Neutral Citation Number: [2022] EWHC 1034 (Ch)

Case Nos: **E00YE350 and 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: 4 May 2022

Before :

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

- -

Between :

In the Possession Proceedings

AXNOLLER EVENTS LIMITED

Claimant

and

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

Defendants

In the Eviction Proceedings

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

Claimants

and

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

- -

- -

William Day (instructed by **Stewarts Law LLP**) for the **Claimant (Possession) and the Defendant (Eviction)**
Mrs Nihal Brake for herself, Mr Andrew Brake and Mr Tom D'Arcy

Hearing date: 29 April 2022

- -

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.

.....

HHJ Paul Matthews :

1. This judgment explains the reasons for my decision announced at a hearing on 29 April 2022 to continue a freezing injunction against Mr and Mrs Brake and Mrs Brake's son Tom D'Arcy (together, "the Brakes"), which I had originally granted without notice on 28 February 2022: see [2022] EWHC 444 (Ch). On 25 February 2022 I had handed down judgment in these two related claims, under neutral citation numbers [2022] EWHC 365 (Ch) and [2022] EWHC 366 (Ch). The first (the "Possession Claim") was a claim against Mr and Mrs Brake by Axnoller Events Ltd ("AEL") for, amongst other things, possession of West Axnoller Farm ("the Farm"), near Beaminster in Dorset (this includes the main house, "the House", and associated equestrian facilities. I held that AEL was entitled to possession.

2. The second ("the Eviction Claim") was a claim against AEL's parent company ("Chedington") by the Brakes for, amongst other things, possession of a cottage near the House, known as West Axnoller Cottage, based on what was alleged to be an unlawful eviction of them by Chedington. I held that the Eviction Claim failed. Chedington is a company in which Dr Geoffrey Guy and his wife Kate Guy are shareholders and directors, and I therefore refer to them and their companies collectively as "the Guy Parties".

3. Following the two judgments referred to, AEL and Chedington applied to me on 28 February 2022 for a freezing injunction covering the Brakes' assets worldwide. As I have said, I granted the injunction, and gave an extempore judgment ([2022] EWHC 444 (Ch)) to which I shall return. I set a return date of 7 March 2022, on the basis that that would be a week away, but in the order offered the Brakes the alternative of 15 March if they preferred, because they would also be occupied with other matters consequential on my two judgments of 25 February, and also because I understood that Mrs Brake had recently suffered a bereavement, and there would be a funeral to attend.

4. On 2 March 2022 I made an order on the joint application of the parties varying my order of 28 February 2022, by providing for a return date of 8 March 2022. On 4 March 2022 I made a further order, also on the basis that all parties consented, varying my order of 28 February 2022, by providing now for a return date of 1 April 2022. However, shortly before that date, Mrs Brake developed a problem with one eye, and was unable to read. I therefore proposed to move the hearing to 6 April 2022, though in fact it then turned out that there would be a hearing in the Court of Appeal the next day, and so the parties agreed to a further adjournment to 29 April 2022. On 21 April, Mrs Brake sought a further adjournment, which however I refused, for reasons given.

5. My order of 28 February required the usual affidavits of assets to be made by the respondents. These were duly made on 8 March 2022. On 3 March 2022 AEL and Chedington issued a further application notice seeking a continuation of the freezing injunction on the return day.

6. In my judgment of 28 February I referred to the decision of the Court of Appeal in *Lakatamia Shipping Ltd v Morimoto* [2019] EWCA Civ 2203, [33] and held that all the requirements for a freezing injunction were satisfied. Two of them could be dealt with quite easily. I held that the applicants had shown a good arguable case in relation

to their respective claims to costs in the two actions, and that AEL had similarly shown in relation to its claim to damages for trespass. I set a limit of £700,000 on the injunction. I held that there was reason to believe that there were relevant assets of the respondents within and without the jurisdiction.

