Neutral Citation Number: [2021] EWHC 3377 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION

No. IL-2021-000033

On line remotely and as from Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday 16 November 2021

Before:

MR DANIEL ALEXANDER QC
(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

(1) OCIUSNET UK LIMITED
(2) OCIUSNET GROUP AB (SWEDEN) Claimants

- and -

(1) ALTUS DIGITAL MEDIA LIMITED
(formerly OCIUSNET DIGITAL MEDIA LIMITED)
(2) SEAN NICHOLAS SMITH Defendants

- and -

CHARLOTTE SMITH Respondent

Mr A. Cuiker appeared on behalf of the Claimants, instructed by Arma Litigation Ltd.
Mr R Colbey appeared on behalf of the Respondent, instructed directly.
The defendants were not present and were not represented.

A p p r o v e d J u d g m e n t

MR DANIEL ALEXANDER QC:

A. Non-party costs application

1 This is an application for a non-party costs order against Mrs Charlotte Smith ("the respondent") pursuant to s.51 of the Senior Courts Act 1981.

2 Mr Ashley Cukier appeared for the claimants and Mr Richard Colbey for the respondent. Neither defendant was represented and no submissions were made on their behalf. The hearing was held remotely which gave rise to temporary communication/availability issues and minor adjustments to timing. However, apart from that, the hearing proceeded smoothly and I have been greatly assisted by the clear and concise submissions of counsel. This is a revised version of the judgment delivered orally over Microsoft Teams transcribed by Opus 2 at the end of the hearing on 16 November 2021.

Background

3 The background to the application is summarised in the evidence of Mr Matthew Harrison, a director of the first claimant and a board member of the Ociusnet group of companies. It is not seriously disputed for the purpose of this application and is as follows.

The Ociusnet group

4 The Ociusnet group is an international market leader in fibre network technology, software, and deployment services. Its evidence is that it has invested significantly in the use of the name and mark "Ociusnet" to promote and market the services of the group on a global basis. It claims that the mark is distinctive and that it possesses significant goodwill in it which is unique to it. The second claimant is the parent company. Its most important non-wholly owned subsidiary is Ociusnet Inc which is 30 per cent owned by a company called Espertus HK Limited ("Espertus"), which was formerly controlled by Mr Peter Smith. Mr Peter Smith died in June 2020 and the respondent's late husband. The claimants believe that his interest in Espertus passed to the respondent after his death.

The respondent's involvement in Ociusnet Inc.

5 The respondent was heavily involved in Ociusnet Inc. from its inception. She was its office manager and a director in addition to being company secretary and corporate treasurer from the date of its incorporation. The respondent had regular dealings with the second claimant, which it is said in the evidence she referred to as the "mother company". Mr Harrison's evidence explains that the nature of the respondent's role involved her having access to confidential information of the claimants. It is said that the respondent knew about the group in great detail and would have understood that the intellectual property rights associated with the group, including the Ociusnet trademark, were the group's property.

Events following the death of Mr Peter Smith

6 After Mr Peter Smith died, the group sought to acquire the respondent's shareholding in Espertus and attempts were made to reach agreement to that end. However, it is said by the claimants that the respondent did not comply with the

terms of the deal or proposed deal and negotiations broke down. Following that, it is said by the claimants that the respondent sought to "leverage her position" by causing damage to the claimants in a range of ways of which Mr Harrison's witnesses statement sets out a number of instances (or alleged instances).

7 First, there was a cyberattack on the group which it is said was caused by the respondent and there was extensive damage as a result. Second, it is said that an attempt was made by the respondent to infiltrate the group's account and gain access to confidential information. Third, it is said that the group had become aware in April 2021 that a company had been incorporated (the first defendant), then known as Ociusnet Limited, with its sole director being the second defendant who is the respondent's 22 year old son, Mr Sean Smith. Its shareholders were him and, at the time, the respondent's daughter. The proposed nature of that business was the same as that carried out by Ociusnet Inc. for the benefit of the group. It is said by the claimants that it was clear that setting up the first defendant, which had no connection with the claimants, was an attempt to cause damage to the group and that the respondent must have been well aware that the logo and the main name Ociusnet were the intellectual property of the claimants and/or the claimants' group.

The claimants seek to prevent the defendants using the name Ociusnet

8 On 27 April 2021, the claimants' group was informed that third parties had been applying to "trademark" the name Ociusnet, including an indication that the respondent was involved because of a potential connection in the name of the applicant.

9 The claimants therefore sought to prevent the first defendant from using the name Ociusnet and thereby passing itself off as the claimants or connected with them. First, there was correspondence including a lengthy letter before claim dated 28 April 2021 addressed to the first defendant and Mr Sean Smith. The defendants did not adequately engage with that correspondence. In consequence, the claimants brought a claim for passing off and an application for an interim injunction, issued on 21 May 2021 and served on 28 May 2021.

