Neutral Citation Number: [2021] EWHC 1842 (Ch)

Case No: CR-2018-009045

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

Rolls Building
Fetter Lane
London EC4A 1NL

Date: 05/07/2021

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

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Between:

THE OFFICIAL RECEIVER	**Applicant**
- and -	
JOHANNES CHRISTIAN MARTINUS AUGUSTINUS MARIE DEUSS	**First Respondent**
-and-	
STEPHEN HUNT (Liquidator of OWL Limited)	**Requesting Creditor**

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- -

RAJ ARUMUGAM (instructed by **Government Legal Department**) for the **Applicant**
TOM SMITH QC (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **First Respondent**
CALEY WRIGHT (instructed by **Blake Morgan**) for the **Requesting Creditor**

Hearing dates: 18 June 2021

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Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10:00 hrs on 05 July 2021

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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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

Introduction

1. Transworld Payment Solutions UK Limited ("the Company") was dissolved in May 2010.

2. In September 2014 the liquidator of TC Catering Limited (a partner of Mr Hunt) obtained a double-barrelled order to restore and wind up the Company.

3. Mr Hunt was appointed liquidator of the Company. Owl Limited ("Owl") is a creditor of the Company. Mr Hunt is the appointed liquidator of Owl.

4. As liquidator of Owl Mr Hunt made a request (the "Request") to the Official Receiver for the public examination of Mr Deuss, a resident of Bermuda, pursuant to section 133(2) of the Insolvency Act 1986 (the "Section 133 Application").

5. On 2 December 2020 Mr Deuss successfully resisted the Section 133 Application (the "December 2020 Judgment"). He now seeks to join Mr Hunt in his personal capacity to the Section 133 Application and obtain a third-party costs order against him.

6. I am told that there is no authority where a third-party costs order has been made following a failed application pursuant to section 133 of the Insolvency Act 1986.

7. Prior to the substantive hearing of the Section 133 Application ICC Judge Jones was asked to determine whether the Section 133 Application had extra territorial effect. He handed down judgment on 27 January 2020 (the "January 2020 Judgment") finding that that there are no territorial limits.

8. The remainder of the hearing before the Judge was taken up with directions for the substantive hearing of the Section 133 Application.

9. The Official Receiver seeks her costs of the challenge made by Mr Deuss in respect of the jurisdiction issue but does not pursue a costs order in so far as the hearing before Judge Jones related to directions.

10. Her position is neutral as to the outcome between Mr Hunt and Mr Deuss but seeks an order for her costs against OWL.

Background in brief

11. For ease of reference, I provide some of the salient background facts set out in the December 2020 Judgment which may be found at [2020] EWHC 3441.

12. Mr Deuss is aged 78. He was President, CEO and a director of First Curacao International Bank N.V. ("FCIB"). He was at all material times the ultimate beneficial owner of the Company but he contends not a director, officer or employee.

13. Mr Hunt contends that the Company was involved in missing trader, intra-community VAT fraud (known as "MTIC fraud"). That fraud involved FCIB. Mr Deuss contends that FCIB was itself a victim of the fraud. Creditor claims in the Company's liquidation are said to have soared to in excess of £415 million.

14. As an alleged victim of fraud perpetrated by FCIB the Company issued a claim in September 2020 against Mr Deuss, among others. The core of the allegations is that FCIB and Mr Deuss acted dishonestly by causing, allowing or otherwise assisting in the MTIC fraud.

15. Mr East is a solicitor acting for Mr Deuss. In a witness statement produced by Mr East, he explained that there had been a settlement following extensive negotiations in 2014 and 2015 whereby Mr Hunt (and other liquidators) came to terms releasing all former officers and employees of FCIB from any new claims or demands. Mr Deuss was a party to the settlement.

16. Mr Hunt had not recovered the books and records of the Company. He had made investigations of the Company's *de jure* director who had identified Mr Deuss as having overall control of the Company. Mr Hunt had written to Mr Deuss seeking information, but Mr Deuss had not cooperated. He had offered to meet Mr Deuss for the purpose of interviewing him at a location of his choice. Mr Deuss had not responded.

17. On 23 November 2017 Owl made the Request to the Official Receiver, for the public examination of Mr Deuss in the Brighton County Court. The Official Receiver made an application under section 133 and an order was granted on 4 January 2018. However due to a technical deficiency, that order was later set aside and the Section 133 Application was later issued on 2 July 2018. It was transferred to the High Court on 4 October 2018.

18. I have mentioned that the issue of jurisdiction arose. Further, the Official Receiver was concerned about the complexity of the Section 133 Application and sought directions as to whether it should be discontinued. She was also concerned at the rising costs and asked the court to direct that the deposit be increased to reflect the contentious nature of the proceeding. The matter was listed before ICC Judge Jones which led to the January 2020 Judgment.

