

NEUTRAL CITATION NUMBER: [2021] EWHC 2539 (Ch)  
**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN BRISTOL**  
**INSOLVENCY & COMPANIES LIST (ChD)**

20 September 2021

Before

**HHJ PAUL MATTHEWS**

BETWEEN:

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**AXNOLLER EVENTS LIMITED**

Claimant

-v-

**(1) NIHAL MOHAMMED KAMAL BRAKE**

**(2) ANDREW YOUNG BRAKE**

Defendants

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**Edwin Johnson QC and Niraj Modha** (Instructed by **Stewarts**) appeared on behalf of the  
Claimant

**Mrs Nihal Brake** appeared on behalf of the Defendants

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**RULING**

(As Approved)  
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(Official Shorthand Writers to the Court)

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- 1 JUDGE PAUL MATTHEWS:** I have to determine a question which has arisen in the course of my trying the present claim. This is known as the Possession Claim, because it concerns a claim by the claimant, Axnoller Events Limited (“AEL”), for possession of a property called Axnoller House, West Axnoller Farm, from the defendants, Mr and Mrs Brake, who are currently in occupation of it. In the course of this trial, AEL wishes to cross-examine Mrs Alo Brake on a document which is currently in the trial bundle. This document purports to be a draft witness statement by Mrs Brake and in her name. It is dated 26 November 2018, but it is not signed. The Brakes object to cross-examination of Mrs Brake on that document.
- 2** The background to this litigation is long and complicated and I will not burden this short judgment with all of that information. It is set out in a number of earlier judgments which I have given in other cases between the same parties (most recently, *Brake v Guy* [2021] EWHC 671 (Ch)). In broad terms, I can simply say that the Brakes had originally bought the property at West Axnoller Farm and had lived there. It had then become partnership property in a partnership with an outside investor. The partnership had broken down. The Brakes were eventually made bankrupt, and the receivers appointed by the bank which had lent money on the security of the property enforced the security by selling the property on behalf of Mrs Brake. It was sold to a company called Sarafina Properties Limited. Subsequently Sarafina Properties Ltd itself was sold to Chedington Court Estate Ltd (which belongs to Dr Geoffrey and Mrs Kate Guy), and changed its name to AEL.
- 3** The Brakes were retained by the Guys to continue to run a business at the property, but the relationship between them broke down, and the employment of the Brakes was terminated in November 2018. When the Brakes did not vacate the property, these possession proceedings were brought. The claim form was issued on 19 November 2018, and the first hearing of the claim took place at Yeovil County Court on the morning of 27 November 2018. Mrs Brake was in fact ill at the time of the hearing, and was not at court on that day. But her husband, Andrew Brake, was at court for that hearing, with their counsel Daisy Brown.
- 4** What happened on that occasion is very much in dispute between the parties. What is common ground is that this was the first hearing and that the question for the

district judge was going to be what should happen to this claim in the future, how should it be conducted. One possibility would be that a possession order would be made immediately, but in order to avoid that the defendants would have to show that there was a substantive defence to the claim.

- 5 It is clear on the material that I have seen, and to which I shall refer shortly, that the document with which we are concerned, a draft witness statement, had been supplied by the Brakes' then solicitors to their counsel, Daisy Brown, so that she could inform herself of the background to the case. She had been instructed in something of a hurry, given that the claim had only just been issued and served. Of course, it would be for her to make the case to the district judge to justify directions being given to trial rather than an immediate possession order.
- 6 The case put forward by AEL is that this witness statement was voluntarily disclosed by counsel Daisy Brown to Niraj Modha, who was the counsel instructed on behalf of the claimant at that hearing, and that he had therefore had sight of it and had then indeed photographed it with his mobile telephone.
- 7 The events at court are extremely significant. I will come back to the evidence of Mr Modha in a moment. First of all, there are some emails which have come from Daisy Brown herself. I understand that she is currently on sabbatical leave from practice and that she has produced these emails based on her recollection and any other emails that she has been able to trace.
- 8 On 15 September 2021, there is an email in which she writes to her clerk:

"Hi Justin, I have had a look back at emails from the hearing in November 2018. There is a draft witness statement which is obviously draft with blank brackets in it and not signed. I do recall using it for my own purposes as it provided some background, but it was not served on the other side and was not relied on in court. I'm afraid I do not know how Niraj Modha had a copy of it. This has never been referred to before within these proceedings.