10 The matter then proceeded (or rather was due to proceed) to a full hearing of that application. However, very shortly before the application was due to be heard on 4 June 2021 and without notifying the claimants, the first defendant changed its name to a name not incorporating the word Ociusnet. On 3 June 2021, the day before the scheduled hearing, the defendants agreed to the terms of the injunction order with one exception, costs, and the order was accordingly made by me at a hearing on 4 June 2021.

The order at the hearing on 4 June 2021

11 That hearing was listed before me and was attended by counsel on behalf of the defendants. In the light of the developments there was only substantive argument about costs. I took the view, having heard submissions, that the case merited payment of costs of the application by the defendants for reasons I gave in a short judgment. Part of the reason for the costs award was that there had been a failure to engage with the claimants' legitimate claims until a very late stage, which had necessitated the preparation of quite extensive evidence and attendance at that hearing, including by leading counsel for the claimants. In those circumstances, the

costs claimed were inevitably reasonably substantial and I took the view, having evaluated the statements of costs, that the correct order for costs was payment of £60,000 summarily assessed. That is a significant sum, not only to individuals but even in some corporate contexts. It was, however appropriate, having regard to the work that was reasonably required on the side of the claimants to secure compliance with their rights, the entitlement to which was only effectively conceded at the very last moment once those costs had been incurred.

Events following the order of 4 June 2021

12 The order of 4 June 2021 was served on the defendants accompanied by a penal notice. There was then further correspondence with the defendants. The first communication was from the claimants' solicitors to the representatives of the defendants who wrote on 10 June 2021 inter alia:

> "You may have identified from the consent order we agreed that in the final draft, we did not seek judgment on the claim. This was deliberate. The Claim remains issued but we are now amending it to incorporate further and new relief against [the respondent] and Espertus (in order to deal with further matters which will be set out in a forthcoming new pre-action letter). You will appreciate that we have only served an unsealed copy of the Claim Form which is not effective service (we await a sealed copy of the Claim Form). You may therefore note that we have four months to serve the Claim and we will do so, seeking determinative relief if necessary. For the avoidance of doubt, this new action could also seek relief/determination on the share sale issue in the Manilla subsidiary - Ociusnet Inc - leading to Espertus being ejected from the company as a bad leaver and a forfeiture of its shares."

13 There was also a suggestion in that letter that it would be advantageous for the defendants to enter into alternative dispute resolution with a view to resolving the dispute as a whole ("I invite your clients to enter into further ADR"). That correspondence was followed by another lengthy letter before action, also dated 10 June 2021 addressed to the respondent. It made a number of points and alerted the respondent to the possibility for the first time that, should the costs of the application for the interim injunction not be paid by 18 June 2021, the claimants reserved the right to make an application under s.51 of the Senior Courts Act to obtain an order that these costs would be payable directly by her.

14 It also set out a number of other potential causes of action against the respondent, including claims relating to confidential information and other matters, and invited undertakings to be given in relation to them. It requested relief as to these to be agreed within seven days.

15 That did not result in a productive or constructive response, as far as the claimants were concerned, from either the defendants or the respondent. The consequence of that has been that this application foreshadowed in that correspondence, has been pursued.

The s.51(1) application

Procedural history

16 It is necessary to say something briefly about the procedural course of this non-party costs application because it is relevant to the ultimate decision.

17 Since I had heard the original application and made the costs order, the s.51(1) application first came before me again on 27 October 2021, supported by evidence from Mr Harrison and Mr Leech and a detailed skeleton argument from the claimants' counsel explaining the basis of the application and referring to the relevant law.

18 On the morning of the hearing, the respondent served a skeleton argument through her counsel, then recently instructed pursuant to the Direct Access scheme. This raised certain points on the substance of the application but also said that she had not been properly served with the application, was not a party to it and that it was not clear why she should be a party to it. I considered submissions on behalf of the claimants and the respondent and concluded that it was appropriate, in all the circumstances, to give the respondent an opportunity to address the application against her with evidence and to make substantive submissions. I also gave permission for the respondent to be joined for the purpose of costs since, by that stage, she had received sufficient notice of the application.

19 Reflecting some points made during the hearing, I also gave permission to the parties to apply for an extension of time for timing for provision of evidence in case there were settlement discussions or the parties wished to engage in ADR. I partly took that view because it seemed to me that this case was already running up significant costs and that it would be advantageous on both sides for attempts to be made to resolve it as soon as possible without further costs being incurred.

Evidence is filed by the respondent and claimants in reply

20 In the event, that did not happen and evidence was filed by the respondent by way of a lengthy witness statement which dealt with some but by no means all of the allegations made by the claimants. In particular, as the claimants correctly point out, the evidence does not attempt to distance itself from the earlier cyber-attacks or some of the alleged attempts to obtain confidential information, although in fairness to her, these are not directly in issue on this application.

21 There is also responsive evidence (inter alia) from Mr Harrison indicating that some of the points made in the respondent's witness statement are very unlikely to be correct. The claimants have also drawn attention to various aspects of the respondent's evidence which they claim are false, including allegations concerning the non-receipt by her of communications relating to the case. That, the claimants say, is of some significance because they invite me on this application to treat the claimants' evidence with, at its lowest, a very considerable degree of caution. I return to that below.

