over or access to Ms Maslin’s email account. However, she accepted that she assisted Ms Maslin in phrasing a letter in response to one from the defendants’ solicitors, and they asked Stephen Davies QC “to check the wording because it was about ‘bailment’.”

*Seventh witness statement*

25. At the hearing itself, an issue arose about para 31 of Mrs Brake’s fifth witness statement of 12 May 2020. As I have already said, the first two sentences of that paragraph read:

“Andy and I continue to hold the balance of the funds we received from the Honourable Saffron Foster in our UK bank accounts which we use to meet the costs of the litigation and of living. Those funds are not subject to any trust or scheme to protect them from enforcement.”

Mr Sutcliffe QC said that the sentences were very carefully crafted, so as to be ambiguous. He relied on the fact that the claimants have refused to disclose to the defendants what the current balance in their UK bank accounts now is. He said that those sentences could mean that substantial sums have been hived off from the funds originally received from Mrs Foster and hidden away somewhere, whilst only the (unknown) balance remaining was not subject to any scheme to protect them from enforcement.

26. On instructions, Mr Davies QC denied that that was Mrs Brake’s intention. In order to resolve the situation, he offered to provide a yet further short witness statement from Mrs Brake to make clear that *no* part of the funds received from Mrs Foster had been split off and hidden. Since I thought there was an ambiguity there, I agreed to this, with directions for comments by each side on the new statement, and Mrs Brake’s seventh witness statement was filed and served the next morning, 2 June 2020. That witness statement said, in part:

“4. I confirm that no part of the funds we received from the Honourable Saffron Foster has been subject to any trust or scheme to protect them from enforcement. That is always what I intended to mean and believed that to be perfectly clear from the wording of my fifth statement.”

Then she referred again to paragraph 28 of her fifth witness statement, already quoted above.

*Comments on the late evidence*

27. In a post hearing written comment, Mr Sutcliffe QC on behalf of the defendants conceded that, if this statement from Mrs Brake were accepted, it would mean that the court could not order security for costs, because in the absence of what he called “incontrovertible documentary evidence to the contrary” the court was unable on an interlocutory hearing to question the truth of that statement. But Mr Sutcliffe said that this was not (as he said Mr Davies QC had submitted) a new point taken only at the hearing, but one which had been raised in correspondence between the parties as early as 15 January 2020. The claimants had however refused to give any of the confirmations sought by the defendants, including details of trusts settled and transfers made, and – in particular – details of how the claimants had applied the funds paid to them by Mrs Foster, and how much remained in cash beneficially owned by them. The defendants responded to the claimants’ refusal by saying that the court would be invited to infer that the claimant had put post-bankruptcy assets into trust structures to avoid their being available to pay costs. Paragraph 19 of Dr Guy’s fifth witness statement in March made the same point.
28. Mr Sutcliffe QC referred to two comments made by Mrs Brake in her fifth witness statement, those in paragraphs 28 and 31. The former said the Brakes had not taken any steps “*designed*” to make enforcement difficult. The latter said that they held “*the balance of the funds*” received from Mrs Foster in their UK bank accounts, and that “*those funds* are not subject to any trust or scheme to protect them from enforcement”. (Emphasis supplied in all cases.) The former used a test which was not that in the sub-rule, and the latter (he said) unambiguously referred only to “the balance” of the funds received from Mrs Foster, making it perfectly possible that a proportion of those funds had already been hidden away. The skeleton argument prepared for the hearing, dated 28 May 2020, submitted that the court should draw adverse inferences in respect of what had been done with the funds from Mrs Foster.
29. Mr Sutcliffe’s written comments said further that Mrs Brake’s sixth witness statement, served over the weekend, the day before the hearing, said that “new allegations” were made in that skeleton argument which (it was said) required further evidence in answer. Nevertheless, that witness statement still did not deal with the question whether any steps had been taken with any part of the funds from Mrs Foster. Only the *seventh* witness statement, served the day *after* the hearing, in response to a suggestion made at the hearing, put the matter beyond doubt, and rendered it thereafter impossible for the court to grant security for costs. Accordingly, he said, the submission that the question whether the Brakes had put any part of Mrs Foster’s funds into a scheme to protect them was not a point that had been made before was plainly incorrect. The seventh witness statement provided the very confirmation that was expressly sought and refused in January 2020.
30. Mr Sutcliffe therefore submitted that
- “Had that confirmation be provided when requested, this application would not have been made”.

Accordingly, Mr Sutcliffe now asks for the defendants’ costs of the application in any event, relying on the conduct of the claimants in dealing with the question of what they had done with their assets, which they could and should have dealt with earlier, and doing so in a very late witness statement for which permission was given by a disingenuous submission that the defendants’ skeleton argument raised a new point.

This, he argued, justified not only a different order from the usual “costs follow the event” rule, but also justified an award on the indemnity basis.