Mrs Brake was not in court on 27 November and had a GP email dated 25 November that she was very unwell. I believe that the proceedings were only served two days before the hearing so it isn't clear who was involved in the drafting of the statement.

That probably is not enormously helpful, but please do forward this on to Alo.

Thanks,

Daisy."

- 9 In chronological order, there was then a witness statement from Mr Modha himself, made on 16 September 2021, which contains a statement of truth. The material parts of that witness statement are these:

"6. On Tuesday, 27 November 2018, I attended the first hearing in these proceedings. The hearing was listed for 10 am in the County Court at Yeovil. I had been instructed by Radius Law Limited to represent the claimant at this hearing.

7. At approximately 9.30 am on the day of the hearing mentioned above, I met Ms Daisy Brown, who was counsel for the first and second defendants, in the waiting area of the court building. Neither of our instructing solicitors was present. Mr Andrew Brake, the second defendant, was also at court. The first defendant was not present. The third defendant did not attend the hearing. At this hearing he was not represented. He has since been removed as a party to these proceedings.

8. I introduced myself to Ms Brown as counsel representing the claimant. Ms Brown told me that she represented the first and second defendants. I asked Ms Brown whether she had a skeleton argument that she could exchange with me and whether she was relying on any evidence. She said that she had both a skeleton argument and a draft witness statement. She said that she only had one printed version of each document. She said that she had

already provided her skeleton argument to the court. I was neither shown, nor provided with, a copy of her skeleton argument. I provided Ms Brown with a printed copy of my skeleton argument.

9. Ms Brown told me that she intended to hand up the draft witness statement to the judge who would be hearing the claim. I asked her if I could see this document before the hearing. She gave this document to me. She said that she would need this document to be returned to her before the start of the hearing in order that she could provide it to the judge.

10. I sat down in the waiting area to read the document.

11. After I had finished reading the document, in order to save the time and cost of photocopying, I took individual photographs of each of the seven pages of the draft witness statement on my mobile phone. I did this whilst sitting opposite Ms Brown and the second defendant in the waiting area of the court building. I then attached these photographs to an email that I composed and sent to the solicitor who at that time instructed me on behalf of the claimant.

12. The photographs that I took on 27 November 2018 have been printed and reproduced in the trial bundle at C1, tab 24, 105 to 111. The email to which I have referred in the paragraph above is exhibited to this witness statement at exhibit NM1/1. The photographs of each page of the document which were attached to that email are exhibited at exhibit NM1/2-8.

13. I returned the document to Ms Brown by hand shortly before 10 am. The hearing took place later that morning."

**10** Then the exhibit attaches a rather better copy of the document, which is also to be found in the trial bundle. It is in a more legible state, including complete copies of all of the paragraphs as appear, without any lines being cut off at --