Key points made by the respondent's evidence

22 The respondent's witness statement, however, makes the following points of particular importance on this application.

23 First, she explains that while she is the mother of Mr Sean Smith (the second defendant) she claims that she does not have any involvement in the company in the first defendant.

24 Second, she goes on to say (in paras.12-13 of her statement), having referred to her son's education in business studies and his previous participation in business, that when he received the letter from the lawyers, she did not understand what was happening but that he explained that:

> "He registered the company using Ociusnet in good faith and believed that it is a property of Espertus Hong Kong Limited."

The respondent says that she:

> "Advised Sean [the second defendant] to seek legal help but was not otherwise involved in the dispute."

25 Third, she says that he has considerable practical and academic experience of business and has operated the affairs of the first defendant "completely independently of me". She says that he would resent interference from her as his mother in doing this.

26 Fourth, her evidence concludes (at para.43 of the statement) as follows;

> "I would emphasise that I was not involved in the events that gave rise to the present claim and, in particular, not with the litigation itself. There are complicated ongoing disputes between companies my family has had an involvement in and the Claimants and those who control it. The Claimants elected not to make me a party to the claim and I would argue that it is wrong to expect me to pay the costs in those circumstances."

27 I am bound to say that in the light of the history between the parties as related in the evidence of Mr Harrison and Mr Leech, and the points made in the claimants' skeleton that I have very significant reservations as to whether the respondent's evidence gives a full and accurate picture of her involvement. I should record that there was no application to cross-examine on this material and it is questionable whether that would have been appropriate given the summary nature of the s.51(1) jurisdiction. However, there is, it seems to me, considerable material from which it can be inferred that the respondent was more closely involved than she has been prepared to admit in the matters that gave rise to this action. I will return to the impact of that in considering my overall judgment after setting out the applicable law.

Law

Statutory provisions

28 Section 51(1) Senior Courts Act 1981 provides as follows:

> "51.— Costs in civil division of Court of Appeal, High Court and county courts

> (1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—
>
> (a) . . .
>
> (b) the High Court;
>
> . . .
>
> shall be in the discretion of the court.
>
> . . .
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

Judicial guidance as to the exercise of the jurisdiction

29 The power to make orders against non-parties to proceedings under s.51(1) was first recognised and articulated by the House of Lords in the well-known case *Aiden Shipping Company Ltd v Interbulk Ltd (Vimeira)* [1986] AC 965.

30 The principles governing the exercise of that jurisdiction and relevant factors to be taken into account have been set out on many occasions in the cases and are summarised in the decision of the Court of Appeal in *Deutsche Bank A.G. v Sebastian Holdings Inc & Anor* [2016] EWCA Civ 23. That case refers to *Symphony Group PLC v Hodgson* [1994] QB 179 in which the Court of Appeal outlined key principles governing the exercise of the discretionary power. Since some of those principles are of significance for both parties' submissions in this case, it is necessary to set them out more fully.

Symphony v. Hodgson *guidance as to situations in which s51(1) orders may be appropriate*

31 In *Symphony v Hodgson*, the plaintiff had employed the defendant under a contract with a restrictive covenant. The defendant took a job with a competitor, Halvanto. Proceedings were commenced. The defendant obtained legal aid, the trial judge found in favour of the claimant and, additionally, made an order for costs be paid by Halvanto, which had taken no part in the proceedings but which had been involved in precipitating the proceedings in that it had employed the defendant who was held to have been in breach of the relevant terms of his employment contract. The Court of Appeal overturned that decision.

32 The Court of Appeal identified a number of situations in which decisions had been made to make non-parties liable for costs of proceedings (see the list in the judgment of Balcombe LJ at pp.191-2). The situations have in common that they all involved a very close connection between the non-party which was made liable for costs and the proceedings.

33 The Court of Appeal recognised that one kind of case in which it may be appropriate to make such an order was where the person concerned had "caused the action" although it did not elaborate on that. The Court referred in this connection to the situation in *Pritchard v JH Cobden & Anor* [1988] Fam 22 where the court had held that the defendant's agreement to pay the costs of divorce proceedings, which

were precipitated through the defendant's negligence, could be justified as an application of the *Aiden Shipping* principle.

34 The Court appears therefore to have contemplated that the s.51(1) jurisdiction was sufficiently broad to encompass situations in which a non-party has been so responsible for a cause of action arising in the first place, that it may be appropriate to make that non-party liable for costs of the proceedings even where that non-party has not participated in those proceedings and has not been responsible for increasing the costs of the proceedings. To that extent, I do not accept the submission made on behalf of the respondent in this case that the jurisdiction extends only to making such orders where there has been an increase in the costs of the proceedings as a result of the participation of the non-party in them (see below). The jurisdiction under s. 51(1) extends more broadly than that.

