IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
[2024] EWHC 1482 (Ch)

No. BL-2021-001116

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 15 May 2024

Before:

MR JUSTICE RICHARDS

OLD PARK CAPITAL MAESTRO FUND LTD
(a Cayman Islands company in liquidation) — Claimant/Respondent

- and -

(1) OLD PARK CAPITAL LTD
(2) HUGO VAN KUFFELER
(3) BRUNO PANNETIER — Defendants/Applicant

-and-

JAMES SHERWIN — Costs-only Party

MR L KRSLJANIN (instructed by Greenberg Traurig) appeared on behalf of the Claimant/Respondent and the Costs-only Party.

MR W EDWARDS and MS P DUTTON (instructed by Fieldfisher) appeared on behalf of the Second Defendant/Applicant.

J U D G M E N T

MR JUSTICE RICHARDS:

1 This judgment should be read together with my judgment reported at [2023] EWHC 1886 (Ch) in the trial of this action (the "Trial Judgment"). Terms defined in the Trial Judgment have the same meaning in this judgment unless the context otherwise requires.

2 I have two applications in front of me:

i. HVK's application of 6 March 2024 relating to a possible third party costs order (the "Joinder and Disclosure Application"). By that application, HVK seeks joinder of Mr Sherwin as a costs-only party pursuant to CPR 46.2(1)(a). He seeks disclosure in relation to the arrangements under which the Fund funded the claims against him and he also seeks a hearing to give directions for the future conduct of third party costs order proceedings.

ii. HVK's application under paragraph 2 of Practice Direction 47 (the "Stay Application") for an extension of time in which to commence detailed assessment proceedings and a stay of detailed assessment of the costs order in his favour.

Background

3 The background is well-known to the parties, and I will deal with it briefly. The Fund is insolvent and is in the course of winding-up in the Cayman Islands. It has funding arrangements that enabled it to bring the claims against BP and HVK. It is accepted that one person providing funding is Mr Sherwin and there may or may not be others.

4 In the Trial Judgment, I dismissed all the claims against HVK. In my consequentials order of 28 November 2023, I ordered the Fund to pay HVK's costs to be assessed with part of the costs to be assessed on the indemnity basis. I ordered an interim payment on account of some £734,590 (excluding interest) which was some £208,000 greater than the security for costs which the Fund had been ordered to provide. The Fund has paid the interim payment that I ordered.

5 The Fund has permission to appeal to the Court of Appeal on one ground, with that appeal due to be heard in early July 2024. The Fund has provided £84,000 of security for costs as ordered by the Court of Appeal (by consent).

6 HVK has formed the view that he may be in a position to obtain a third party costs order, pursuant to section 51 of the Senior Courts Act 1981 (the "1981 Act"), against Mr Sherwin. Mr Sherwin is the funder that he knows about and HVK asks that he be joined as a defendant for the purposes of costs only. He also considers that he needs disclosure from the Fund to enable him to consider whether to join others and seek third party costs orders against them. It is accepted that if Mr Sherwin is joined and disclosure ordered and provided, there should not be a directions hearing until after the Court of Appeal hands down judgment in the appeal.

7 In addition, HVK considers that commencing the assessment process now would be premature and risks being wasteful given the pending proceedings in the Court of Appeal, and that is the rationale for the application for the Stay Application.

The Joinder Application

8 It is common ground that the court has power to make third party costs orders pursuant to section 51 of the 1981 Act. The procedure for exercising that power is to be found in

CPR 46.2: first a party is joined as a costs-only party; and second, that party is given a reasonable opportunity to attend a hearing at which the court is to consider the matter further. It is also common ground that I have power to order disclosure ancillary to my jurisdiction under section 51.

9 I agree with HVK that there is no principle of law or practice to the effect that an application for joinder of Mr Sherwin can be made only once a costs liability has been finally determined. *Loson & Anor v Brett Stack & Anor* [2016] EWCA Civ 610 was cited for that proposition. That was a judgment on an application for permission to appeal and so is not citeable in accordance with the *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001. I therefore treat it as an example of how the court has acted in the past, rather than as a precedent of how the court must or should act.

10 I do not, however, think that authority is needed for the proposition that joinder can be ordered before a costs liability has finally been determined. That proposition follows simply from the absence of any such requirement to the contrary in CPR. It also follows from common sense. If there is someone who might be liable to a third party costs order, it makes sense to have power to add them before the costs are finally determined. That way the person in question can make submissions during the assessment process itself on the level of costs for which he or she might ultimately be made liable. Lord Justice Christopher Clarke, sitting at first instance in the case of *Excalibur Ventures LLC v Texas Keystone Inc* [2013] EWHC 4278, made a point substantially to that effect.