**11 MRS BRAKE:** Paragraph 13.

- 12 JUDGE PAUL MATTHEWS:** I am reminded by Mrs Brake that paragraph 13 was missing from the version in the bundle. It appears as a one-line paragraph in the version attached to Mr Modha's statement.
- 13** Mr Modha was in fact cross-examined on his witness statement by Mrs Brake. I should say that I did take time briefly last week to look at some authorities on the question of counsel giving evidence at a trial of matters with which he or she has been concerned as counsel, and I circulated some of those authorities to the parties: *Hickman v Berens* [1895] 2 Ch 638, *Wilding v Sanderson* [1987] 2 Ch 534, and *Appleby v Errington*, *The Times*, 22 October 1952. The last of these is a rather extraordinary case, where it was not just counsel that gave evidence, but also the trial judge (now an appellate judge, Hodson LJ). He gave evidence as to what had happened at the trial. So did the two counsel, one of whom had since become a High Court judge (Karminski J), and the other was in fact subsequently to become a rather famous barrister, Mr John Mortimer.
- 14** It is clear from those authorities that there is no objection in principle to counsel providing evidence of what has happened in a matter with which they were concerned professionally. Exactly how that evidence ought to be elicited must depend on the circumstances. In the present case, what has happened is that Daisy Brown's evidence has been given in the form of emails, which are obviously not evidence on oath or supported by a statement of truth, but they are given by a member of the bar and I am not going to impugn the veracity of a member of the bar who tells me that this is what happened (*cf Appleby v Errington*, per Vaisey J). As it happens, Mr Modha went into the witness box and took an oath and was indeed cross-examined, and of course I have had the opportunity therefore to consider him in somewhat greater detail than if he had simply put in the written statement. I will come back to this question later, but it seems to me that, in circumstances where Mr Modha was prepared to be cross-examined on his witness statement, I should permit that, so that is what I have done.
- 15** To take up the evidence again in chronological order, there was then a further email, this time from Anusheh Burcher on 17 September 2021, who was formerly the solicitor for the Brakes. Indeed she was the solicitor at the two firms which were serially instructed by the Brakes, first Porter Dodson and, secondly, Ashfords LLP.

16 The email that she sent to Mrs Brake reads as follows:

"Dear Alo,

I can confirm that I have checked the Porter Dodson file as transferred to this firm and can confirm the following.

1. There is no signed statement of 26 November 2018, one does not exist.
2. There is no statement of 26 November 2018 complete with exhibit, one does not exist.
3. I am unclear as to what document the list of documents as supplied in March 2019 is referring to when it refers to the witness statement of first defendant inclusive of exhibits, 26/11/2018.
4. The document was never requested by those representing the claimant and so this issue never came to light at that time.
5. The draft unsigned statement of 26 November 2018 has never been supplied to the claimant or their representatives by this firm or our predecessors.
6. Counsel debriefed Porter Dodson, following the hearing on 27 November 2018, there having been no solicitor attendance at the hearing, and it was at no time mentioned that the draft statement had been shared, nor photographed. I have spoken with Christopher Francis concerning this development and he, likewise, has no recollection of having been advised of any such events, nor does his note of his conversations with counsel, to which you do not waive privilege, make any reference to such events."

I previously discussed with Mrs Brake whether she wished to rely on the last half sentence, from "nor does his note", and she confirmed that she did not and therefore no question can arise as to waiver of any privilege in relation to that. The email finishes:

"Please let me know should you require anything further.

Kind regards,

Anusheh."

**17** There was then a witness statement made by Mr Brake, the second defendant, on 19 September 2021. The material part of this witness statement reads as follows:

"2. The hearing of 27 November 2018 was the first hearing of what has now become known as the house possession proceedings.

3. I went alone to court because Alo, my wife, was ill.

4. I went into the waiting room where I met with Ms Daisy Brown of counsel for the first time.

5. The waiting room in Yeovil County Court is a long narrow room, about 20 metres long by 5 metres wide.

6. Ms Brown and I sat down at the far end of the room and had an introductory meeting. She had some pieces of paper which she referred to.

7. Ms Brown said that she had noticed a gentleman who she thought was her opposite number at the other end of the room but sitting on the same side of the long narrow room. I now know that the gentleman in question is Mr Modha.

8. Having spotted him, Ms Brown said, 'I must go and introduce myself', and then went off to the other end of the room and had a very brief conversation with him. I cannot recall if she took any papers with her. I did not hear what they said as I was too far away. I did not see her hand over any paperwork.