35 The principles upon which the discretionary jurisdiction should be exercised were also set out in the *Symphony v Hodgson* as follows at pp192-194:

> "(1) An order for the payment of costs by a non-party will always be exceptional: see per Lord Goff in *Aiden Shipping Co. Ltd v Interbulk Ltd* [1986] A.C. 965, 980F. The judge should treat any application for such an order with considerable caution.
>
> (2) It will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings. Joinder as a party to the proceedings gives the person concerned all the protection conferred by the rules, as to e.g. the framing of the issues by pleadings; discovery of documents and the opportunity to pay into court or to make a *Calderbank* offer (*Calderbank v Calderbank* [1976] Fam. 93); and the knowledge of what the issues are before giving evidence.
>
> (3) Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him. At the very least this will give the non-party an opportunity to apply to be joined as a party to the action under Ord. 15, r.6(2)(b)(i) or (ii).
>
> Principles (2) and (3) require no further justification on my part; they are an obvious application of the basic principles of natural justice.
>
> (4) An application for payment of costs by a non-party should normally be determined by the trial judge: see *Bahai v Rashidian* [1985] 1 W.L.R.1337.
>
> (5) The fact that the trial judge may in the course of his judgment in the action have expressed views on the conduct of the non-party constitutes neither bias nor the appearance of bias. Bias is the antithesis of the proper exercise of a judicial function: see *Bahai v Rashidian* [1985] 1 W.L.R.1337, 1342H, 1346F.
>
> (6) The procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action. Thus, subject to any relevant statutory exceptions, judicial findings are inadmissible as evidence of the facts upon which they were based in proceedings between one of the parties to the original proceedings and a stranger: see *Hollington v F. Hewthorne & Co. Ltd* [1943] K.B. 587; *Cross on Evidence*, 7th ed. (1990), pp.

100-101. Yet in the summary procedure for the determination of the liability of a solicitor to pay the costs of an action to which he was not a party, the judge's findings of fact may be admissible: see *Brendon v Spiro* [1938] 1 K.B. 176, 192, cited with approval by this court in *Bahai v. Rashidian* [1985] 1 W.L.R. 1337, 1343D, 1345H. This departure from basic principles can only be justified if the connection of the non-party with the original proceedings was so close that he will not suffer any injustice by allowing this exception to the general rule.

(7) Again, the normal rule is that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings. One reason for this immunity is so that witnesses may give their evidence fearlessly: see *Palmer v Durnford* [1992] Q.B. 483, 487. In so far as the evidence of a witness in proceedings may lead to an application for the costs of those proceedings against him or his company, it introduces yet another exception to a valuable general principle.

(8) The fact that an employee, or even a director or the managing director, of a company gives evidence in an action does not normally mean that the company is taking part in that action, in so far as that is an allegation relied upon by the party who applies for an order for costs against a non-party company: see *Gleeson v J. Wippell & Co. Ltd* [1977] 1 W.L.R. 510, 513.

(9) The judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant. The courts are well aware of the financial difficulties faced by parties who are facing legally aided litigants at first instance, where the opportunity of a claim against the Legal Aid Board under section 18 of the Legal Aid Act 1988 is very limited. Nevertheless the Civil Legal Aid (General) Regulations 1989 (S.I. 1989 No. 339/89, and in particular regulations 67, 69, and 70, lay down conditions designed to ensure that there is no abuse of legal aid by a legally assisted person and these are designed to protect the other party to the litigation as well as the Legal Aid Fund. The court will be very reluctant to infer that solicitors to a legally aided party have failed to discharge their duties under the regulations – see *Orchard v South Eastern Electricity Board* [1987] Q.B. 565 - and in my judgment this principle extends to a reluctance to infer that any maintenance by a non-party has occurred."

Guidance in ***Deutsche Bank*** *and* ***Dymocks***

36 In *Deutsche Bank* (cited above) the Court of Appeal said of the summary of factors in *Symphony v. Hodgson* reproduced above (in a judgment given by Moore-Bick LJ, which refers to the leading Privy Council case of *Dymocks v. Todd*):

"17. A number of points emerge from that case. First, we think it is clear that all three members of the court assumed that the procedure to be adopted for deciding whether a third party should bear all or part of the costs of the litigation should be summary in nature, in the sense that the judge would make an order based on the evidence given and the facts found at trial, together with his assessment of the behaviour of those involved in the proceedings. Second, in order to justify the adoption of a summary procedure

the third party must have had a close connection of some kind with the proceedings. Staughton and Balcombe L.JJ. both emphasised that the court should not make an order for costs against a third party unless it is just and fair that he should be bound by the evidence given at trial and the judge's findings of fact. Whether that is so in any given case will depend on the nature and degree of his connection with the proceedings.

18. Third, we do not think that the court was seeking to do more than provide an indication of the kind of factors that judges should take into account, as appropriate in the particular cases before them, when asked to make an order of this kind. Factors such as failing to join the person concerned as a party to the proceedings or failing to warn him that an application for costs may be made against him may in some cases weigh heavily against adopting a summary procedure, but each case has to be considered on its own merits in order to ascertain whether the third party will suffer an injustice if he is held bound by the evidence and findings at the trial. Decisions made on applications of this kind since *Symphony v Hodgson*, to many of which we were referred, only serve to illustrate the wide range of circumstances in which orders for costs have been sought and made against third parties.