19. Mr Hunt was given permission to file evidence to identify the topics which he felt were the proper subject of a public examination.

20. Following the handing down of the December 2020 Judgment Mr Deuss, by his solicitors, wrote to Mr Hunt to put him on notice that they would be seeking a third-party costs order. The application was subsequently issued.

Public examinations

21. In the January 2020 Judgment ICC Judge Jones commented:

> "[I]t is important to make clear as a matter of general principle that a risk of costs should not exist if it will have the effect (whether through intimidation or otherwise) of avoiding public examinations in conflict with the Intention of Parliament and the Statutory Purpose."

22. The leading judgment in *In Re Casterbridge Properties* [2004] 1 WLR 602 was given by Chadwick LJ. It provides a detailed consideration of public examinations. I shall cite some of his judgment here starting at paragraph 45, 48 and 49 where he states:

> "In reaching that conclusion I have had regard to the legislative history of section 133 of the 1986 Act, to the comparable provisions in bankruptcy, and to the recommendations of the Review Committee on Insolvency Law and Practice chaired by Sir Kenneth Cork…"
>
> The provisions in section 270(1) of the 1948 Act were the subject of comment and recommendation by the Cork Committee, in its report published in 1982, in paragraphs 653 to 656, under the heading "Public Examination":
>
> "653. Under the existing law and procedure a public examination can only be held in a winding up case if the Official Receiver makes a further report to the Court under section 236 (2) of the Act of 1948 alleging fraud in relation to

> the company; in these circumstances the Court may order a public examination to the person against whom the allegations have been made. In practice, the provisions enabling a public examination to be held are no longer invoked. A public examination does not appear to have been held since 1935.
>
> 654. We believe that this approach to the public examination requires to be reviewed. If, as we recommend, the whole purpose of a Compulsory Winding-up Order is to deal with cases which are of sufficient gravity to justify a full investigation then, we believe, a public examination has a role to play in those proceedings
>
> 656. We believe, as did the Jenkins Committee, that the revival of the public examination as a factor to be reckoned with in winding up proceedings is desirable. By exposing serious misconduct, it will help to promote high standards of commercial and business morality and will also serve as a form of sanction against former officers of the failed company who have not adequately assisted the Official Receiver and the liquidator in the course of the respective investigations and administration of the company's affairs.""

23. At paragraph 50 Chadwick LJ explains the statutory purpose behind the change in legislation:

> "In my view the clear statutory purpose behind the change that was made in the 1986 legislation — in recognition of the recommendations — was, first, to make greater use of public examination in cases where companies were being wound up by the court and, second, to assimilate the practice in corporate insolvency with that which had existed in individual insolvency since at least the Bankruptcy Act 1869."

24. The legislative purpose of public examinations provides useful context to the application made by the Official Receiver and the Request.

Third-party costs orders- the principles

25. That there is no authority for the proposition that a third-party costs order may be made following a failed application for a public examination may be due to the nature of such applications. First, the Section 133 Application was not made by Mr Hunt. Only the Official Receiver may apply in England and Wales. Secondly, the Official Receiver "shall" make an application at the request of one-half, in value, of the company's creditors; or three-quarters, in value, of the company's contributories, unless the court

orders otherwise. And thirdly, the requesting creditor was Owl and not Mr Hunt in his personal capacity.

26. Although there is no authority for the proposition that a third-party costs order may be made following the failure to obtain a public examination, the general principles provide helpful guidance.

27. By section 51(1) of the Senior Courts Act 1981, the Court has a discretion to exercise in respect of the costs "of and incidental to all proceedings". Section 51(3) provides: "the court shall have full power to determine by whom and to what extent the costs are to be paid".

28. CPR 46.2 provides a two-step process. First Mr Hunt, as a non-party to the Section 133 Application, must be added as a party for the purposes of costs only. Secondly, he must be given an opportunity to attend a hearing at which the Court will consider the matter further. There is no dispute that he has been given an opportunity under the second step. The dispute arises as to whether he should be joined as a party. That itself turns upon whether there is a reasonable prospect of an order being made against him.

29. The parties agree that the principles set out by the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others* [2004] UKPC 39 provides the starting point:

    29.1. Non-party costs orders are "exceptional";

    29.2. The term "exceptional" should be read as meaning "no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense";

    29.3. The courts will not, as a general rule, make an order against a "pure funder";

    29.4. If a non-party has control or benefits from the litigation and is a funder the court is more likely to make a non-party costs order. This is because such a party is likely to be "the real party" to the litigation, even if they are not the only party;

    29.5. There is no need for an applicant to establish impropriety. Impropriety is a factor the court will take into account;

29.6. The ultimate question in any case is whether in all the circumstances it is just to make the order.

30. As regards insolvent companies, the guidance provided by the Privy Council is that the court will be willing to look behind the company and determine whether a funding party is funding for his own financial benefit.