11 Nor do I agree with Mr Krsljanin that it is "vanishingly rare" for the court to add a party as a costs-only party before a costs liability has gone unpaid. He relies on *Thomson v Berkhamsted Collegiate School and others* [2009] EWHC 2374 (QB) and *Automotive Latch Systems Ltd v Honeywell International Inc.* [2008] EWHC 3442 (Comm) as examples where joinder was made when there was a costs order unpaid, but I do not consider that an exercise of fact-matching precludes the power from being exercised in different circumstances.

12 I conclude that there is no principle or practice to the effect that I can only join Mr Sherwin as a party once there is an unpaid costs order and the question therefore reduces to whether I should join Mr Sherwin as a party in this case.

13 I also agree with HVK that on an application for joinder the court should not engage in a detailed preliminary examination of the merits. If it is clear that the joinder would be an abuse of process, then I should obviously refuse it. That follows from *PR Records v Vinyl 2000 Limited* [2008] 1 Costs OR 19.

14 I agree that the examination should not stop at the question of abuse of process. If an application is obviously flawed for other reasons, for example, if the claim for a third-party costs order would obviously be meritless, there would be no sense in joining the party in question. However, in *PR Records* Morgan J expressly rejected the proposition that it was necessary to show an arguable case in order for a party to be joined. I should, therefore, consider whether the application to join Mr Sherwin is obviously meritless, and I should consider that in the context of a procedure that is intended to be broadly summary (see [44] of *PR Records*).

15 Mr Krsljanin objects that if I decline to perform a searching examination of the merits of the claim for third party costs against Mr Sherwin, I will be applying a different test when deciding whether to join Mr Sherwin from that which I apply when I consider whether I order the Fund to give disclosure. However, I do not see any such difficulty. Joining

Mr Sherwin as a costs-only defendant does not in itself require him to do anything. By contrast, making an order for disclosure against the Fund would require it to comply with that order and face sanctions if it does not. Given that difference, it is not surprising that there should be a different threshold for making a disclosure order against the Fund as compared with an order for joinder of Mr Sherwin.

16 Mr Krsljanin relies essentially on four factors that he says point firmly against the joinder application being successful:

i. He notes that there are currently no unsatisfied costs orders against the Fund and it is "vanishingly rare" to join a party with a view to making a third party costs order before a costs order has gone unpaid. I have dealt with that argument already.

ii. All evidence to date suggests that the Fund will meet any costs orders that are made in the future. He refers to this as a "track record of compliance", and notes that in correspondence the Fund has confirmed that its funding arrangements have both been approved by the Cayman court and extend to satisfying adverse costs orders.

iii. HVK's approved costs budget is just £855,000 and £734,590 of that has already been paid. Accordingly, HVK has a limited exposure to a future non-payment of costs and the Fund is likely to pay any relatively modest additional payment that is due.

iv. There is no sufficiently good evidence of conduct, whether on behalf of Mr Sherwin or indeed anyone else, that is close to the exceptional behaviour that it would be necessary to make someone liable for costs as a third party.

17 I will deal with those in turn.

18 I accept that it can be, in principle, relevant to consider the extent to which historic costs orders have been paid (see, for example *Rudd v Bridle* [2019] EWHC 1986 (QB)). Therefore the "track record of compliance" to which the Fund refers is a relevant consideration. However, I consider that counts for less in this case than the Fund suggests. I accept that previous costs orders have been paid, but I consider that was in circumstances where they had to be. If security for costs was not given in the High Court, then the claim would ultimately have been struck out and if security for costs was not given in the Court of Appeal, then the appeal would not have been allowed to go ahead.

19 I am not for a moment suggesting that the Fund necessarily will not pay costs orders in the future. However, it is relevant to note that, once the Court of Appeal proceedings are concluded, the Fund will have a potentially lower incentive to pay than it has had to date.

20 I recognise that a letter from the Fund's solicitors of 18 August 2023 confirms that its funding arrangements cover adverse costs orders. However, that letter does not confirm the detail of that coverage or deal with matters such as whether a cap applies. The Fund could conceptually have offered HVK some kind of undertaking to pay costs and the absence of such an undertaking leaves open the possibility that, even if the Fund wanted to pay in the future, it might not have the resources to do so.

21 I do not attach great significance to the fact that the funding arrangements have been approved by the Cayman Islands court. It is not obvious to me that the Cayman court will have been considering whether those funding arrangements would enable HVK to be paid his costs in full should the claim fail. Rather, quite properly, the Cayman Islands court

would have been considering the funding arrangements from the perspective of the rules applicable to liquidation of the Fund.