31. As I have said, Mr Davies QC said that the question of the ambiguity of paragraph 31 of Mrs Brake’s fifth witness statement was raised for the first time at the hearing of this application. And it was resolved by Mrs Brake’s seventh witness statement. But, he said, it was irrelevant to the question whether the defendants could have obtained an order for security for costs, because in any event the defendants would not have satisfied the gateway condition in the sub-rule. Refusing to say whether or not you have taken a ‘step’ within the sub-rule does not establish that you have taken one. Accordingly, Mr Davies QC argued that the defendants had seized upon the alleged ambiguity in paragraph 31 of Mrs Brake’s fifth witness statement “and elevated it into a determinative issue in an effort to salvage their position on costs”.
32. Mr Davies QC goes on to argue that this application as well as earlier applications were not intended to advance the litigation but instead to drain the claimants’ funds by making them incur cost. He pointed to the six-day hearing in November 2019 which the claimants funded in order “to recover *their own* emails and to uncover Dr Guy’s widespread unlawful discrimination of them”. He pointed also to the “serious allegations made at great length against Mrs Brake in Guy 5 of fraud and deliberate wrongdoing”. He said that the court should treat such conduct as out of the norm. Accordingly, the claimants seek an order that the application be dismissed, with costs to be assessed on the indemnity basis.
33. In my judgment, there is no reason for me not to accept the statement in Mrs Brake’s seventh witness statement of 2 June 2020. On the evidence as a whole, it is not manifestly incredible. There is nothing positive to the contrary. And the ambiguity in paragraph 31 of Mrs Brake’s fifth witness statement could not have arisen before she made it, on 12 May 2020. On the other hand, the question whether the Brakes had done anything with the funds from Mrs Foster to protect them from costs and other creditors’ claims was *not* a new point. It had been squarely raised in the correspondence in January. And the claimants were not obliged to and did not answer it then. At the hearing however Mr Davies offered to resolve the ambiguity point by means of a short further statement. That statement resolved the ambiguity, but it also gave a confirmation which the defendants had been seeking since January.
34. So both sides accept that an order for security cannot now be made against the claimants. On the other hand, each side seeks an order for costs on the indemnity basis against the other, on the basis of the other’s conduct in these proceedings. All this puts the court in a difficult position. For the parties it has been a short exit from the application. For the court it has become a long journey through the thicket of costs. It seems to me that the only way I can resolve the question of who should pay the costs of the hearing which has not resulted in an order being made is by looking at the material before the court on the application, and the arguments made, and considering what the court would have done were it not for the seventh witness statement of Mrs Brake. Somewhat reluctantly, therefore, I turn to consider those matters.

## **THE LAW**

### **Civil Procedure Rules**

35. I therefore consider the law first of all. CPR rule 25.13 relevantly provides:

“(1) The court may make an order for security for costs under rule 25.12 if –

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) (i) one or more of the conditions in paragraph (2) applies, or

[ ... ]

(2) The conditions are –

[ ... ]

(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.”

### **Case law**

36. This provision has been the subject of a number of decisions. In *Ackerman v Ackerman* [2011] EWHC 2183 (Ch), the claimant and his late brother had run a successful property business together (“the Group”). He brought proceedings against his brother’s widow and son, and also against a barrister who had been engaged by the parties to give effect to a division of the Group, alleging breaches of the agreement by which the division was to be effected. The widow and son (and a company to be used as a vehicle in the division) sought security for their costs of the claim, on the basis of rule 25.13(2)(g). Roth J considered earlier decisions, and said:

“15. Thus the making of an order for security (and therefore if any, its amount) is discretionary and for such an order here to be made:

i) the condition in sub-para (g) must apply; and

ii) the court must be satisfied that it is just in all the circumstances to make such an order.

16. The general principles that govern the making of an order for security and the application of CPR 25.13(2)(g) are well-recognised. They include the following:

i) The requirement is that the claimant has taken in relation to his assets steps which, if he loses the case and a costs order is made against him, will make that order difficult to enforce. It is not sufficient that the claimant has engaged in other conduct that may be dishonest or reprehensible: *Chandler v Brown* [2001] CP Rep 103 at [19]-[20];

ii) The test in that regard is objective: it is not concerned with the claimant’s motivation but with the effect of steps which he has taken in relation to his assets: *Aoun v Bahri* [2002] EWHC 29 (Comm), [2002] CLC 776, at [25]-[26];

iii) If it is reasonable to infer on all the evidence that a claimant has undisclosed assets, then his failure to disclose them could itself, although it might not

necessarily, lead to the inference that he had put them out of reach of his creditors, including a potential creditor for costs: *Dubai Islamic Bank v PSI Energy Holding Co* [2011] EWCA Civ 761 at [26];

iv) There is no temporal limitation as to when the steps were taken: they may have been taken before proceedings had been commenced or were in contemplation: *Harris v Wallis* [2006] EWHC 630 (Ch) at [24]-[25];

v) However, motive, intention and the time when steps were taken are all relevant to the exercise of the court's discretion: *Aoun v Bahri*, *ibid*; *Harris v Wallis*, *ibid*.