7. As for the requirement that there be a real risk of dissipation of assets, I was referred to two separate groups of events, both of which had been the subject of findings by me at earlier stages of the litigation between these parties. The first related to the dissipation of assets in the arbitration and subsequent enforcement litigation between Patley Wood Farm LLP ("PWF") and Mr and Mrs Brake. Despite being bankrupt, and despite injunctions restraining Mr and Mrs Brake from doing so, by the use of a nominee (the Hon Saffron Foster, a friend of Mrs Brake) Mr and Mrs Brake managed to buy the Farm through a company ("SPL", which later became AEL) incorporated using another nominee, Alice Wyatt (Mr Brake's niece), when the receivers appointed by the mortgagee put it up for sale. They also bought the property at what appears to have been a significant undervalue compared with the valuation that was placed upon it for the purposes of obtaining a loan. That loan, indeed, from a commercial lender, was for more than Mr and Mrs Brake actually paid for the property.

8. The result was that, despite their own bankruptcies, they were able to retain the Farm, and carry on the wedding business they had built up on the back of that formerly carried on by the partnership with PWF. Then, two years later, they were able to sell SPL (and therefore the Farm) and the wedding business to Chedington, at a significant profit to themselves (about £3,000,000), whilst the principal of PWF, Mrs Lorraine Brehme, who was the largest creditor of the partnership, never received a penny.

9. The second group of events related to matters which were demonstrated to me for the purposes of my making an order in late 2021 for security for costs against Mr and Mrs Brake in the Eviction Claim. These matters were (1) the removal from the House to a hidden location of valuable furniture in order to avoid its being used to satisfy a future costs order, (2) the removal from the Farm to other locations, some out of the jurisdiction, of several horses belonging to the Brakes, again done in order to avoid satisfying future costs orders, and (3) the apparent transfer of ownership of a Range Rover motorcar to Mrs Brake's sister, initially said to be a gift, but later said to be a sale, at a price which, on its face, appeared to be lower than the market value. (In relation to the second and third of these, I held that the evidence put forward on behalf of Mr and Mrs Brake was simply not believable.)

10. It was on the basis of these two groups of events that I was satisfied that there was a real risk in the present case of dissipation of the assets of Mr and Mrs Brake if they were not restrained from doing so.

11. Lastly, I decided that it was just and convenient in all the circumstances of the case to grant a worldwide freezing order. In particular, I took into account the fact that this was not a pre-judgment but a post judgment application. I considered that the Guy Parties had a strong case both in relation to damages in the Possession Claim and costs in relation to both cases. However I should record that I also took into account the fact that any order I made would be made only over a short period, that is, until the return day. As it happens, because in all the circumstances the parties agreed to push back the date of the return date, that period was longer than I had intended.

12. The application notice of 3 March was of course a new and separate application, for a continuation of the freezing order, and at the hearing I had consider whether the requirements were satisfied completely afresh, but this time taking into account everything which the Brakes wished to put before me. In that connection, I should record here that, at the hearing, Mrs Brake, on behalf of the Brakes, did not seek to challenge my finding on either the first requirement (good arguable case) or the third (reason to believe assets within and without the jurisdiction). But she did submit that the Guy Parties (on whom the burden lay) had not shown that there was a real risk of dissipation of assets, or that it was not just and convenient in all the circumstances to grant the injunction. It is right also to record that Mrs Brake did not stay for the whole hearing. Towards the end she became upset and she and her husband left abruptly.

13. In his affidavit in support of the continued injunction, Mr Spendlove pointed out that, although in an email on 3 March 2022, Mrs Brake had claimed that certain horse semen doses previously owned by them had been destroyed, she had not referred to the fact that 46 doses of this semen had in fact been sold by her in June 2021. The affidavits of assets of the three respondents showed assets of over £500 amounting to the total value of £108,000. This compared with evidence of assets in the summer of 2021 of at least £650,000. This included pension policies, some of which were later liquidated, and antique furniture which on the evidence before me I had held in an earlier application to be worth at least £200,000. Some £218,000 had since been paid by the Brakes to the Guy Parties in respect of costs orders.