31. The principle about funding an insolvent company appears to be no more than what has already been expressed by the Privy Council: a fact specific inquiry as to the identity of the "real party".

32. The focus in *Metalloy Supplies Ltd v M.A. (UK) Ltd* [1997] 1 WLR 1613 was an action made by a liquidator where a Deputy High Court Judge made an order that the liquidator be personally liable for costs. Millett LJ observed [p.1620]:

> "[A] third party [may have] been responsible for bringing the proceedings and they have been brought [them] in bad faith or for an ulterior purpose or there is some other conduct on his part which makes it just and reasonable to make the order against him. It is not, however, sufficient to render a director liable for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are brought bona fide and for the benefit of the company, the company is the real plaintiff. If in such a case an order for costs could be made against a director in the absence of some impropriety or bad faith on his part, the doctrine of the separate liability of the company would be eroded and the principle that such orders should be exceptional would be nullified".

33. This is the position of a company director who acts as agent of the company. In respect of a liquidator of an insolvent company, his position is similar:

> "Where a limited company is in insolvent liquidation, the liquidator is under a statutory duty to collect in its assets. This may require him to bring proceedings. If he does so in his own name, he is personally liable for the costs in the ordinary way, though he may be entitled to an indemnity out of the assets of the company. If he brings the proceedings in the name of the company, the company is the real plaintiff and he is not."

34. The question remains: who is the real party? It was this question that was addressed in *Housemaker Services Ltd v Cole* [2017] EWHC 924 (Ch), when a director of a dissolved

company controlled and funded the company in what turned out to be unsuccessful litigation. HHJ Matthews found that funding and controlling was insufficient and something more was required:

> "This might be, for example, that the claim is not made in good faith, or for the benefit of the company, or it might be that the claim has been improperly conducted by the director. So, for example, in both Gardiner v FX Music Ltd and Deutsche Bank v Sebastian Holdings Inc, a director of the unsuccessful corporate party was ordered to pay the costs to the successful party. But in each case the director had given false evidence and fabricated documents."

35. The learned judge had in mind Millett L.J's view at page 1620 but appears not to have been taken to the more recent decision of the Court of Appeal, *Axel Threlfall v ECD Insight Ltd & Anor and Pintorex v Nasser Keyvaner & Ors* [2013] EWCA Civ 1444. The first instance judge had rejected an application to make a non-party costs order against a director of a solvent company where the director was the sole shareholder. Lewison LJ warned against citing numerous authorities on the issue of costs as each case is fact sensitive. He explained:

> "Where a non-party director can be described as the "real party", seeking his own benefit, controlling and/or funding the litigation, then even where he has acted in good faith or without any impropriety, justice may well demand that he be liable in costs on a fact-sensitive and objective assessment of the circumstances."

36. The rationale for this position is relevant:

> "If a non-party costs order is made against a company director, it is quite wrong to characterise it as piercing or lifting the corporate veil; or to say that the company and the director are one and the same. As Mr Shaw has demonstrated, the separate personality of a corporation, even a single-member corporation, is deeply embedded in our law. But its purpose is to deal with legal rights and obligations. By contrast, the exercise of discretion to make a non-party costs order leaves rights and obligations where they are. The very fact that the making of such an order is discretionary demonstrates that the question is not one of rights and obligations of a non-party, for no obligations exist unless and until the court exercises its discretion. Moreover the fact that the discretion, if exercised, is exercised against a non-party underlines the proposition that the non-party has no substantive liability in respect of the cause of

> action in question. Of course, it is not enough merely to say that Mr Whitney was a director of ECD, but in deciding whether or not to make such an order, the court is not fettered by the legal realities. It is entitled to look to the economic realities."

37. On the facts of the case the Court of Appeal found that the sole director and shareholder was liable. He had advanced a false defence and should be liable.

38. Having reviewed some of the authorities cited to the court and seeking not to fall into the trap of referring to cases that do not elucidate principle I turn to consider the current application on the facts of this case.

Discussion

39. Mr Smith argues that Mr Hunt should be joined as a party and suffer a third-party costs order as he was the "real party". In support of his argument, he refers to the topics for public examination provided by Mr Hunt: access to accounting papers whilst the Company traded; circumstances leading to dissolution; banking arrangements; how the premises were vacated after September 2006 and papers concerning employment rights of employees. He says not only were the topics unsuitable for examination but also demonstrate that the real party was Mr Hunt as he drove the examination.