vi) In the exercise of its discretion, the court may take into account whether the claimant's want of means has been brought about by any conduct of the defendant: *Sir Lindsay Parkinson & Co v Triplan* [1973] QB 609 per Lord Denning MR at 626; *Spy Academy Ltd v Sakar International Inc* [2009] EWCA Civ 985 at [14].

vii) Impecuniosity is not a ground for ordering security; on the contrary, security should not be ordered where the court is satisfied that, in all the circumstances, this would probably have the effect of stifling a genuine claim: *Keary Developments Ltd v Tarmac Construction* [1995] 3 All ER 534 at 540, para 6. Thus the court must not order security in a sum which it knows the claimant cannot afford: *Al-Koronky v Time-Life Entertainment* [2006] CP Rep 47 at [25]-[26] (where this was referred to as 'the principle of affordability');

viii) The court can order any amount (other than a simply nominal amount) by way of security up to the full amount claimed: it is not bound to order a substantial amount: *Keary* at 540, para 5.

ix) The burden is on the claimant to show that he is unable to provide security not only from his own resources but by way of raising the amount needed from others who could assist him in pursuing his claim, such as relatives and friends: *Keary* at 540, para 6. However, the court should evaluate the evidence as regards third party funders with recognition of the difficulty for the claimant in proving a negative: *Brimko Holdings Ltd v Eastman Kodak Co* [2004] EWHC 1343 (Ch) at [12].

x) When a party seeks to ensure that any security that may be required is within his resources, he must be full and candid as to his means: the court should scrutinise what it is told with a critical eye and may draw adverse inferences from any unexplained gaps in the evidence: *Al-Koronky* at [27]."

37. In that case, it was accepted by the claimant that the condition in sub-para (g) was satisfied. But he asserted that he had no significant assets or income beyond some £80,000 in his bank accounts. The judge therefore considered what the claim should properly cost, what the defendants' recoverable costs were likely to be, and the resources to which the claimant had access. The judge said:

"39. The difficulty as to what the court should do in a case such as this where it considers that a claimant has access to more funds than he is prepared to reveal

but cannot determine how much, was addressed by the Court of Appeal in *Al-Koronky* as follows:

‘28. ... the court, once satisfied that the case is one in which the claimant ought to put up security for the defendant's costs before continuing with his action, is going to find itself in one of two situations. Either it will be satisfied that it probably has a full account of the resources available to the claimant, in which case it can calculate with reasonable confidence how much the claimant can afford to put up; or it will not be satisfied that it has a full account, and so cannot make the calculation. Does it follow in the latter situation that the court must go straight to the amount sought by the defendant and, having pruned it of anything which appears excessive or disproportionate, fix that as the security? Or is there a middle way - for example to set an amount which represents the court's best estimate of what the claimant, despite having been insufficiently candid, can afford?’

29. In our judgment there is such a power, but it resides in the court's discretion rather than in legal principle. In the second situation we have postulated, the requirements of the law have been exhausted: what remains is to set a suitable sum. This classically is where discretion fills the space left by judgment: the court has a choice of courses, none of which it can be criticised for taking provided it makes its election on a proper factual basis uninfluenced by extraneous considerations’.”

In the end the judge concluded that the claimant and his family could produce security in a total of £600,000, and so ordered.

38. The summary of the law in para [16] of the judgment in *Ackerman v Ackerman* has been cited with approval in other cases since, including *Kolyada v Yurov* [2014] EWHC 2575 (Comm), [27], *Al Jaber v Al Ibrahim* [2019] EWHC 1136 (Comm), [4], and *Wojakovski v Tonstate Group Ltd* [2020] EWHC (Ch) 328, [11]. Neither side in the present case suggested that this summary of the law was wrong or that I should not follow it. The claimants also specifically drew attention to *Al Jaber v Al Ibrahim*, where Sir Ross Cranston, sitting as a High Court judge, said:

“16. The fact that, in the past, enforcement proceedings have been difficult does not assist with the issue as to whether the claimant has taken the steps in relation to his assets and whether those steps would make it difficult to enforce an order of costs against him. As the authorities establish, this is a backward looking provision. Park J in *Chandler v Brown* pointed out in [2001] CP Rep at 103 the word ‘would’ in the rule cannot be used as a springboard for an argument that the paragraph can be used in relation to steps which the claimant had not taken, but which, if he did take them before judgment with costs given against him, would make it difficult to enforce a costs order.”