19. In *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2004] 1 WLR 2807 the Privy Council awarded the successful petitioner its costs, but since the respondents were unable to pay them, the petitioner applied for an order that they be paid by a third party, a company associated with one of the respondents which had promoted and funded the appeal substantially for its own benefit. Giving the judgment of their Lordships Lord Brown of Eaton-under-Heywood said:

> "25. A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows. (1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against. (2) Generally speaking the discretion will not be exercised against "pure funders", described in para 40 of *Hamilton v Al Fayed (No. 2)* [2003] QB 1175, 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights. (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or

> at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence-see, for example, the judgments of the High Court of Australia in the *Knight* case 174 CLR 178 and Millett LJ's judgment in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in *T G A Chapman Ltd v Christopher* [1998] 1 WLR 12, 22 as "the defendants in all but name"."

20. A little later, summarising the principles to be derived from those and other authorities, he said:

> "29. In the light of these authorities their Lordships would hold that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interests."

21. These principles have been applied in a number of subsequent cases, but it is unnecessary to consider them in detail because they all turn to a greater or lesser degree on their own facts. When an order for costs is sought against a third party, the critical factor in each case is the nature and degree of his connection with the proceedings, since that will ultimately determine whether it is appropriate to adopt a summary procedure of the kind envisaged in the authorities, leading to what Neuberger L.J. in *Gray v Going Places Leisure Travel Ltd* [2005] EWCA Civ 189 described as "the overall order made by the court at the conclusion of the trial." It is important to note, however, that, contrary to Mr. Cogley's submission, the guidance given in *Symphony v Hodgson* has not been regarded as immutable, but has been developed and modified in subsequent cases to reflect the differing circumstances under which applications for orders of this kind have been made.

22. As the judge noted in paragraph 9 of his judgment, an application under section 51 does not involve the assertion of a cause of action; it is a request for the court to exercise a statutory discretion in relation to the costs of proceedings before it. Section 51 is now the source of the court's discretion to determine who shall bear the costs of proceedings, whether they are parties to the proceedings or third parties. In principle, therefore, one would expect the procedure in each case to be substantially the same and the order to reflect broadly similar matters, such as the conduct of the proceedings and the nature of the party's or third party's involvement. In our view there is a clear distinction to be drawn between the process by which the court makes an

> order for costs at the conclusion of a trial, whether that order involves the parties alone or one or more persons who are not parties, and separate proceedings against a third party consequent upon the outcome of the trial. In the former case, the ordinary rules of evidence do not apply, precisely because the person against whom an order for costs is sought has had a sufficiently close connection with the proceedings to justify the court's treating him as if he were a party. We therefore turn to consider the nature of Mr. Vik's relationship with Sebastian and his involvement in the main action."

37 I draw out the following general points in particular in the light of these authorities and the arguments on this application.

38 First, there is a broad discretion to make costs orders against non-parties in a range of differing circumstances. These are however, exceptional. Key focus should be on the extent of connection between the non-party and the proceedings. In particular, in order to justify the adoption of the summary procedure to make a non-party liable for costs, as the Court of Appeal recognised in *Deutsche Bank*, the third party must at least have had a sufficiently close connection with the proceedings. A critical question is whether the person sought to be made liable for costs is a party in all but name.

39 Second, in a case where the question is not only (or primarily) whether there has been a close connection between the non-party and the proceedings but between the non-party and the reason why the proceedings were necessary in the first place, the court (a) must be sufficiently satisfied that it is in a position reliably to evaluate that connection summarily and make a determination as to the closeness of connection between that non-party and the reason why the proceedings were necessary and (b) must be able to evaluate that connection adversely to the non-party.

40 Third, it is not in dispute that s.51(1) permits and requires the court to consider not only whether the non-party should pay some of the costs of proceedings but also, in appropriate circumstances, to determine what part of the costs the non-party should be responsible for. Before an order is made making a non-party liable for all of the costs of the proceedings or an aspect of them, it must be just and equitable for a determination to be made, not only that there should be some order for payment of costs by that non-party but that the non-party should bear all of the costs of the proceedings or the given aspect of them.

41 Fourth, the court may need to consider whether evaluation of a non-party's liability to pay costs of the proceedings is appropriately done at an interim stage in the proceedings or only after the proceedings have concluded, or at least after the evidence has become clearer as to the precise nature of the involvement of the non-party.

Claimants' submissions

42 The claimants submit that there are four main reasons why, in this case, the court should be satisfied at this stage that there is a sufficient connection to make the respondent liable for costs.

43 First, the claimants submit that the evidence is powerful that the respondent had a close connection with the proceedings that generated the injunction order of 4 June 2021 and they invite the court to conclude, on the basis of reasonable inferences, including inferences from what has not been controverted with respect to other activity, that she was closely involved.