14. The Guy Parties considered that these figures showed a shortfall of some £324,000 which could not be explained by living and legal expenses. They raised it in correspondence with the Brakes. Mrs Brake's response was that the furniture had been sold for £101,000, meaning that it had been over estimated in value by some £99,000. She did not however give full details of this transaction, and neither did she state what furniture was left, or where it was stored. She also said that some £80,000 was payable in tax on the liquidation of pension policies, and some £64,000 was spent on living legal expenses. The Guy Parties did not accept these explanations, and sought disclosure of relevant documentation. But they pointed out that, even if these explanations were true, there would still be an unexplained shortfall of some £81,000. Accordingly, they sought further disclosure of what the Brakes had done with their assets.

15. But, in addition, they referred to several other matters as issues of concern. One concerned references in correspondence to 2 other companies which appeared to be involved with the Brakes' pensions, namely Phoenix Group and Reassure Limited. A second was the existence of a third trust, in addition to (i) the Brake Family Trust (created in June 2013) and (ii) the declaration of trust in favour of some of the creditors of the partnership (made in January 2015), called the William D'Arcy Discretionary Settlement Trust, which was apparently created in 2014, at a time when the Brakes were facing bankruptcy.

16. A third issue of concern was the question of what interests in horses the Brakes still had. According to a report commissioned by Mrs Brake, the once valuable horse Voss had a value of nil, as had another horse, Jackman, whilst Ulynesse Z had a residual value of £9000 based simply on its "unproven" breeding potential. But Mr Spendlove's evidence was that (i) Jackman was still active in Ireland and regularly competing, being registered to a former employee of the Farm in 2010-2012, (ii)

Ulynesse Z's breeding potential was not "unproven" because she had had a foal in 2016, and (iii) a lady called Danielle Ryder, who previously looked after the Brakes' horses, had told him that Ulynesse Z had not been given away, but was still owned by the Brakes as to 75%, with a 50% interest in foals.

17. Then there was the question of the horse semen. It appeared that semen from Voss had been stored with Stallion AI Services between 2015 and 2018. The ownership of this semen was said to have been transferred during this time from the Brakes to Tulloch and Maslin Ltd (a company belonging to Susan Maslin, another friend of the Brakes) and then to Loxley and Brake Ltd, a company owned by the Brake Family Trust. Although Mrs Brake had reported that the semen had been destroyed in 2021, Mr Spendlove's evidence was that doses of the semen had been sold on 4 June 2021 and sent to their new owner. Accordingly, the Guy Parties sought disclosure from the Brakes to deal with this question.

18. In Mrs Brake's witness statement of 21 April 2022, she made a number of points in answer to these allegations, and indeed more widely. She confirmed that furniture belonging to the family trust had been sold for £101,000. She also said that they had borrowed sums totalling £101,000 from her sister in the autumn of 2021. This in part enabled payments to the Guy Parties totalling £218,000 at about the same time. They also paid the lawyers who conducted the appeal (in the Documents Claim) £50,000. She also referred to the fact that a painting belonging to the family trust, insured for £20,000, had fetched only £2870 at auction, which she said demonstrated that insurance value was no guide to market value. Her sister had also bought their Range Rover motorcar in April 2021, although payment was only received in August 2021. She confirmed that the Brakes had a container parked at Ms Maslin's farm, containing furniture and other personal items, but they were not planning to move there.

19. Concerning the three trusts referred to by the Guy Parties, Mrs Brake said this. The family trust was in contemplation from early 2013 and had nothing to do with dissipating assets. It was a coincidence that the Partial Final Award in the arbitration against PWF was handed down a few days after the trust was in fact created. Moreover, she said that the assets in the trust belonged to John D'Arcy rather than to the Brakes, and therefore did not dissipate any assets of theirs. So far as concerned the declaration of trust of January 2015, she said that this declared a trust of the Brakes' own claim against their former partner PWF for the benefit of the creditors of the partnership, rather than for their own benefit. Thirdly, she said that the William D'Arcy Trust was created with a nominal amount of money (supplied in fact by the professional trustee), but no substantive assets were ever settled.

