EMPLOYMENT TRIBUNALS

Claimants:	Mrs N M K Brake (1) and Mr A Y Brake (2)
Respondent:	Axnoller Events Ltd (1) The Cheddington Court Estate Ltd (2) Dr Geoffrey Guy (3) Mr Russell Bowyer (4)
Heard at:	Exeter (on the papers) **On:** 17 May 2021
Before:	Employment Judge Housego
Representation	
Claimant:	Written submissions from Christopher Milsom, of Counsel
Respondent:	Written submissions from David Reade QC and Martin Palmer, of Counsel

JUDGMENT

1. The Claimants' claim for costs in respect of the hearing of 09 July 2020 is dismissed.

REASONS

1. On 09 July 2020 I heard a case management hearing (by cvp) in these linked cases. The Claimants were represented by Christopher Milsom, of Counsel, and the Respondents were represented by Martin Palmer of Counsel.

2. The Respondents applied for a stay of the hearing of the claims. I refused that application as part of my case management order, sent to the parties on 13 July 2020.

3. The Respondents have appealed that decision, which was acknowledged by the EAT on 15 October 2020. The appeal was drafted by David Reade QC and Martin Palmer, who appeared in the hearing of 09 July 2020. The progress of that appeal is not known to me.

4. In July 2020 the Claimants sought a costs order in respect of that application (it is dated 7 July 2020, but that predates the hearing, so that presumably it was 17 or 27 July 2020).

5. At a further case management hearing, conducted on the telephone by EJ Cadney, the Respondents sought the costs of the case management hearing

before me on 09 July 2020, in so far as they related to the costs of opposing the application for the claims to be stayed.

6. EJ Cadney suggested, and the parties agreed, that that application should be referred to me, to be dealt with on the papers. These were emailed to me on 01 March 2021. The Respondents then replied, serially, and in volume.

7. The costs provisions of the Rules are at Rule 74-84. Rule 76 states:

> "When a costs order or a preparation time order may or shall be made
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> **76.**— (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
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> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
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> (b) any claim or response had no reasonable prospect of success; or
>
> (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.
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> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.
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> (3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—
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> (a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and
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> (b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.
>
> (4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.
>
> (5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.

8. The Claimants assert that the application was unreasonably pursued, and/or enjoyed no reasonable prospects of success such that the threshold tests in Rule 76 are satisfied. They say that there is no issue of means to pay, and that although the application had no reasonable prospect of success they still had to incur the costs of opposing it.

9. The Claimants assert that there was an ulterior motive, to force them to fight in a forum where costs usually follow the event and not in the Employment Tribunal, which is usually a forum where each party pays its own costs (save where Rule 76 applies). This, they assert is to remove equality of arms.

10. The Claimants assert that, as I found, there was no real overlap of issues (at paragraphs 54-56 and 59-62 of my Order).

11. They assert that there was no practical reason why there should be a stay, because by the time the claims were heard in the Employment Tribunal the High Court case should have been resolved, as I pointed out in the hearing of 09 July 2020.

12. The Respondents reply that they think my decision was flawed in a variety of ways, set out in the notice of appeal, and they are prepared to go to the expense of an appeal to the EAT. This is indicative either of conviction that my decision is flawed (the Respondent's likely opinion), or that the Respondents will follow every avenue to make the progression of the claims difficult for the Claimants (the Claimant's likely view).

13. I do not wish to predict the opinion of a superior Court, but if one party or the other disagrees with this decision doubtless there can be an appeal to the EAT to be joined with the present appeal.

14. Since the application was made, there have been voluminous submissions from the Respondent, who have also provided me with the decision in
(1) NIHAL MOHAMMED KAMAL BRAKE (2) ANDREW YOUNG BRAKE
and -
(1) GEOFFREY WILLIAM GUY
(2) THE CHEDINGTON COURT ESTATE LIMITED
(3) AXNOLLER EVENTS LIMITED [2021] EWHC 671 (Ch), dated 25 March 2021.

15. That judgment runs to 88 pages. It refused the application of the Claimants for an injunction or an order for destruction of records, and stated that they were entitled to no other remedy in respect of the matters litigated in that case.

16. It is necessary to set out the first paragraph of that judgment to place it in context:

> *"This is my judgment on the trial of part of the claim, by claim form issued on 2 September 2019 for a final injunction and damages in respect of the alleged accessing, retention and deployment by the defendants of emails said to be private and confidential to the claimants and held within three email accounts. It is a trial of part of the claim because the full claim would have taken between 10 and 15 days to try, and so it was decided to try all the issues except the so-called "iniquity" defence advanced by the defendants. It was also decided to try, as a preliminary issue, the question whether the "iniquity defence" was available to the defendants as a matter of law. If the results of this part of the trial and of the preliminary issue show that it is necessary to go on to try the "iniquity defence", then the time taken by this part of the trial and the preliminary issue will not have been wasted, because these always needed to be decided. But if they*

show that the trial of the remainder is not necessary, considerable time and money will have been saved."

17. The Judge explained the background at paragraph 3 of his judgment:

"This claim forms a discrete part of wider ranging litigation between the claimants on the one hand and the defendants on the other. There are (or have been) a number of other claims between the parties. This is only the second of them to come to trial. There are others waiting in the wings."

18. He then set out the background to the litigation in paragraph 4 et seq, and I set it out here as it may be of use to the judge in subsequent hearings in the Employment Tribunal, particularly as it is *res judicata* and may form the basis of findings of fact:

4. In September 2004, the first claimant (then Mrs D'Arcy, but whom I shall call by her current name, Mrs Brake) acquired West Axnoller Farm ("the Farm"), near Beaminster in Dorset, 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. In 2006 Mrs Brake began to operate a holiday letting business at the Farm, subsequently joined in partnership in 2008 by her husband, the second claimant ("Mr Brake"). Just outside the southern boundary of the Farm, on the other side of the private lane leading to the Farm, lies another, smaller residential property known as West Axnoller Cottage (the "cottage").

