Neutral Citation Number: [2021] EWHC 982 (Ch)

Case Nos: E00YE350, F00YE085

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

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

Date: 21/04/2021

Before :

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

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BETWEEN:

AXNOLLER EVENTS LIMITED

Claimant

and

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

Defendants

AND BETWEEN:

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(3) TOM CONYERS D'ARCY

Claimants

and

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

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MRS NIHAL BRAKE on behalf of herself and Mr Andrew Brake in Claim No E00YE350, and herself, Mr Andrew Brake and Mr Tom D'Arcy in Claim No F00YE085
ANDREW SUTCLIFFE QC and **WILLIAM DAY** (instructed by **Stewarts LLP)** for the Defendant in Claim No F00YE085,
and **EDWIN JOHNSON QC** and **NIRAJ MODHA** (instructed by **Stewarts LLP)** for the Claimant in Claim No E00YE350

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 version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 2 pm.

HHJ Paul Matthews :

1. By application notice dated 14 April 2021, Mr and Mrs Brake ("the Brakes") apply for the adjournment of two forthcoming trials in which they are concerned, in which companies owned or controlled by Dr Geoffrey Guy appear on the other side. These trials form part of wider litigation between the Brakes on the one hand and Dr Guy and his companies on the other.

2. The first trial (which I shall call the possession trial) arises in a claim by Axnoller Events Ltd against the Brakes for the possession of a property known as West Axnoller Farm, which includes Axnoller House and an adjacent covered arena, and is listed for seven days from 26 April 2021; this is claim E00YE350. The second trial (which I shall call the eviction trial) arises in a claim by the Brakes and the son of Mrs Brake in respect of their allegedly unlawful eviction by the Chedington Court Estate Ltd from a property known as Axnoller Cottage, which is on the same estate as and close to Axnoller House, and is listed for five days from 10 May 2021; this is claim F00YE085.

3. The possession claim was issued on 19 November 2018 in the County Court at Yeovil. It was listed for trial as a fast-track claim to be heard on 17 January 2019, but was adjourned because the deputy district judge considered that the time allowed was insufficient. It was then listed for 24-28 February 2020, but was again adjourned by the district judge so that further time could be given to disclosure. In each case the adjournment was (as it happens) at the instance of the Brakes, but of course for reasons considered by the court to justify it, and in neither case on medical grounds.

4. The eviction claim was issued in April 2019, again in the County Court at Yeovil. The Brakes twice sought an expedited trial by application notices issued in July and September 2019, but this was not ordered on either occasion. On the other hand, in December 2019 deputy judge John Jarvis QC ordered a stay of the eviction claim, pending trial of the so-called 'insolvency proceedings' (meaning two large scale insolvency applications, connected with the Brakes' bankruptcy and with the liquidation of a partnership in which they had been partners).

5. In the wider litigation between the parties, however, there is unfortunately a history of applications for adjournments by the Brakes. For example, there were three attempts to adjourn an earlier trial in May 2020 (the section 283A or 'revesting' claim: [2020] EWHC 1810 (Ch)), and three earlier attempts to adjourn post-trial matters in the 'documents' claim (BL-2019-BRS-000028: [2021] EWHC 671 (Ch)) since I circulated a draft judgment to the parties a month ago. One was to adjourn the formal hand-down, and was refused by me, and the other two were to adjourn the hearing of consequential matters and were refused by Marcus Smith J: [2021] EWHC 828 (Ch). But I should say that none of these applications was put on medical grounds.

6. In the present case, I have read the application notice, the evidence in support (witness statements from Mrs Brake, and from two of her solicitors, Ms Burcher and Mr Francis, plus letters from Mrs Brake's consultant physician, Dr David Taube), the written submissions from Mrs Brake, the written submissions in answer from the other side

(whom I shall call the Guy Parties), and a further written submission in reply from Mrs Brake. It is apparent from the written submissions from the Guy Parties that, realistically, they do not oppose the application, but seek to make the grant of an adjournment conditional on certain other matters.

7. Partly because the non-opposition from the Guy Parties is not unconditional, and partly because there is a significant public interest in breaking any trial fixture, let alone two at once, I have thought it right to consider the matter not only as between the parties but also in the wider public interest. I say therefore at once that the conclusion to which I have come (which I communicated to the parties before preparing these reasons) is that the interests of justice require that neither of the two trials take place as listed. What should happen instead is however more difficult.