22 Turning to the point made in paragraph 16iii), I accept that, if HVK is awarded just his budgeted costs, his exposure to the Fund's ability or willingness to pay amounts to some 14 per cent of his budgeted costs. However, HVK's costs budget was approved before I ordered that HVK should obtain indemnity costs from January 2023 onwards. Therefore, I do not consider that the costs budget provides as reliable a guide to HVK's likely recovery of costs as the Fund suggests.

23 The Fund's next point relates to the "exceptional" conduct that is said to be necessary for the court to make a third party costs order. Both sides agree that "exceptional" in this context does not mean that the conduct needs to be egregious or particularly reprehensible. Rather, the word "exceptional" is used in the sense of a third party costs order being an exception to the normal position.

24 These submissions require some consideration of the principles underpinning the ultimate grant of a third party costs order. *Deutsche Bank AG v Sebastian Holdings* [2016] 4 WLR 17 shows that it is relevant to consider the nature and degree of connection between Mr Sherwin and the proceedings. The Privy Council's decision in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807 also sets out useful principles that should be applied. The authorities recognise a broad distinction between "pure" funders (who would not ordinarily be made subject to a third party costs order) and persons who not only fund but also have some degree of control over, or benefit from, the proceedings in question. The most difficult cases are said to be those in which a non-party, such as Mr Sherwin, funds a financially insecure company with a view to advancing the funder's own financial interests.

25 In *Dymocks* at 29, it was said:

> "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. *Deutsche Bank AG v Sebastian* recognises the fact-specific nature of the enquiry.

26 I quite accept that Mr Sherwin may be able to establish ultimately that he should not be made subject to a third party costs order. At trial he said in his evidence that he was providing funding for the litigation and was seeking a commercial return. That is not inconsistent with a role as a "pure funder". However, he also referred to the fact that his wife had lost money from her investment in the Fund and he explained that part of his motivation for providing funding was that he felt deeply that that should not have been allowed to happen.

27 Mr Krsljanin argues that there is no evidence of Mr Sherwin controlling the proceedings. That is true, but since I do not consider that HVK needs to show an arguable case in order to obtain joinder of Mr Sherwin I do not consider that to be fatal. It is difficult to see how HVK could produce such evidence since he has not yet had any disclosure from the Fund as to how its funding arrangements worked. In any event, it is not implausible to argue that

someone who feels so strongly as Mr Sherwin said he did at trial might at least seek to cross the line between being a pure funder and becoming a person who seeks control. Nor is it unreasonable to assume that Mr Sherwin would be consulted on important matters, not least as he was funding an insolvent company which was periodically required to give security for costs.

28 I recognise that it was Mr Sherwin's wife who suffered loss from an investment in the Fund rather than Mr Sherwin himself. However, I consider the considerations above still to be relevant. I consider the case for joinder appears sufficiently strong that the joinder application should be allowed.

29 There is one final point. Mr Krsljanin says that I should not make a joinder order now but should adjourn and wait to see if the costs are ultimately paid. Perhaps if stronger assurances had been given that the Fund could and would pay, that might have been appropriate. However, I have explained why I have some reservations on that issue. There is always a temptation to defer decisions, but doing so would run particular risks in this case. Consider the situation where the Fund is unsuccessful in the Court of Appeal, detailed assessment is commenced and concluded, the final costs order is not paid with the funders arguing that they are either not obliged to pay or require the Fund to sue them to make them pay. In that case, Mr Sherwin could be certainly be joined at that later stage. However, if joined late in the day, he might well point to the unfairness of being bound by a detailed assessment of costs in which he had not been able to participate.

30 The court should not require either Mr Sherwin or HVK to run that risk. I consider that the correct response to the joinder application is to join Mr Sherwin as party today, and I will do so in accordance with CPR 19.2 and 19.4.

The disclosure application

31 Much of what I have said on the joinder application can be applied to the disclosure application.

32 HVK seeks disclosure of the following matters:

i. the identity of all persons providing funding,

ii. the amount of that funding,

iii. the terms on which the funding is provided,

iv. the extent of each party's involvement in the process of the litigation and the nature and extent of that party's interests, financial or otherwise, in the outcome of the action.

33 It is common ground that it does not follow that just because the Fund may be liable to pay HVK's costs, HVK is entitled to full disclosure of the Fund's assets or how it proposes to pay. That follows from *Rudd v Bridle* to which I have already referred.

34 Relevant factors as to the exercise of my discretion are set out in *Thomson v Berkhamsted Collegiate School* to which I have also referred already. I have a general judicial discretion, but in exercising it I should consider the following:

i. the strength of the application for the third party costs order without disclosure;

ii. the potential value of the documents sought to be disclosed such as whether they are likely to be highly probative of the court's exercise of discretion or whether they are likely to take the court down a side alley;

iii. whether it is obvious that the disclosure sought will be subject to legal professional privilege; and

iv. whether the likely effect of the order is proportionate or just in the circumstances.