## DISCUSSION

### Defendants’ argument

39. At the hearing the defendants argued that condition (g) was satisfied because of (i) previous steps that the claimants took prior to their bankruptcy, (ii) evidence that they

were continuing to take such steps, and (iii) the claimants' refusal to confirm their current asset position. As to (i), the defendants relied on four matters. First, there was the establishment of the Brake Family Trust on the day before the arbitration award of 20 June 2013 was made (which went against the claimants). Second, they relied on the creation of the Claim Trust on 25 January 2015. Third, they relied on the purported sale of horses and horse semen to Ms Maslin. Fourthly they relied on the assignment by Mr Brake of life policies to Mr Phillips' company Acorn. As to (ii) they relied on the continued use of the Brake Family Trust as a vehicle for the claimants' assets and activities, first for holding the shares in a company belonging to the Brakes called Loxley & Brake Ltd, and second in order to make a bid for the partnership's interest in the cottage, and on the continued use of Ms Maslin's name in relation to the horses stabled on the Farm. As to (iii), they referred to the correspondence between the defendants' solicitors and the claimants' solicitors in January and May 2020, which I considered above.

### **Claimants' argument**

40. The claimants said that rule 25.13(2)(g) looks at *past* actions, and not future ones. As to the past, they denied that any steps falling within the rule have been taken, and therefore they said that the court had no power to order security for costs to be provided by them. As to the creation of the two trusts, the claimants said they took place years ago, and their effect was now spent. But in any event since those events the claimants had been made bankrupt and their partnership had gone into liquidation. So, if they had not made these trusts, any assets which they had would have vested in the trustee in bankruptcy or the liquidators of the partnership for the benefit of bankruptcy or liquidation creditors. Accordingly, creating these trusts could not have been steps "that would make it difficult to enforce an order for costs" against them, because the assets concerned would never have been available for the purpose of satisfying a costs order in these proceedings.

### **Assessment**

#### *Past and future*

41. First of all, I agree that rule 25.13(2)(g) looks at past actions, and not future ones. In *Chandler v Brown* [2001] CP Rep, 103, Park J said:

"17. ... Three requirements emerge from the wording of the paragraph: (1) the claimant must have 'taken steps'; (2) the steps must have been taken in relation to his assets; (3) the steps must be steps which would make it difficult to enforce an order for costs against him. I have one point of construction to make. It relates to the use of the word 'would' in requirement (3). That word cannot be used as a springboard for an argument that the paragraph can be used in relation to steps which the claimant has not taken but which, if he did take them before judgment with costs is given against him, 'would' make it difficult to enforce the costs order."

And, as I have already said, in *Al Jaber v Al Ibrahim* Sir Ross Cranston said:

"16. ... As the authorities establish, this is a backward looking provision."

*Lapse of time*

42. Secondly, as to the lapse of time that may be involved since the steps were taken, in *Chandler v Brown* Park J said:

“20. ... Even if Miss Allan can point to something which could be described as a step taken by Mr. Chandler in relation to an asset (and I am not convinced that any of the matters which she itemises could be so described), it was all in the past now and any effects which it had at the time are by now spent. There is no basis on which it can be said that something done by Mr. Chandler several years ago will make it difficult to enforce a costs order which might be made against him several months from now.”

This was echoed by David Donaldson QC, sitting as a deputy judge, in *Dass v Beggs* [2014] EWHC 164 (Ch), where he said:

“13. ... I need not therefore pause to consider whether even without the bankruptcy the causal effect of the diversion would in all likelihood have been spent by this time.”

43. On the other hand, in *Harris v Wallis (No 2)* [2006] EWHC 630 (Ch), Sir Frances Ferris rejected the argument

“that these steps must have been taken at a time when the proceedings were in contemplation or at a time reasonably close to the commencement of proceedings”,

and held that no

“temporal limitation must be placed on the steps which are capable of justifying an order for security under para. (g).”

And in *Ackerman v Ackerman* Roth J agreed (at [16](iv)).

44. In my judgment, these statements are not inconsistent with each other. The judges in the earlier decisions were making the point that there may come a time when a step taken in relation to an asset ceases to make it difficult to enforce a future costs order. For example, if a relatively small amount of money is given away, it is hardly likely that, if it had not been given away, it would still have been intact and available to a costs claimant 5 years later. It would have been spent in the normal course in the meantime. But if an estate worth £10 million were given away, it can easily be seen the likelihood of that asset still being available, in whole or in part, if it had not been given away, is very different. The judges in the latter cases were simply dealing with the different question whether the steps had to be taken after the litigation had been commenced or at any rate contemplated.

*Effect of insolvency*

45. Thirdly, turning to the point about the effect of bankruptcy or liquidation, *Dass v Beggs* [2014] EWHC 164 (Ch) was a case where the claimant (against whom security was sought on the basis of steps taken that would make it more difficult to enforce a



costs order) had indeed become bankrupt after the steps had been taken. David Donaldson QC said:

“13. ... if the monies paid in late October 2009 had been received by the Claimant in an account in his own name, they would in all probability have passed to the trustee-in-bankruptcy in December 2009. In that event, they would not have been available as a possible object for execution some years later.”