44 Second, the claimants submit that it was plainly the respondent who stood to benefit the most from the attempts to pass off that formed the basis of the injunction application, particularly since it is said that this may have been part of an overall strategy by her to damage the claimants' business to leverage her negotiating position into offering more favourable terms in exchange for her shareholding. It is therefore to be inferred that she is the person who stood to gain most with respect to that conduct.

45 Third, the claimants submit that the court should take a realistic and robust view of the denial of any connection with the proceedings by the claimants in circumstances where other aspects of her evidence have been shown to be inaccurate and that it would be inappropriate for the court to give her any benefit of any doubt in those circumstances.

46 Finally, it is said that in all the circumstances, it is just that she should be ordered to pay the costs because the claimants would otherwise be at risk that the costs may not be paid and that they would be at risk of other damage, including potentially further damage that she might do as part of a campaign of activities that she may engage in.

47 Those are powerful submissions and they were deployed with skill and force by counsel for the claimants.

Respondent's submissions

48 However, as against that, the respondent's counsel made a number of points with no less skill and force which I summarise and evaluate below.

49 First, it is said that this was a case where the respondent ought to have been joined as a defendant. It is, it is said, a situation in which the absence of joinder should be given very significant weight, as it was in *Symphony v Hodgson*.

50 In my view, this factor is of some but not overriding weight in this case. The reason why it is not overriding is that the proceedings in respect of which costs are claimed were proceedings for an interim injunction albeit, ultimately, that a final order was made and it was not unreasonable for the claimants only to join to the proceedings at that stage those who were thought to be most responsible for that activity, in this case, the defendants, namely the company in question and Mr Sean Smith. The claimants say, with some justification in the light of the manner in which issues relating to service and otherwise have developed that, if an application had been made to join the respondent, it may have caused delay and increased costs, and the fact that problems may have been caused as a result was a good reason not to join her at that stage, bearing in mind the need for rapid relief. So, while I think that there is justification for the defendants making the point on lack of joinder of the respondent and it is to be given some weight, I do not think it is decisive against the application in this case.

51 Second, it is said that the respondent was not warned of her potential liability for costs. That point goes together with another made on her behalf, namely that as a result, she was unable to make submissions in relation to costs at the hearing where costs were determined or apply to be joined to the action at a point where she could have made submissions in relation to that.

52 Again, in the light of the approach taken to this aspect of the jurisdiction in the authorities (including *Deutsche Bank*), I do not regard the failure to warn as an overriding factor in this case but it is of some importance. In some cases, costs can be a very significant aspect of a dispute and can weigh heavily in matters such as settlement between the parties. In circumstances where it is thought that a non-party is likely to be made be liable for costs if they are not paid by the party, it is preferable for the non-party to have that drawn to their attention in good time before any order is made in relation to costs so that they can make submissions both as to the appropriateness of an order for costs being made at all and, in particular, in relation to the question of how any costs should be apportioned as between the non-party and those others who may be primarily liable for such.

53 Third, it is said on behalf of the respondent that the commentary in the White Book (para. 46.2.2, 2021 Edition) which says that a non-party should not ordinarily be liable for costs which would in any event have been incurred without the non-party's involvement in the proceedings (although the position may be different where a number of non-parties have acted in concert). I have addressed this point above in connection with the observations on the *Symphony Group* case and the circumstances in which orders for payment of costs by a non-party may be made. I do not regard this commentary as, of itself, standing in the way of a non-party costs order in this case.

54 Fourth, it is said that particular caution should be exercised before making a director and, all the more so, a shadow director, liable for costs in relation to activities undertaken by a company which is primarily liable for the payment of them. In my view, that too is a relevant factor. Again, it is not decisive but the cases that I have considered and the references to other authorities suggest that the circumstances in which directors are to be made liable for non-party costs in relation to conduct which was said to give rise to the action but where they have not been themselves sued as joint tort-feasors are rare. Cases such as *Deutsche Bank* are exceptional and in that case the non-party's liability for costs was only determined after trial at which it was clear that he had not only participated in the acts giving rise to the liability but also had played a very substantial role in the proceedings in various ways.

55 The fifth point relates to the appropriateness of a costs order of this kind being made at an interim stage of the claim or in respect of certain interim proceedings. I should mention that this was raised by me in argument rather than clearly raised in skeletons and was responded to orally by counsel for the claimants. Its significance is as follows.

56 At an interim stage of non-party costs evaluation, a full picture of the respective parties' involvement is not always easy to determine. That is particularly the case with respect to apportionment of liability for costs. In circumstances where proceedings are to continue, the final picture in relation to costs, particularly the liability of a third-party, a non-party who it is sought to be made a party for the

purpose of the continuation of wider proceedings, may not be clear because other orders as to costs may subsequently be made which may make it either more or less appropriate for an order for costs in respect of this stage of the proceedings to be made against the non-party in respect of conduct before that person had been made a party. Moreover, an order for non-party costs which are summarily assessed involves the court, in essence, making a summary assessment not only of the costs but also making a summary evaluation by which person those costs should be paid and, as I have said, the appropriate apportionment.