5. In July 2002 a Mr and Mrs White had purchased the cottage from the Vickery family and were living there when Mrs Brake bought the Farm. Mrs Brake borrowed money from bankers Adam & Co in 2006, secured by a first legal charge on the Farm. The financial crisis of 2008 made it impossible to obtain further bank finance to expand the business being carried on at the Farm. The claimants therefore looked for an outside investor.

6. In February 2010 the claimants entered into a partnership with a limited partnership called Patley Wood Farm LLP ("PWF"), whose principal was Mrs 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 claimants contributed the Farm as partnership property, although it remained charged to Adam & Co to secure existing borrowings. With funds contributed by Mrs Brehme, on 8 March 2010 the partnership acquired the cottage, the legal title to which was transferred to the claimants and Mrs Brehme jointly, who were registered as proprietors. 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.

7. Differences arose between the claimants on the one hand and PWF on the other, as partners in Stay in Style. In accordance with the partnership agreement, these were referred to arbitration, which ended on 21 June

2013 with an award in favour of PWF, and the dissolution of the partnership. Following a failure to pay orders made against them for costs in the arbitration, the claimants were adjudicated bankrupt on 12 May 2015. Mr Duncan Swift was appointed trustee in bankruptcy with another person, who later retired and was not replaced. The partnership itself subsequently went into administration (in 2016), and then into liquidation (in 2017).

8. *In October 2014 Adam & Co, the bank which had lent money to Mrs Brake against the security of the Farm, appointed receivers under the Law of Property Act 1925. After marketing the property, the LPA receivers sold it in July 2015 to a newly incorporated company, Sarafina Properties Limited ("Sarafina"), said to be a corporate vehicle for the Hon Saffron Foster ("Mrs Foster"), a daughter of Lord Vestey, as well as a friend of Mrs Brake.*

9. *In February 2017 Mrs Foster sold the company to The Chedington Court Estate Ltd ("Chedington", the second defendant), and its name was changed to Axnoller Events Limited ("AEL"). It is the third defendant in this claim. Chedington is an investment vehicle for Dr Geoffrey Guy ("Dr Guy", the first defendant). Mr and Mrs Brake were employed to continue to run the wedding and rental accommodation business as before. Relations between the parties broke down, and on 8 November 2018 notice was given of the termination of their employment. This led to proceedings in the employment tribunal against Chedington and others by each of the claimants ("the Employment Claims"), and proceedings in the High Court by AEL against the applicants to recover possession of the Farm ("the Possession Claim").*

10. *Following this, in January 2019, Mr Swift as trustee in bankruptcy 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 the second defendant is in occupation of the cottage, and the third defendant seeks possession of the house. Trials of these two possession claims are currently listed for April and May 2021.*

11. *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 adjacent parcels had revested in them and Mrs Brake respectively 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 taken no steps to realise 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 two orders by consent, one removing Mr Swift from office, and another appointing his successors.

12. *In January 2020 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 ([2020] EWHC 538 (Ch)), and most of the Bankruptcy Application ([2020] EWHC 537 (Ch)), for lack of standing. An appeal against my decision in the Liquidation Application was dismissed by the Court of Appeal. An appeal against my decision in the Bankruptcy Application was however allowed, so that that application is yet to be tried (see [2020] EWCA Civ 1491 for both appeals). But, as at March 2020, the only significant matter left from the Liquidation and Bankruptcy Applications to be tried in May of that year, against the former trustee and Chedington, was the revesting issue under section 283A."*

19. This claim is that the Claimants were employees of one or more of the Respondents, and of disability discrimination (based upon the 1st Claimant's health), and of public interest disclosure detriment, notice pay, holiday pay and deduction from wages. I set out the history, as far as it could be ascertained in the course of the hearing I conducted on 09 July 2020, in my case management order, at paragraphs 26 onwards. That hearing was about whether the Employment Tribunal claims should be stayed pending the High Court action(s) as the Respondent sought, or not, as the Claimants opposed the application.

20. I decided in favour of the Claimants, and refused the application to stay for the reasons I set out. The Claimants assert that the Respondents should pay their costs of defending that application. They say, in summary, that it was a device to try to get findings of fact in a forum where they will be at risk of costs, and that this was a manoeuvre, not a bona fides application.

21. I decline to order the Respondents to pay costs of that application. This is not a *"costs follow the event"* jurisdiction, and it is legitimate to seek to litigate matters in one forum rather than another, where the impact of one piece of litigation will impact on another between the same parties.

22. More fundamentally, the litigation between these parties is beginning to make Jarndyce v Jarndyce look like a fast-track case. There is a great depth of antagonism between the parties, who clearly will fight this litigation in as many ways and to whatever lengths they can. It would be unrealistic to seek to penalise one party to this application when it is but one small part of a no holds barred contest between the two parties.

23. Nor is it a productive use of judicial time to prepare a detailed factual and legal analysis of why I conclude that even if the Respondents have acted in a way that engages Rule 76 (and I make no finding of fact that they did so) I would not exercise the discretion conferred by that Rule to make a costs order in favour of the Claimants.

24. Accordingly, the application for costs made by the Claimants in respect of the hearing on 09 July 2020 is dismissed.

Employment Judge Housego
Date: 17 May 2021

Judgment and Reasons sent to the Parties: 26 May 2021

FOR THE TRIBUNAL OFFICE