46. Accordingly, unless the bankruptcy or liquidation concerned was one where there was a real prospect of a surplus, in my judgment a step taken by the claimant which otherwise would fall within this sub-rule would not do so, because had the step not been taken the asset concerned would have passed into the insolvent estate, and would not have been available to pay the costs claimed subsequently. So the two trusts which the evidence shows were established in June 2013 and January 2015 could not be ‘steps’ within the rule once the claimants had become bankrupt, and neither could the accepted assignment of the life policies in May 2013 and the purported sale of the horses and horse semen in September and October 2013 (it is not necessary to decide exactly what happened on this occasion). There were other arguments made by the claimants as to why these matters should not fall within the sub-rule, but in the circumstances I do not need to deal with them.

#### *Use of the Family Trust*

47. The defendants also relied on the continued use of the Brake Family Trust “as a vehicle for the claimants’ assets and activities”, and “on the continued use of Ms Maslin’s name in relation to the horses stabled on the Farm”. As to the former, the defendants referred to two matters. First there is the accepted fact that the shares in Loxley & Brake Ltd, incorporated in July 2015 to carry on an antiques business, were placed in that trust. That was plainly a step (putting in trust) in relation to assets (the shares) which would make it more difficult to enforce a costs order against the settlor (to the extent of their value). Since this occurred *after* the claimants’ discharge from bankruptcy, it is not affected by the argument addressed above. On the face of it, therefore, the sub-rule threshold condition *was* satisfied in relation to this. I will return to this later.
48. The second matter is that the claimants used the Family Trust in order to make a bid for the partnership’s interest in the cottage. But the evidence is to the effect that the bid failed, and that no money was put into the trust for the purpose of effecting the acquisition (although no doubt it would have been had the bid succeeded). The bid may have been a ‘step’ in the ordinary sense of the word, but only in relation to the *partnership’s* interest in the cottage, and therefore it was not a step in relation to assets of the *claimants*. Even if it were such a step (*eg* in relation to the money which they intended to lend to themselves as trustees), since the money was never lent it could not have the effect of making enforcement more difficult.

#### *Use of Ms Maslin’s name*

49. As to “the continued use of Ms Maslin’s name in relation to the horses stabled on the Farm”, this relates to a claim by the defendants that certain of the horses stabled on the Farm belonged to Ms Maslin. When the defendants wrote to her seeking to charge livery, Ms Maslin replied, refusing (as was her right) to answer the question whether

any of the horses belonged to her. The defendants sought to make something of the fact that the reply from Ms Maslin, sent by email from her own account, passed through the hands of both Mrs Brake and Mr Davies QC, who both provided input. I agree with the defendants that this supports the view that Ms Maslin is not operating at arms' length from the claimants. But in my judgment it does not show any more than that. In particular the evidence available does not allow me to conclude that the horses really belonged to the claimants, and that Ms Maslin was lending her name to a scheme to protect the claimants' assets from claims of creditors of the claimants. It is therefore not necessary to consider whether, had it done so, this would have been a 'step' within the sub-rule.

### *Correspondence*

50. The correspondence between the parties' solicitors, in January and then in May 2020, was not itself a 'step' within the sub-rule either. But the defendants relied on it as a basis for the court drawing an inference that the claimants must have taken steps within the sub-rule other than the ones already referred to. They referred to the well-known principle in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, CA. In that case, Brooke LJ (with whom Roch and Aldous LJ agreed) said:

“(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.”

51. This statement has been quoted with approval and followed in later cases. But, as Sir Ernest Ryder SPT (with whom Sales LJ agreed) made clear in *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882:

“30. ... *Wisniewski* is not authority for the proposition that there is an obligation to draw an adverse inference where the four principles are engaged. As the first principle adequately makes plain, there is a discretion *ie* 'the court is *entitled* to draw adverse inferences'.” [Emphasis added]

52. It seems to me that the problem for the defendants in this case was that, leaving aside the matters to which they had already referred and relied on to establish “steps” within the sub-rule, they had not put forward any evidence to show that there must have been *other* such steps which had not been disclosed. As Brooke LJ said in *Wisniewski*,

“there must be a case to answer on that issue” before inferences can be drawn. Moreover, the failure of the claimants to respond to the invitation to state what they had done with their assets, in large-scale litigation where no quarter is given by either side to the other, and where the claimants say that they fear that the defendants are simply trying to outspend them, does not seem to me probative of anything. The reason given for refusing to answer is not implausible.

53. In any event, it was not the case that the claimants had refused to give any confirmations whatsoever. There were the statements in paragraphs 28 and 31 of Mrs Brake’s witness statement of 12 May 2020. I accept that the former statement referred to not taking steps ‘*designed*’ to protect assets, whereas the test in the sub-rule is objective, and does not depend on intention. And I also accept that the latter paragraph was ambiguous. Neither statement is as absolute as the claimants would have me believe. But each was made in a statement subject to a statement of truth, and therefore subject to the usual sanctions for perjury. In the context of all the material before me, I do not find this evidence incredible, and accordingly I am not free to disbelieve it. Indeed, I accept it. Taken as a whole, in my judgment, in these circumstances the court should not draw any inference adverse to the claimants in relation to the taking of steps within the sub-rule. I note that in *Yang v Official Receiver* [2015] EWCA Civ 1600, [12], Gloster LJ similarly declined to infer from Ms Yang’s silence as to her assets that she had taken steps within the sub-rule.