40. By reference to the December 2020 Judgment, he points to other factors in favour of a finding that Mr Hunt was the real party:

    40.1. the only point of the liquidation is the litigation that was to be conducted by Mr Hunt (para 40);

    40.2. Mr Hunt had sent letters before action prior to the hearing in December 2020 (para 41);

    40.3. Mr Hunt reported to creditors that he had obtained a large amount of information and interviewed a director of the Company (para 49);

    40.4. Although the court could not find as a fact that the sole purpose of the liquidation is litigation it found that there existed a strategy to issue claims for the purpose of achieving a recovery (para 50);

40.5. Mr Hunt has not asked Mr Deuss about the topics he wishes to examine him upon (para 55);

40.6. Mr Hunt would receive 50% of the proceeds of any claim made as a result of the remuneration proposal approved by Mr Bramston (the partner of Mr Hunt) as liquidator of Catering, the only creditor to vote at the remuneration meeting. The claim issued by Mr Hunt sought the recovery of losses in excess of £415m (paras 57, 80-81);

40.7. Mr Hunt had failed to explain what documents he had received from an alternative source (para 68) and failed to discharge the burden of proof that a public examination had utility (paras 69-70);

40.8. Some questions Mr Hunt wanted answered involved the "entire trading period" of the Company. There was an overlap with the questioning he wished to pursue and the issued claim form (paras 76-79); and

40.9. Mr Deuss was not a *de facto* director. Mr Hunt had not made out that he was not an officer of the Company. Prima facie he was an outsider during the Company's life.

41. Mr Smith submits that other factors point toward a conclusion that Mr Hunt is the real party. These include his position as liquidator with the responsibility to adjudicate on all proofs of debt in relation to the Company and Owl and that he had failed to obtain recognition in Bermuda to examine Mr Deuss. Of greater weight is Mr Hunt's involvement in the Section 133 Application: he initiated the Request for a public examination and was represented throughout by solicitors and counsel.

42. Mr Smith does not argue that Mr Hunt acted wrongfully.

43. Mr Wright's argument benefits from simplicity. The actual party and "real party" are the same: the Official Receiver. There is no application before the court to join Owl.

44. Mr Hunt says that "it is impossible to tell from Mr Deuss's application notice or evidence in support what it is said that I have done as liquidator of Owl that should lead to a costs order being made against me either as liquidator of Owl or as agent for Owl". He explains that he had caused Owl to make the Request for a public examination on the basis that Mr Deuss had "been concerned, or had taken part, in the promotion or management" of the

Company, and that any questioning would be limited to his role in the Company. Having made the Request and paid the deposit his involvement ceased:

> "I expected the [Official Receiver] to proceed with it without my involvement except in so far as I could assist the court."

45. His involvement, however, was revived at the hearing before ICC Judge Jones where the Official Receiver had asked the court to order an increase in the deposit. He explains that such an application is unusual. Not wishing to pay more than the statutory requirement he resisted the application and was successful. He explains:

> "I have had no further involvement since then as officeholder of [Owl]."

46. As a matter of fact, which has not been challenged, Mr Hunt states in his third witness statement:

> "Owl did not set out questions that would be put to the proposed examinees as I did not think that was necessary or appropriate and is not required by the Act or the Rules. The [Official Receiver] did not at any stage ask for any further information to support the Request. The Request made it clear that questions would be put to the examinees by counsel for the liquidators of the [Company]."

47. Mr Wright argues that although the potential for large fee recovery is great for Mr Hunt it cannot be said to have any evidential weight for the purpose of determining the "real party".

Conclusion

48. Mr Hunt is a non-party. In my judgment he cannot be described as the "real party". First the evidence supports a finding that the Request was not made by Mr Hunt in his personal capacity. The Request was made by Owl, a creditor of the Company. Secondly, only the Official Receiver can make an application pursuant to section 133 of the Insolvency Act 1986. Thirdly, it is agreed by all that Mr Hunt, as liquidator of Owl, is entitled to remuneration. There is no evidence to support the view that he caused the Request to be made for his own benefit. Fourthly, the uncontested evidence is that Mr Hunt did not control the Section 133 Application. The Official Receiver not only made the Section 133 Application but also controlled it. The Official Receiver sought directions as to whether

to discontinue and to increase the deposit paid by Owl. Mr Hunt opposed the increase in deposit and was ordered by the court in January 2020, to file and serve evidence to identify topics about which questions would be asked of Mr Deuss. In my judgment Mr Hunt cannot be deemed to have had control of the proceedings by reason of being subject to a court order to produce such evidence. Fifthly, it is not suggested that he in his personal capacity or in his capacity as a liquidator funded the Section 133 Application. Lastly, it is not said that he acted otherwise than in good faith or with any impropriety.

49. An objective assessment taking account of the economic realities fails to demonstrate that justice demands Mr Hunt to be personally liable in costs.

50. I invite the parties to agree an order.