35 As to the first factor, the strength of the case without disclosure, there is some suggestion that there are other funders in a similar position to Mr Sherwin. The liquidator of the Fund, Mr Trott, suggested in his evidence at trial that there were other funders. He suggested in paragraph 41 of his witness statement, that they might be drawn from those economically harmed by the Fund's failure. I accept that a professional office holder such as Mr Trott might not completely have ceded control of the action. However, if the funders are drawn from people who lost money in the Fund, it is not impossible that those funders will be treated, applying Lord Justice Coulson's formulation in *Goknur Gida v Aytacli* [2021] EWCA Civ 1037, as the "real parties" to the action against whom a third party costs order could be made. It does seem to me that there is a plausible basis on which such funders could be joined, and made subject to a third party costs order applying the formulation in both *Goknur Gida* and *Dymocks*.

36 I have already dealt with, and rejected, the Fund's arguments that there is an insufficiently strong basis for joining Mr Sherwin. I consider that analysis to apply to potential other funders of the type that Mr Trott described. I therefore consider that there is an adequately strong case even for joining such additional funders as there may be even without the disclosure sought.

37 I consider that HVK's disclosure request is appropriately circumscribed and goes directly to the issues. The Fund argues that it is disproportionate to require disclosure on the level of involvement in the action, but that point can be dealt with by making it clear that there does not need to be a description of each or every meeting or telephone call, just a high-level analysis.

38 There does not seem to be any suggestion that there is a problem with legal professional privilege.

39 Finally, as regards proportionality, I consider the disclosure sought to be modest and circumscribed. I recognise that the Fund does not want to give it. I recognise that there is a possibility that disclosure might prove unnecessary if ultimately the Fund pays the costs orders. However, given the relatively circumscribed nature and the other considerations outlined in this section I consider making the disclosure order to be proportionate in the circumstances and I make that order.

The Stay Application

40 The Stay Application is now not opposed. There are some points as to whether the Fund is a few days late in applying for an extension of time to commence detailed assessment proceedings so as to need relief from sanctions, but neither side suggests that this is a matter for me to determine today. Although it does not formally oppose the Stay Application, the Fund makes the reasonable point that it is made for HVK's benefit, though it does not deny that there are perfectly sensible case management reasons why it should be allowed.

41 It was common ground that the fact that the Fund has not commenced detailed assessment proceedings by the applicable deadline engages the court's power in CPR 47.8(3) to disallow interest that would otherwise be payable under the Judgments Act 1838. The debate before me focused on the extent to which the accrual of interest should be "switched off" until detailed assessment proceedings are commenced.

42 It is common ground that as matters stand the Fund is liable to an accrual of interest at the 8 per cent Judgments Act rate on unpaid costs. There was a period for which it was liable to interest at a rate of base plus 6 per cent, which obviously would be higher than 8 per cent, but interest at that rate ceased accruing from the date of my order of 28 November 2023.

43 HVK's position is that even until he commences proceedings for detailed assessment, he is still out of his money and therefore should continue to accrue interest at the full 8 per cent Judgments Act rate. The Fund's position is that the deferral of detailed assessment proceedings is entirely for HVK's benefit and therefore interest should cease to accrue. Put another way, the Fund should not incur a disbenefit as a consequence of an order that is being made for HVK's benefit.

44 Given that debate, I consider it appropriate to look at the precise nature of the Fund's disbenefit. The Fund will retain the use of the money until detailed assessment proceedings are concluded force and therefore can be expected to earn some return on it. However, against that it continues to accrue interest at 8 per cent on its costs liability to HVK.

45 HVK says that is no real disbenefit because commercial interest rates can be assumed to be at or around base rate plus 2 per cent and therefore the interest rate differential is immaterial.

46 However, I consider that analysis overlooks the fact that ultimately the deferral of detailed assessment proceedings is sought for HVK's benefit. Also I accept Mr Krsljanin's submission that the Fund should not be assumed to be able to earn a return at base rate plus 2 per cent. While that might be achievable if the Fund's money is "locked up" for a period, the Fund is not in a position to lock up its money for long because it might need it at short notice to meet a costs liability.

47 HVK responds that the court should not postulate an "earmarked" fund that is invested somewhere but should perform a more general enquiry based entirely on rates.

48 In my judgment, the correct approach is this. The deferral of detailed assessment proceedings is for HVK's benefit and it is appropriate for the court to act to prevent it causing a realistic disbenefit to the Fund. I therefore propose to assume, in the Fund's favour, that that Fund can obtain a return of base rate only, and therefore during the period until detailed assessment proceedings are commenced, unpaid costs due to HVK should accrue interest at base rate only rather than at 8 per cent.

CERTIFICATE

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