9. Ms Brown returned. Her only comment to me was that she was upset and that he had been 'unpleasant' and that it was 'just not necessary'.

10. She then said she had to pop to the loo. She left her bag next to me.



11. A couple of minutes later I decided to go to the gents. I did not take her bag with me as I was only in the loo for a couple of minutes.

12. I am absolutely certain that I did not see Mr Modha taking photographs of any papers. I am also certain that he was not sitting opposite me. 13, I do not recall much about the hearing itself, except that the judge did say they had to amend their pleadings and I do recall Ms Brown brought to the judge's attention AEL's harassment of us and the judge said if it continued we were to come back to get an injunction."

**18** That is the substantive end of the witness statement, although there is of course a statement of truth. Mr Brake was cross-examined by Mr Johnson on that witness statement.

**19** There are finally two further emails from Ms Brown which are dated yesterday, 19 September 2021, one is timed at 11.56 and the other is timed at 13.10.

**20** The one at 11.56 says:

"Dear Justin/Nick,

Please could you forward this email to Mrs Brake. I have been back to look at the contemporaneous note of the 27 November 2018 hearing which I sent to Porter Dodson, but this does not refer to the draft witness statement. I also have the skeleton argument that was filed the day before the hearing which does not refer to the draft witness statement. Therefore, relying on memory alone of what transpired before and during the hearing, to the best of my recollection:

1. I had one copy of the draft witness statement with me;

2. This had not been filed and no copy was given to District Judge Davis before or during the hearing. The hearing was listed for five minutes, although it went on for slightly longer than that. It would not be my practice to hand to a judge an incomplete and unsigned witness statement.

3. Mr Modha did not ask to take a photograph of the draft statement or take a photograph of it that I saw. This would have been an unusual and alarming request and I would have thought I would have refused had he asked but I do not recall that he did.

4. I have no recollection of giving Mr Modha my copy of the draft statement to read. Again, this would have been an unusual thing to do, bearing in mind it was incomplete and unsigned. It is not my practice to give incomplete witness statements to opposing counsel to read.

Thanks,

Daisy."

**21** Then the email timed at 13.10 yesterday:

"Thanks so much, and sorry for doing this at the weekend. I'm afraid I have one more note following my trawl through emails on 27 November. I don't know how relevant this is, but

(a) the time listing was in fact ten to 15 minutes, not five, but I cannot say how long it actually lasted;

(b) I had a recollection that I spent most of the time before the hearing trying to sort out getting a hard copy of the skeleton to the judge because I did not have a working printer at home. I can now see an email that shows that you, Justin, sent the skeleton argument and cost schedule to the court office in the morning of the hearing whilst I was waiting so they could print it out to give to the judge.

Please could you also send this on to Mrs Brake in case it is of relevance.

Thanks,

Daisy."

**22** The other documents which have been supplied to me include a copy of the disclosure list for the defendants which of course was prepared by their solicitors. That disclosure list was emailed by Porter Dodson to the then solicitors for AEL on 22 March 2019. It is in standard form and then there is an actual list of documents. Under the heading "Pleadings, applications and orders", the fourth entry in that part of the list reads as follows:

"Witness statement of first defendant (inclusive of exhibits), 26 November 2018."

**23** So it is clear that notice was being given by the Brakes' solicitors to AEL of the existence of a document with those details. But, as will have been seen from the email supplied by Ms Burcher, she has been unable to locate any other document which satisfies those criteria; that is to say, a draft witness statement of the first defendant, together with exhibits, of the date 26 November 2018. So the document with which I am currently concerned is said not to be that document, simply because it does not have any exhibits.

**24** The other document which I have looked at is the order made by the district judge on that day. That does not refer to any documents having been handed up to the judge, for example, "On reading such and such a witness statement", or something like that. There is no reference to any other document before the district judge. That is not conclusive because, as I know from my work in this court, it often happens that orders are drawn without reference to the documents that were actually referred to, but there is simply no reference in that order.