8. It will already be apparent that the circumstances in which the application is made are complex. Those circumstances are set out in a number of earlier judgments, including those in two trials, one concerning a claim by the Brakes under section 283A of the Insolvency Act 1986 ("the revesting claim"), and one involving a claim by the Brakes in respect of documents contained within an email account ("the documents claim"). Judgment in the revesting claim was handed down in July last year. A draft judgment in the documents claim was circulated to the parties on 19 March 2021, and formally handed down (without attendance) on 25 March 2021.

9. Unfortunately, between those two dates junior counsel who had appeared for the Brakes at the trial of the documents claim (and indeed the revesting claim and the insolvency proceedings) withdrew from that case, and also from the forthcoming possession trial and eviction trial. On 29 March 2021 it was confirmed that leading counsel who had been retained in each of those two trials (two different people) had also withdrawn. This left the Brakes without any retained barrister to carry out the advocacy at the two trials.

10. Their solicitors, however, remained on the record. I understand, however, that none of those solicitors is a solicitor advocate with rights of audience in the High Court. Those solicitors wrote a letter to the court on 29 March 2021, which said that the withdrawal of counsel was not the fault of the Brakes. I am not in a position to be able to test that proposition, but, for the purposes of considering this application, I will proceed on that basis.

11. A quite different question which arises is whether the Brakes would be able to fund legal fees (including those of counsel) for these two trials. I am told that the combined budgeted fees for counsel in the two trials amount to £183,000. Given the costs orders which have been made against the Brakes by Marcus Smith J and myself in the documents claim, and the evidence provided by the Brakes as to their financial position, at present I cannot see how the Brakes could possibly afford to engage counsel at that kind of budgetary level for the purposes of the two trials.

12. Nevertheless, the evidence of Mr Francis shows that significant attempts have been made on behalf of the Brakes to secure other counsel to represent the Brakes at the two forthcoming trials. These efforts were unfortunately unsuccessful. The lack of success has been attributed to the shortness of the time remaining before the start dates for the two trials. I accept that any competent counsel approached would have seen that as a real obstacle to accepting the instructions.

13. That evidence has been criticised by the Guy Parties, on the basis that (i) the number of chambers approached was limited, and did not include a number of well-known specialist chambers dealing with this kind of work, and that (ii) the approaches seemed to be confined to Queen's Counsel, rather than considering appropriately qualified junior barristers (who would be less expensive in any event). Both those criticisms seem to me to have some force, and in another case it might have mattered, but in this one, at the end of the day, I do not think that it makes a difference overall.

14. The fact is that the Brakes are now without professional advocacy for two complicated trials, one to last seven days and one to last five, on a fully represented basis. These would be daunting for professional lawyers, let alone litigants in person. As it happens, the position is worse than this, because of the medical evidence of Dr David Taube, a consultant specialist physician, contained in two letters dated 9 and 15 April 2021. This evidence too has been criticised on behalf of the Guy Parties, but I proceed on the basis that in its essentials it is accurate.

15. Mrs Brake (who would act as the advocate for the Brakes) is a highly intelligent and articulate person, with a first-class degree and a background in investment banking and asset management. But she is seriously unwell. She has suffered from a chronic illness for many years, and had a transplant in 2001 from one of her sisters. This enabled her to lead a more normal life. Unfortunately she subsequently suffered another serious (but unrelated) illness, and the treatment that she received for that had a negative effect on her transplant. She is now at the end stage of a repetition of the same chronic disease. Her consultant considers that it is likely that she will need other significant treatment or another transplant in 12 to 18 months.

16. What this means is that at present Mrs Brake is suffering from fatigue, cramps, restless legs, disturbed sleep and above all reduced mental acuity. Dr Taube also says that stress (such as may be caused by being involved in heavy litigation) may well have a deleterious effect on kidney function. He suggests that Mrs Brake needs three months to prepare for the first trial, and that any trial should be in half days only.