### **Exercise of discretion**

#### *Merits*

54. If I had had to decide the application for security in the absence of the seventh witness statement of Mrs Brake, I would have concluded that the only step within the sub-rule that I found the claimants to have taken was that of settling the shares in Loxley & Brake Ltd in July 2016. But that would merely have opened the door to making an order, and therefore engaged the question of discretion. One point that was urged upon me by Mr Davies QC was that, as part of the exercise of discretion, I should look at what he regarded as the underlying merits of the claim. In *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420, Sir Nicolas Browne-Wilkinson V-C dismissed an application for security for costs against a foreign plaintiff under the former RSC Order 23.
55. In so doing he said this (at 423C-F):

“The matters urged before me have spread over a fairly wide field. First there have been attempts to go into the likelihood of the plaintiff winning the case or the defendant winning the case, presumably following the note in *The Supreme Court Practice 1985*, p. 384, under rubric 23/1-3/2, which says: ‘A major matter for consideration is the likelihood of the plaintiff succeeding.’ This is the second occasion recently on which I have had a major hearing on security for costs and in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or

failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.

Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself I deplore the attempt to go into the merits of the case, unless it can clearly be demonstrated one way or another that there is a high degree of probability of success or failure.”

56. This approach is still regarded as important in the context of applications for security for costs: see for example *LIC Telecommunications SARL v VTB Capital plc* [2016] EWHC 1891 (Comm), [9], per HHJ Waksman QC (as he then was). Nevertheless, at the hearing Mr Davies QC pressed me with what he said was the strength of the claimants’ case against the defendants. In particular he pressed me with the fact that last November Mr Jarvis QC spent an entire hearing over several days considering the documents in this case. This hearing was for the purpose of deciding whether or not to grant (i) a delivery up order in relation to documents in the defendants’ possession which had come from an email account which the claimants said was confidential to them, and (ii) an interim injunction restraining the defendants until trial from disclosing or making use of those documents. The defendants’ response to these applications was to say that the documents disclosed an unlawful scheme and therefore the claimants were not entitled to any relief. Of course, I do accept that Mr Jarvis QC had to look at many more of the documents in this case than I have so far been able to. I also accept that he did make the delivery up order and impose the interim injunction sought.
57. Nevertheless, in relation to the application for delivery up, the deputy judge said:
- “35. I must remind myself at this stage that I am dealing with an interim application, and that it is inappropriate for me at this stage to make findings of fact. My interim conclusion is that the enquiries account was confidential to Mrs Brake...”
58. He considered statements of the law contained in the decision of the Court of Appeal in *Imerman v Tchenguiz* [2011] Fam 116, in relation to an application for an interim injunction to restrain the use of confidential documents obtained by a person who had no right of access, and concluded:
- “42. In this present application, it seems to me that a similar result should follow. All the documents in the enquiries account should be returned to the Brakes’ solicitors, who should preserve them. However, Mr Sutcliffe QC then makes a submission that what is revealed in these documents in the enquiries account is an unlawful scheme and that the so-called iniquity principle applies.”
59. The deputy judge then considered the question whether the documents showed that there was an unlawful scheme. He said (at [53]) that there were
- “a number of difficulties with Dr Guy’s description of the unlawful scheme”,

and set them out. He concluded:

“67. ... that the Guy Parties do not satisfy the court threshold test of strong prima facie case of unlawful conduct”

referred to in *Hotel Portfolio II Ltd v SMA Investments Holdings Ltd* [2019] EWHC 1754 (Comm).

60. Overall, the deputy judge decided that the claimants’ interlocutory application had in substance been made out, and made the interim orders sought. However, I must also take into account that the claimants made an application for their costs to be paid by the defendants in relation to the applications in which they had been successful. The claim for costs was opposed by the defendants, who argued that the proper order was that costs should be reserved to the trial. The deputy judge agreed with the defendants, and so reserved the costs. In the course of giving his reasons for this decision, he made a number of comments which are relevant to my consideration of his judgment on the main applications.

61. The deputy judge said:

“7. Third, Mr Davies QC urged on me to say that I was deciding this case on incontrovertible facts. However, I made it very plain that the findings which I made were interim only and could not in any sense be seen as final. Mr Davies QC argues that they were based on the witness statements and documents which originated with the Guy parties. That is, in a sense, true but the whole picture is wider than that and I bear in mind that Mr Sutcliffe QC argued strongly for the fact that taken in the context of the business relationship, the password and the other factors that I took into account needs to be counterbalanced by the employer/employee relationship. I take into account in that my view must be taken as the preliminary construction which I put on the employment agreement, upon the contract, and the circumstances in which that was dealt with between the parties and that it is susceptible to evidence. Mr Sutcliffe QC properly wants to cross examine the witnesses.