57 Ordinarily, as the authorities indicate, that evaluation is undertaken by the trial judge after a full trial. Here, because undertakings that were given at the interim injunction stage and because of their finality, there has not yet been a trial and those are effectively final orders. Nonetheless, this action is not concluded for the reasons set out above. For all of those reasons, the court needs to consider whether it is in principle appropriate for the order sought to be made at the particular stage of the case.

58 Finally, the respondent contends that the quantum of costs in respect of which the respondent is sought to be made liable, is significant for an individual. £60,000, plus interest which is running, is undoubtedly a significant sum and it may well be that the respondent cannot go behind that assessment. However, it is relevant on an application of this kind to consider whether it is appropriate to make an interim non-party costs determination of summary liability of a potentially significant sum to an individual particularly in circumstances where there is litigation continuing relating to a wider set of issues.

Evaluation

59 The guidance in the case law requires evaluation of the factors that point in favour and against making an order or making an order, or doing so at this stage of the proceedings, bearing always in mind the exceptional nature of such an order.

60 Although, in my view, there are strong *prima facie* reasons for making an order against the respondent in this case, I do not consider that it would be appropriate to do so at this stage of the proceedings for the following reasons.

61 First, the respondent could have been joined as a party to the proceedings and, while there were reasons not to do so, it seems to me that in the light of the authorities, this is a factor that is of some albeit not overriding significance.

62 Second, I regard the failure to warn the respondent of a potential liability to costs in this case as a factor of greater significance than it was, for example, in the *Deutsche Bank* case for reasons I have articulated above.

63 Third, there is specific evidence from the respondent distancing herself from the specific acts giving rise to this application, even if not in relation to some of the wider allegations advanced. While I have considerable reservations about the evidence, I do not consider that it would be appropriate to decide that issue summarily, notwithstanding that the procedure for determining non-party liability for costs is a summary one. That is because, in effect, it would be to decide summarily a question of whether the respondent was, in effect, a joint tortfeasor (or similarly liable) attracting responsibility for having caused the action in respect of

the acts complained of on the basis of material which the claimants themselves, fairly, characterise as inferential at least in part.

64 Fourth, given that the claim is to continue and that the respondent is said to be directly liable for further acts, it is preferable to address the question of liability for costs overall in the context of those wider proceedings even though, in effect, final relief has been granted in respect of the part of the overall dispute that relates to the use of the Ociusnet mark by the first defendant.

65 Fifth, it is accepted by the claimants that the question of apportionment of costs may remain an issue and that is harder to evaluate at this stage of the proceedings.

66 Sixth, although it is possible to have reservations as to whether the costs of the application will be recoverable from the first and second defendants, it is not clear that they would not be and it is also not clear from the accounts of the claimants that cash flow considerations are such that it is imperative that an order be made now.

67 Finally, no case has been cited to me where an order for non-party costs was made against a non-party in respect of an interim order in circumstances such as these. For reasons I have given above, I have no doubt that the jurisdiction exists in principle but the fact that it has not previously been exercised in this way suggests that particular caution is needed before doing so in this case. Although in some sense, as I have said, the order here is final and that it resolves that part of the case, for the reasons I have given, it is nonetheless still better treated as an interim order as the claimants themselves have sought to do.

68 For all of those reasons, with some hesitation, in my judgment this application should better be made at or after the trial of the action when all of the facts relevant to the evaluation are likely to be clearer. I therefore refuse the claimants' application for a non-party costs order at this stage and instead adjourn the application until trial.

69 It might be thought that this is in colloquial language to 'kick the can down the road' to a trial that may never take place. If I had taken the view that the matter was so clear as regards specific responsibility of the respondent for the specific acts in respect of which this action was brought, I would have had no hesitation, in principle, in making an order of this kind. However, in circumstances where it is not possible to be as definitive about that matter as is desirable, it is more appropriate to give the claimants a renewed opportunity to obtain their costs from the respondent at a stage when matters are likely to be clearer.

B. Costs (following further argument)

70 There are two issues on costs. One is whether, as I indicated prima facie would be appropriate, the costs of the application should be reserved, or, as counsel for the respondent submits, because this application has not succeeded, costs of the application should be awarded to the respondent and summarily assessed. The other relates to a specific claim for summary assessment of costs relating to the alleged wasted costs necessitated by having an adjourned hearing.

Costs of the application

71 Costs of the application will be reserved. Although the claimants have not succeeded on the application, I have adjourned the application to trial to be dealt with at a more appropriate time. It cannot therefore be said that the claimants have been unsuccessful. Nor can it be said that the respondent has been successful. The claimants' application was reasonable in the sense that there were serious grounds for it even though I have not acceded to it at this stage. It seems therefore inappropriate for the claimants to be ordered to pay the respondent's costs at this stage in circumstances where a renewed application that the respondent should pay the costs at a more appropriate stage of the proceedings may succeed.