17. The court has power to adjourn any hearing under CPR rule 3.1(2)(b). In exercising that power the court has regard to the overriding objective. The burden is on the applicant for an adjournment to demonstrate the need: see *Teinaz v Wandsworth LBC* [2002] ICR 1471, [20]. The court is obviously reluctant to adjourn a trial which has been listed for some time (which is this case). But sometimes justice so demands. In *Decker v Hopcraft* [2015] EWHC 1170 (QB), [22], Warby J said that, subject to important qualifications,

> "A court faced with an application to adjourn on medical grounds made for the first time by a litigant in person should be hesitant to refuse the application…"

18. In *Bilta (UK) Ltd v Tradition Financial Services Ltd* [2021] EWCA Civ 221, the Court of Appeal considered an appeal against a refusal to adjourn a forthcoming trial because of the unavailability on *bona fide* medical grounds of an important witness against whom allegations of dishonesty were made, but who was predicted to become available later, if an adjournment were granted. The appeal was allowed. Nugee LJ (with whom David Richards and Peter Jackson LJJ agreed) said:

> "30. … the guiding principle in an application to adjourn of this type is whether if the trial goes ahead it will be fair in all the circumstances; that the assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist; that although the inability of a party himself to attend trial through illness will almost always be a highly material consideration, it is artificial to seek to draw a sharp distinction between that case and the unavailability of a witness; and that the significance to be attached to the inability of an important witness to attend through illness will vary from case to case, but that it will usually be material, and may be decisive. And if the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for."

19. Here Mrs Brake would not only be an important witness, but also the advocate at the trials. She is also a party to both claims. It was originally suggested by the Guy Parties that an accommodation could be made to Mrs Brake as a litigant in person by utilising the time set aside for the *two* trials for the *first one* alone, sitting only for half days on four days a week, and postponing the second trial to a later date. But that would not give Mrs Brake the preparation time that her consultant says she needs.

20. As I have said, the Guy Parties have now stepped back from that position, and do not oppose an adjournment of the two trials, provided that this is on certain terms. The Guy Parties propose a six-week adjournment of the possession trial, being relisted for the time estimate of three weeks from the first available date after 7 June 2021, to conclude by the summer vacation, and taking account of their counsel's availability. They further propose that the eviction trial should be listed with a three-week estimate, at least six weeks after the conclusion of the trial in the possession proceedings, again taking into account their counsel's availability.

21. The terms on which the Guy Parties say that the adjournment should be granted are the following. First, if the possession trial is adjourned again for any reason, it should be moved into the slot reserved for the eviction trial, and the eviction trial relisted thereafter. Secondly, all other existing proceedings over which the court has jurisdiction should be stayed pending the possession trial and the eviction trial. This would not cover any appellate proceedings, nor the current employment proceedings. However, the Brakes should consent to a stay of the employment proceedings. Thirdly, the existing injunction and undertaking should be modified so that they no longer apply to the covered arena. Fourthly, the Brakes should undertake to vacate the arena without prejudice to their claim in the possession trial, and allow the Guy Parties to occupy it pending trial so that work can take place at their risk to prepare it for eventing teams. Fifthly, the Brakes should undertake pending trial not to set foot on the cottage or its surrounding land. This would permit the Guy Parties to dispense with the security team stationed there, and thus mitigate their loss.

22. In the Brakes' reply to the submissions of the Guy Parties, they invite the court to list both trials to be heard by the first available judge with the possession trial immediately preceding the eviction trial, the gap between the two trials being no more than five business days, to begin on a date not before 26 July 2021, with judgment reserved until the conclusion of both trials. The Brakes also agree to a single trial bundle for both trials.

They agree that there needs to be three weeks for the possession trial, but say that only two weeks are needed for the eviction trial. They also agree that, if they are able to secure counsel for the trials, they will immediately advise the court and the other parties so that arrangements for trial can be appropriately varied.

23. They do not agree to any stay of the employment proceedings, they do not agree to any variation of the injunction or undertakings relating to the arena, and they do not agree to give any undertakings relating to the cottage. In their earlier submissions of 15 April 2021, they offered to move from the house to the cottage from 31 May 2021 until the matters the subject of the two trials were determined, but of course without prejudice to the claims that they were making. The Brakes said they would also "consider giving permission for the Olympic teams, attending and making use of the riding surface within the indoor arena" (not including any stabling or other use of the facilities), but only "with prior permission and prior arrangement" and in the presence of the Brakes, and "without impact on [their] own continued and sole use".