20. I find what Mrs Brake says about the family trust difficult to accept. This is first of all because, although no one could be sure exactly when the arbitration award would be handed down, it was plainly going to be handed down at some time in the near future, and the Brakes, having refused to take part, could hardly have expected a positive result. Secondly it is because, on 3 March 2020 in an earlier application in another part of this litigation, I was shown the family trust deed, and specifically noted that the settlor of the trust was not John D'Arcy, but *Mr and Mrs Brake* acting jointly, and they were also trustees: see [2020] EWHC 538 (Ch), [9]. What Mrs Brake says about the declaration of trust is broadly correct, but lacks a vital fact. The beneficiaries of the declaration of trust of their own claim against PWF were defined so as *not* to include the principal creditor of the partnership, namely Mrs Lorraine Brehme, who,

as I have said, never recovered a penny. Those beneficiaries instead included only a small number of other creditors, for modest sums, who were all connected with the Brakes. As for the third trust, I am not in a position to resolve the dispute of fact concerning this, and put it on one side for present purposes.

21. Mrs Brake referred to other "allegations" that (i) she had caused Rebecca Holt, a director of SPL, to open a bank account in her own name for Mrs Brake's use, (ii) used the funds of SPL to fund her lifestyle, and (iii) purchased the car in the name of Alice Wyatt to disguise her ownership of it. (I note in passing that the "allegations" at (ii) and (iii) were actually findings of fact made by me in my judgment in the Possession Claim: [2022] EWHC 365 (Ch), [101], [116].) In addition, Mrs Brake prayed in aid the fact that all the money from SPL – a company she claimed not to own – that was spent on her personal matters was repaid on completion of the sale of the company to Chedington. That of course was true, but, as I found in the Possession Claim, it was *Chedington's* accountants who discovered this expenditure in the company's books, and insisted that it be moved to a loan account which had to be repaid on completion: [2022] EWHC 365 (Ch), [116]. Mrs Brake said that these were not attempts to dissipate assets. I accepted that they were not attempts at dissipation which were relied upon by the Guy Parties in this application: I have already set out above the acts of dissipation on which they did rely. But what these further matters did evidence was a readiness on the part of Mrs Brake to dissemble and to use nominees to achieve her objects.

22. Mrs Brake went on to make the point that there was no evidence that her son Tom D'Arcy had ever dissipated any assets. This was correct. But the argument for the Guy Parties was that Tom lived with his mother and could effectively be expected to do everything that she told him to. If a real risk of dissipation by Mr and Mrs Brake was established, then, in order not to leave an obvious loophole in the protection intended to be granted to the Guy Parties, Tom would have to be included too. The fact that Tom had taken no active part in any of the proceedings in which he has been involved, apart from being present in court to give evidence in person in the Eviction Claim, but had left it to his mother to conduct the litigation and act as advocate, even in his absence, to my mind added some substance to this point.

23. Mrs Brake also said that all the events relied on by the Guy Parties to show a risk of dissipation were historic, and not recent. As to this, I accept that some go back to 2013, but others are more recent. The various dealings with the Range Rover, for example, took place in 2021. These involved an obfuscation of what really happened, by first claiming a gift and then a sale, to Mrs Brake's sister Mrs Hill. And a similar obfuscation appears to have occurred in relation to the furniture, in the autumn of 2021. It was first alleged that Mrs Hill had lent money to the Brakes, and subsequently it was said that this debt was partially satisfied by the sale to Mrs Hill of some at least of the antique furniture said to belong to the trust. These showed a readiness to change stories about assets from time to time to suit the purposes of the moment. This readiness created a real risk of dissipation of assets.

24. So far as the older events are concerned, I was (and am) not aware of any authority which holds that events giving rise to a risk of dissipation must have taken place within a certain time of the application. It must be a question of fact whether the conduct which is demonstrated can be such as to prove that there is still a real risk of dissipation. In the present case, the litigation between the Brakes and the Guy Parties

has been inextricably bound up with the acquisition of AEL by Chedington, and AEL (then SPL) was set up to allow the Brakes to carry on the wedding event business previously run by the partnership, once they had fallen out with their partner, lost the arbitration and been made bankrupt.