**25** There was no transcript made of that hearing, unfortunately, because it transpires that the recording equipment was not working on that day. I may say that, back in 2019, that was not an uncommon phenomenon either. But at a later hearing, on 10 December 2018, the same judge, District Judge Davis, began his judgment (which has been transcribed) by referring back to the earlier hearing in this matter on 27 November.

**26** He says this:

"1. This is an application that has been made to extend an injunction issued by my colleague, Deputy District Judge Cornford. He made this order a few days ago on 4 December. This is the case of *Axnoller Events Limited v Brake and D'Arcy*, E00YE350. The case comes back before me today quite properly because the learned deputy decided to make a short-term order and have the order come back before me for further consideration. This is because I was the judge who had previously dealt with this case a few weeks previously, a case I recall for being notable in that the claimant's particulars and supporting case paperwork were badly flawed and the information surrounding those claims needed to be properly remedied. I gave directions to enable that remedying process to commence, for there to be a proper response filed by the defendants and for this matter to be dealt with at a contested hearing before an experienced district judge on 17 January.

2. I also made it very clear to the parties that I expected the status quo between them to be maintained. I warned them that if that status quo was not maintained, then an application would doubtless be made for injunctive relief and I would have no hesitation in granting that."

**27** Again, this is not conclusive because other things may well have been mentioned as well, but it shows what was recollected by the district judge as some, at any rate, of the business transacted before him on 27 November.

**28** Now the evidence, as I have said, the witness statements of Mr Brake and Mr Modha were subject to cross-examination. I will say here and now in relation to Mr Brake's evidence that I found him to be a very careful and precise witness, not wishing to say any more than he could, plainly of course with an interest in the matter. But I can see no reason for supposing that he was trying to mislead the court or tell me an untruth. If he thought he did not recollect something, then he simply said: I don't recollect or I have no memory of it. He was of the opinion that counsel Mr Modha was lying, although that may simply be an impression on his part. I cannot take his own opinion as justifying any conclusion which I might reach independently on the material before me.

- 29** So far as concerns the actual evidence that he gave, I will just mention that Mr Brake was quite clear that counsel was not sitting opposite Daisy Brown, and he also said that he had to go to the lavatory as a matter of urgency, and that is why he left Daisy Brown's bag in the waiting area.
- 30** So far as concerns the evidence of Mr Modha, I found him to be a very professional and careful witness, who was very clear thinking and gave clear responses to the questions which he was asked. As with Ms Brown, there is no question of impugning his veracity. He also gave some valuable evidence about the geography of the waiting area at the court. He said that the appointment before the district judge was not a ten or 15-minute appointment, as Ms Brown had said, but a 30-minute appointment. He also said in his evidence that Ms Brown had explained the nature of the defence to the district judge without handing over any witness statement, but that the nature of the defence given to the district judge mirrored some of the details of the witness statement. As a result of this, and other things, the matter was listed for trial by the district judge for 17 January 2019.
- 31** I must therefore, it seems to me, consider carefully what is common ground and what is not common ground. First of all, I bear in mind that there is a document mentioned in the defendant's list of documents. No document can be found to correspond exactly to that description, but the draft witness statement with which I am concerned today most closely, but not completely, matches its description. No other document is known which has those details.
- 32** The copy in the bundle is, however, of a poor quality, consistent with having been photographed on a mobile device on the day of the hearing, and it is not consistent with an original document which would have been disclosed or rather produced for inspection in the normal way had any other document been in the list of documents, so there is a tension there.
- 33** I bear in mind also the circumstances of the hearing. These were that this was a possession claim under Part 55, and that the Brakes would have needed to put forward some idea of their defence to the district judge in order for a possession order not to be made straightaway. So it would have been incumbent on Ms Brown to

explain to the judge what the Brakes' case was. As I understand Mr Modha's evidence, that is precisely what she did. Ms Brown says she did not actually rely on the witness statement, but that is quite consistent with what Mr Modha says about that.