24. It is unfortunately clear that the parties are still some considerable distance apart. And the matter is of course not all one way. The Guy Parties have rights under ECHR Art 6 too. As the Court of Appeal said in *Price v Price* [2003] EWCA Civ 888, [35], "the concept of a fair trial betokens fairness to both sides." The Guy Parties' claim for possession of the house and arena has been on foot since November 2018, and the trial has been adjourned twice so far. However, as I said, having considered all the material, I am in no doubt that the trials fixed for April and May cannot be held as listed. This is because the Brakes through no fault of their own no longer have counsel to represent them, and have so far been unable to secure substitute counsel, whilst Mrs Brake, who in these circumstances would have to shoulder the burden of representing her family, and also has important evidence to give, is simply not well enough to be able to do so within the current timescale.

25. Although it is exceptional to break a trial fixture, in the present case the interests of justice demand that I do so. This case concerns the Brakes' current home, and not merely their money or their employment. There may also be reputational questions at stake. The consequences for the Guy Parties are simply financial, although I do bear in mind (as Nugee LJ made clear I should) that the Brakes may well not be in a position to pay any compensation ordered if they lose.

26. As I have said, Mrs Brake is not merely a party to this litigation, and a witness, but as things stand will be required to act as the advocate too. I do not say that a fair trial could never be had without her, but I do say that, if reasonable accommodation can be made so that she is given enough time to prepare and the trials are structured so that she can have appropriate intervals for rest, a fair trial can be had in those circumstances, even though she will be against leading and junior counsel. I make clear that 'equality of arms' does not mean equality of skills, training or experience in advocacy. Just because the Guy Parties have a QC, for example, does not mean that the Brakes must have one, or indeed a junior barrister, or else the trial is unfair. That is not the law.

27. The real difficulty is to decide what to put in place of the existing arrangements. I have first of all considered the court's diaries. Plainly, I am the judge with the most knowledge of the background of this matter, and with the most familiarity with the documents. It is likely to be quicker and more efficient for me to deal with these two trials than for any

other judge. However, having considered my diary for the rest of this year, I find that I could not accommodate a three-week trial before the week beginning 6 September 2021. I also find that the other section 9 judge with appropriate experience in Bristol, HHJ Russen QC, could not do so either. It is possible that a deputy judge might be obtained for a three-week period before the summer, but at present I do not know.

28. In order not to lose existing date availability, I will list the possession trial for three weeks beginning on 6 September 2021, and the eviction trial for three weeks from 4 October 2021, both before me. There will be a one-week (five business days) gap between the two trials, as requested by Mrs Brake. Judgment will be given in both trials at the same time. There will be a single trial bundle. Notwithstanding these arrangements, I will make enquiries to see whether there is another judge who could deal with the matters more expeditiously. But unless and until my decision is varied, it will stand.

29. As to the five terms which the Guy Parties put forward, I agree with the first and second. If there is any postponement or adjournment of the possession trial, it will be moved back to the slot reserved for the eviction trial, and the eviction trial relisted. All other proceedings over which the court has jurisdiction will be stayed pending the resolution of the possession trial and the eviction trial, save that directions can be sought if there are issues on which directions are necessary.

30. The other matters are different, because they rely on the Brakes giving undertakings. I do not think, and I have seen no authority for the proposition, that the court can properly conclude that it would be unfair to continue with a trial as originally listed, and then refuse to adjourn merely because the applicant for an adjournment would not give an undertaking on a collateral matter. In relation to the employment proceedings, however, I do not think that this matters. As I understand the position, these are for trial for three weeks from the end of November, and therefore the trial timetable I am putting in place will not be interfered with.

31. So far as concerns the other matters, if the Guy Parties wish to make an application to deal with the modification or release of the injunction in relation to the arena, then they must make a formal application for that purpose, supported by evidence, which the Brakes and the court can consider. Given that these trials are not now going ahead in the near future, there will be time to deal with that before the summer.

32. Lastly, there is the cottage. It is of course in one sense in the interests of the Brakes that the security at the cottage be dispensed with, because it reduces the potential damages for which they might be liable in certain circumstances (though I am saying nothing about the merits of either party's case, because at this stage I simply do not know). But as I say I do not think I can require the Brakes to give any undertaking as the price of an adjournment of this kind. If the Guy Parties consider that they are entitled to an injunction, then they can apply for it in the usual way.

33. I should mention the two offers made by the Brakes. The first is to move from the house to the cottage, without prejudice to their various claims. That is a matter for the Guy Parties, not for me. I see no value in trying to incorporate it in my order. The other concerns the offer of access to the arena for equestrian eventing teams. This is couched in such terms as to give the Brakes complete control of what happens. This is not a useful suggestion, and I disregard it.