8. Those three factors alone convince me that it would be dangerous to order costs on the basis of what is undoubtedly only a preliminary view of the position expressed by me and so my reaction is that the normal order for a case where there is an interim injunction should be that the costs are reserved to trial. That leaves the somewhat unusual position of the LPP application.

9. So far as part one of the LPP application is concerned, it started with the Brakes asserting the privilege existed in the 12 documents annexed to the application. As it turned out, not all of those were seen as being privileged and, indeed, for the limited purpose of the application, privilege is waived in relation to them. To that extent, the Guy parties might see themselves as being successful.

10. As to part two of the LPP application, as a provisional view, because all I was concerned with was with a prima facie view, I did not find that the Guy parties’ case on the unlawful scheme was made out. Of course, I may have been wrong about that because as Mr Sutcliffe QC points out, at the trial of the documents application, the trial judge will have to deal with that in a great deal more detail

than I did and he may conclude differently from me. It would seem odd, in those circumstances, if I were to award costs in relation to that against the Guy parties in the event that the trial judge in the documents' application reached a different conclusion."

62. Having considered all the material placed before me, and in the light of the comments of Mr Jarvis QC which I have quoted, I am quite satisfied that his judgment was purely interlocutory, and made no final findings of fact. All that the judge decided was whether on the material before him he should make the interim orders sought. So, in my judgment, this was not a case in which, to use the words of Sir Nicholas Browne Wilkinson V-C in *Porzelsack*,

"it can clearly be demonstrated ... that there is a very high probability of success."

Accordingly, I would not have thought it right to take into account the potential merits of this claim in exercising my discretion as to whether to order security for costs against the claimants.

#### *Late application*

63. But there were other matters too. Mr Davies QC complained that the application for security for costs was made late. As to this, proceedings were commenced in September last year, when particulars of claim were served. However, no defence was served by the defendants until 29 May 2020, the working day before the hearing of this application. It is fair to say however that this responded to *amended* particulars of claim which are dated 23 March 2020. The defendants' application for security was in fact issued two days later, on 25 March 2020, so six months after issue. And, as I have already mentioned, the only court hearing so far has been in relation to the interim orders sought and obtained by the claimants in November 2019. We are still a long way from any trial. Whilst I accept that the application for security could have been made sooner, I do not think it was made so late that I should not have ordered security simply because of lateness.

#### *Other points*

64. In this case, there was no suggestion that I should not order security because to do so would stifle the claim, or that the wealth of the defendants disentitled them to an order for security if it were otherwise appropriate. What Mr Davies QC *did* say was that I should take into account the fact that the defendant started this dispute, first by threatening Mrs Brake's internet service provider in order to obtain passwords for her email account, and by issuing the proceedings for the possession of the House. I am afraid that to my mind this rather smacked of the playground. Then I should take into account alleged breaches of the Brakes' rights under article 8 of the European Convention on Human Rights. It may be that at trial the claimants are successful in proving all the allegations that they make. And, if they do, that will have consequences. But I am in no position to adjudicate on this now and, as I have already said, I do not regard this as a case where the court could be satisfied *at this stage* that there was a high probability of success.

#### *Impact of step taken*

65. However, Mr Davies QC also referred me to the decision of Master Bowles in *Stavrinides v Cyprus Popular Bank* [2018] EWHC 313 (Ch). The claimants sued the successor to their bank for breach of an alleged agreement with the predecessor. The defendant bank sought security for costs against the claimants, in particular under CPR rule 25.13(2)(g). The master said this:

“58. The consequence, or effect, of the foregoing is that, while I am satisfied that Mr Stavranides has taken steps in respect of his assets which would, potentially, render the recovery of costs more difficult, he has only done so in the respects set out and dealt with in paragraph 40 of this judgment.

59. On that footing, it seems to me that, while the relevant 'gateway' to an order for security has been established, a serious question arises as to whether the extent and impact of the steps taken by Mr Stavranides, in respect of his assets, warrants, or renders it just to make, an order for security against him.

60. It seems to me that the rationale behind this particular 'gateway' provision, under CPR 25.13(2)(g), is that a defendant should not be disadvantaged, in respect of his potential recovery of costs, by the fact that steps have been taken by a claimant which would, in the event that that defendant was awarded his costs, have the effect of rendering the recovery of those costs more difficult. Granted that rationale, it further seems to me that, if, in fact, the steps taken have had no, or minimal, adverse effect upon the defendant's ability to recover his costs, then, logically, there is no, or only a minimal basis, for the court ordering security. Put shortly, it seems to me that the order for security should reflect the adverse consequence, if any, flowing from the satisfaction of the gateway condition giving rise to an entitlement to seek security and that, if there is no such adverse consequence, or if the adverse consequence is insignificant, then that is and ought to be a good reason for refusing an order for security.”

66. I respectfully agree with what Master Bowles says. In this case, I had no evidence as to what the value of the Loxley & Brake Ltd shares was at the date of settling them in 2016, but such evidence as was before me showed that they had little or no value now. Consequently, the step taken by the claimants in 2016 had in fact had either no effect or only a minimal effect upon the defendants' ability to recover costs from the claimants in future. As a result, there could only be a minimal basis at best for ordering security to be given. And that was the only step within the sub-rule that I had found on the material before me.