- 34** It is clear from Ms Brown, and indeed from all the circumstances, that the document in question did exist, and that she had it on that day. It is also clear that she looked at it in order to inform herself of her client's case, which she was to present to the court. However, it is clear also from Mr Modha's evidence that he saw that document, and that he photographed it.
- 35** I keep in mind that it was in the Brakes' own interest to tell AEL, and therefore their counsel, that they had a substantive defence. Conversely, it was not in AEL's interest in fact to know that they had one, because if they knew they had one, then they would realise that the matter could not be dealt with summarily on that day but would have to go off for trial.
- 36** I am satisfied on this material that Ms Brown *did* tell the judge at least the nature, the substantive nature, of the defence in order to prevent an immediate possession order being made, and also that she must have obtained that information from the draft witness statement which she had with her and which may well have been used, for example, to inform her skeleton argument, which it appears was passed to the court earlier that morning.
- 37** However, the question is whether the draft witness statement was ever voluntarily disclosed to AEL. It is clear that it was not supplied to AEL by the solicitors, that is the evidence of Ms Burcher, and there is no suggestion from AEL that they obtained it from the solicitors. If they had, there would be some documentary record of that and there is none.
- 38** At the end of the day, I conclude that this is a draft witness statement which has got into the hands of AEL only because it has been seen by their counsel at the hearing on 27 November. I come then to the question: did Ms Brown allow Mr Modha to read it? Mr Modha says she did. Ms Brown says she has no recollection of allowing him to see it and also that would not be her normal practice. Mr Brake's evidence was that he did

not see this happen. Yet, here, the Brakes would have had to persuade the court that they had some defence to put forward, otherwise they risked an immediate possession order.

- 39** So, as I have said, I infer that Ms Brown told the court something of the defence, and it would have been quite reasonable in those circumstances to show the other side something beforehand to show them what was the nature of the substantive defence. I entirely accept what Ms Brown says, that ordinarily counsel do not show draft witness statements (or any draft documents) to their opponents. But in this case there was a good reason to do so, and all that Ms Brown says is that it was not her practice and that she has no recollection of doing it on this occasion. So there is not, strictly speaking, any conflict on this point between Ms Brown and Mr Modha.
- 40** Nevertheless, my conclusion on all the material before me is that Ms Brown *did* lend Mr Modha her copy of this witness statement so that he could glean the substantive nature of the defence and that, he having read it, then photographed it. I quite accept that Ms Brown says she did not authorise him to photograph it, but that in a sense is water under the bridge, because in my judgment the act of deliberately showing the draft witness statement to opposing counsel is enough to waive privilege in it, and it does not much matter then whether the photographing was authorised or not.
- 41** In any event, however, I find that Mr Modha did photograph it openly in the waiting area, although, since he was not as close to Ms Brown and to Mr Brake as he might have been, it is very possible that they simply missed this. As I say, Ms Brown's evidence is that she did not see him photograph it, and Mr Brake's evidence is similar.
- 42** Then there is the further question whether the witness statement was deployed in court. I am clear in my mind that it was not deployed in the sense that it was shown to the court and the court was asked to read it and rely on it. What was deployed, of course, was the nature of the substantive defence, but I do not think that that amounts to deploying the witness statement in any meaningful sense.
- 43** Accordingly, my conclusion is that, if this was a privileged document as a draft witness statement, compiled by the solicitors for the purposes of this hearing and compiled

from information which had been provided for that purpose to them by Mrs Brake, which is more or less as she told me this morning, then privilege in that document was waived by the deliberate showing of that document by Ms Brown to Mr Modha on 27 November. The document is in the bundle, which, strictly speaking, makes it admissible in evidence under CPR Practice Direction 32, paragraph 27.2, but even if it were not admissible in evidence, there would be nothing to stop Mr Johnson from cross-examining on the document since, as I have held, privilege in it has been waived. That is my ruling.



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