Costs of the adjournment

72 The second is the claimants' application for costs said to have been wasted as a result of the adjournment. The items claimed are a proportion of counsel's brief fee for the October hearing, various work done by solicitors, including attendance at court and preparation of certain documents. The basis of the application is, as it is said, that it is now clear from the evidence of Mr Leech in his fourth witness statement dated 10 November 2021, that it is overwhelmingly likely that the respondent received the relevant communications, or at least had means of access to the relevant communications relating to the application, at a date much earlier than she had previously said and, in particular, in such a way that would have enabled her to address the application without the need for adjournment of the hearing of 27 October 2021.

73 In my view, there is substance in that application. I do not propose to go through all of the evidence in Mr Leech's statement but there are three aspects of it that suggest strongly that it is likely that the respondent will have had adequate notice of this application at an earlier date. First, the evidence relating to the attempts to serve other documents on 28 May 2021, in relation to which I have read a transcript of the attempts to serve, which, to my mind, indicates that it is highly likely that documents would have at least been available to come to the respondent's attention at an earlier stage. Second, the fact that the respondent and Mr Smith, the second defendant, are closely related. Thirdly, the specific evidence relating to the service of the material and the access of the material potentially by email set out in paras.19 - 26 of Mr Leech's witness statement. In my judgment, it is likely that at least this material was available or potentially available at an earlier stage, either directly or by potential communications with the second defendant.

74 In those circumstances, costs have been wasted as a result of the adjournment in that this is an issue that could have and should have been dealt with sooner by the respondent. Costs were increased as a result.

75 It is appropriate to assess those costs summarily and I shall do so in the following way. Six items claimed: a small sum in respect of the third witness statement of Mr Leach; a sum in respect of the attendance of instructing solicitors, which is the second largest sum of £2,600 referable to the earlier hearing; a proportion of counsel's brief fee claimed at £2,750 representing, it is said, one day's work of preparation; and various smaller sums relating to attendances on clients and a strategy conference relating to matters that took place after the hearing in October. The total sum claimed in respect of that is £6,199.40.

76 Counsel for the respondent says that the sums claimed, in particular, for attendance by solicitors are excessive bearing in mind the nature of the hearing, the burden that counsel would have had, and the relatively modest burden as a result of remote attendance. Three fee earners' attendance is claimed in respect of this. I agree that this sum is too high. Similarly, the claim in respect of the strategy conference does not seem to be sufficiently referable to the matters in question to justify a claim and, in my judgment, although it is hard to evaluate whether or not the sum claimed for counsel's fee is appropriate and I do not say that it is excessive in the circumstances, it seems to me that I need to take a reasonably conservative approach as to the right proportion to attribute if I am making an evaluation on an summary basis of those costs.

77 Looked at in the round, an appropriate, proportionate, and fair order is to award £1,500 in respect of the work done by solicitors, including preparation of the witness statement, the attendance at court, and the other attendances on clients and others, and £1,500 in respect of the proportion of the brief fee claimed in respect of this matter.

78 Accordingly, I summarily assess that portion of costs attributable to the increased hearing costs of this application wasted by the adjournment at £3,000, payable by the respondent. Otherwise the costs are reserved.

C. Approach to resolution of the dispute

79 I add the following to emphasise certain points discussed in argument.

80 In the most recent Court of Appeal case addressing principles applicable to s.51(1) applications, *Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Ticaret Ve Sanayi AS v Aytacli* [2021] EWCA Civ 1037, Lord Justice Coulson opened his judgment as follows:

> "For those who believe that most civil litigation does not end up being about the costs that were incurred in pursuing that same litigation in the first place, look away now."

81 That was said at the conclusion of litigation. The present case has hardly reached first base. Despite that, it has involved three hearings requiring multiple days of preparation by the parties and significant court time, including consideration of a hearing bundle running to nearly 700 pages not including authorities. No hearing so far has focussed on the merits. Each has dealt almost entirely with what costs should be paid and by whom or the procedure for resolving such. The costs of arguing about the costs of a claim which has barely started already run to tens of thousands of pounds.

82 At para. 19 above, I referred to the previous order adjourning the s.51(1) application, which included an order facilitating the parties' engagement in settlement/ADR. In this case, in my view, a non-litigated approach to the dispute should be treated as the primary not the "alternative" means. The recent Ministry of Justice document *Dispute Resolution in England and Wales Call for Evidence 2021* states at p6:

> "We want to support people to get the most effective resolution without devoting more resources than necessary – financial, intellectual and emotional – to resolve their dispute. Creating more proportionate and constructive routes to resolution avoids the need for these resources to be expended, saving the user's time, as well as reducing their levels of stress at an already difficult time."

83 Having now considered the case on three occasions it is clear that devoting significant financial, intellectual and emotional resources to this litigation in the wake of Mr Peter Smith's passing is unlikely to be the most efficient and cost effective way of resolving the key underlying issues. The court will support more effective means of doing so. In further management of the dispute, the parties should co-operate in creating proportionate, constructive routes to resolution, *inter alia* to avoid more costs being incurred arguing about costs.