### **Hypothetical conclusion on the application**

67. In all the circumstances, and taking into account all the matters urged upon me, even in the absence of Mrs Brake's seventh witness statement I would not have considered that justice required that I order the claimants to give security for the defendants' costs. I would therefore have dismissed the application.

### **COSTS OF THE APPLICATION**

#### **Law**

68. I therefore turn finally to the question of costs. So far as relevant, CPR rule 44.2 provides as follows:

“(1) The court has discretion as to –

- (a) whether costs are payable by one party to another;
- (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.

(5) The conduct of the parties includes –

- (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.”

### **Discretion**

69. Costs are in the discretion of the court. I consider that it is appropriate for the court to make an order in this case regarding the costs of the application. For the purposes of rule 44.2(2)(a), it is obvious that the successful parties are the claimants, and that the unsuccessful are the defendants. So the general rule would result in an order that the defendants pay the claimants’ costs of this application. The claimants say that that is the order I should make, whilst the defendants say I should make a different order (in their favour) within rule 44.2(2)(b).

*In favour of the defendants*



70. In my judgment, in this case there is no basis for my making a different order, in favour of the defendants. Even with the flaws in Mrs Brake’s fifth witness statement, I have held that the application would still have failed. The seventh witness statement made no difference to the result. The claimants had no obligation to answer the defendants’ questions as to what they had done with their assets. Of course, in not responding they ran the risk that, if the defendants could show “a case to answer” on taking steps within the sub-rule, their refusal to answer might result in adverse inferences being drawn against them. But they were prepared to take that risk.

*In favour of the claimants*

71. So I return to the general rule, and the question of making an order that the defendants pay the claimants’ costs. I ask myself whether there is any reason why the court should make a different order within rule 44.2(2)(b). It cannot lie in an argument that, without Mrs Brake’s seventh witness statement, the application would have succeeded. I have held that that is not so. On the other hand, I accept Mr Sutcliffe’s statement that, had the declaration of assets contained in the seventh witness statement been given at an earlier stage, the application would not have been made. Such a statement given formally under a statement of truth would if accepted have prevented this application altogether. If the defendants had persisted in the face of such a statement, they would not only be likely to have failed, but they would also been potentially liable for costs assessed on the indemnity basis.
72. In my judgment the statements in the fifth witness statement (paragraph 28 and 31), were flawed, for the reasons already given, and therefore cannot be accepted as clear answers to the questions about what the claimants had done with their assets. And Mrs Brake’s sixth witness statement – without permission, the day before the hearing – still did not deal with the question whether any steps had been taken with any part of the funds from Mrs Foster. On the other hand, it was not until the hearing that the flaws in Mrs Brake’s fifth witness statement were exposed, and Mr Davies QC agreed to supply a further witness statement to remedy this. I do not think that the claimants can be criticised for making this offer, even if it arose out of a flawed witness statement. And, if the claimants had not offered that witness statement, they would still have won. So the fact that they did so is no reason to deprive the claimants of their costs of the application against the defendants. And I see no other reason for doing so.

**Basis of assessment**

73. The claimants ask for their costs on the indemnity basis. In *Hosking v APAX Partners LLP* [2019] 1 WLR 3347, Hildyard J considered the relevant caselaw, and concluded:

“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 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.”

74. The claimants here submit (in summary) that
1. This application was part of a scheme to drain the claimants’ funds;
  2. The defendants’ capitulation in the face of the seventh witness statement was an attempt to salvage their position on costs;
  3. Serious allegations were made against Mrs Brake, even in the post-hearing Note;
  4. The court’s function is to protect litigants against baseless allegations.
75. I deal with these submissions as follows:
1. On the evidence available to me I do not accept that the defendants’ purpose in making the application was to drain the claimants’ funds. But in any event merely trying to outspend your opponent is not conduct out of the norm justifying indemnity costs.
  2. It was not wrong or otherwise out of the norm for the defendants to try to protect their costs position once they realised that the claimants were now willing to give a confirmation that they had been seeking since January.
  3. Allegations against any party which are not supported by evidence are of no value and are to be ignored. Moreover, allegations in other proceedings are irrelevant. It is ridiculous to suggest that a judge would be influenced by such things in making a decision in other pending proceedings. On this application I have not had to decide, and have not decided whether there is any substance in these allegations.
  4. The court protects litigants by deciding the matters before the court. That is what I have done.

In my judgment there is nothing here sufficiently out of the norm to justify an award of costs on the indemnity basis. The application was serious, not speculative, and supported by some evidence, though in the end it failed.

## **CONCLUSION**

76. I will order that the defendants jointly and severally pay the claimants’ costs of the application on the standard basis. I understand that these have been agreed between the parties in the interval between the circulation of this judgment in draft and its handing-down, and I look forward to receiving a minute of order for approval.