25. Mrs Brake argued that, since the Farm was acquired with a loan which more than covered the whole value, it could not be dissipating assets to have acquired it in this way. But this missed the point. The conduct concerned included attempts to avoid partnership creditors (in particular Mrs Brehme), to conceal assets from their trustee in bankruptcy, and to flout injunctions granted to prevent them acquiring the Farm or carry on the wedding business for six months. I was entirely satisfied that this earlier conduct displayed a propensity on the part of the Brakes to hide their assets from their creditors, and therefore created a real risk of dissipation for the purposes of the freezing order jurisdiction.

26. In her witness statement, Mrs Brake was concerned to rebut allegations by the Guy Parties that they had not disclosed all of their assets. She explained that the Voss semen had not been sold (as the Guy Parties alleged), but instead given away for nothing, in order to save on storage costs of approximately £300 a year. However, some of the doses had been damaged in error, and thus destroyed. She reiterated that the two horses that went to Ireland ceased to belong to the Brakes in July 2020. She insisted that Ulynesse Z had been valued (at £9000) by Andrew Elliott on the basis that she *could* bear foals, despite the fact that he said that her breeding potential was "unproven", and that therefore there was no error. (For what it is worth, I did not accept this. There is clearly a difference between the breeding potential of a mare which has never had a foal and that of a mare which has had one.) Mrs Brake dismissed the allegations by Danielle Ryder on the basis that she was upset with the Brakes, because they no longer kept any horses with her. She asserted that the Guy Parties had overestimated the value of the pensions because of the tax payable, and had overstated the Brakes' assets by £336,000. She denied that there was any understatement of the value of the furniture (that is, £99,000, as alleged by the Guy Parties). She said there was no inventory to demonstrate one way or the other, and anyway the furniture still at the cottage was excluded.

27. Ultimately, the problem for Mrs Brake was that she chose to fight over allegations which were not the main points on which the Guy Parties relied to show a real risk of dissipation. As to these, she made no significant headway. As a result, I was quite satisfied at the hearing that there nevertheless was a continued real risk of dissipation of assets by the Brakes.

28. Lastly, there was the question of whether it was just and convenient to continue the freezing injunction. Apart from the fact that the freezing injunction would now be continued over until trial, the same considerations that applied on the original without notice grant of injunctive relief applied here too. But Mrs Brake argued that there was no need for a freezing injunction, because they had no significant assets to dissipate, and the little they had would be needed for living and legal expenses. The problem with this argument was that the Guy Parties were (and are) highly suspicious that there are other assets which had not been disclosed, whether held by nominees or simply hidden away. At this stage I could not resolve this dispute, but I was satisfied that there was at least a good arguable case for there being other assets which the

Brakes have not disclosed. The freezing injunction would, of course, continue to provide for living and legal expenditure.

29. Mrs Brake also made the point that her husband Mr Brake, was (and continues to be) in a mental health crisis moratorium, and that she herself had (and has) a number of chronic health conditions. But, provided that any order made did not in any way impede access to appropriate health treatment, I could not see how the state of health of either Mr or Mrs Brake was of more than minimal weight in relation to the question I had to decide. The litigation would be continuing, whether or not there was a freezing injunction in place.

30. Overall, I considered that it was indeed just and convenient to continue the freezing injunction until trial or further order in the meantime. For all these reasons, I concluded at the hearing that I should continue the injunction, and announced my decision accordingly.

31. The freezing order also imposes certain disclosure obligations on the Brakes at paragraphs 10 and 11. Mrs Brake told me that she had already provided this information to the Guy Parties. But the Guy Parties wished it to be confirmed by affidavit. In the circumstances outlined earlier in this judgment (particularly at paragraphs 12 to 16), coupled with the unsatisfactory explanations given by Mrs Brake (especially at paragraphs 17 to 20 and 24), I considered that it was appropriate to make this part of the order.