

Case No: CL-2021-000532

Neutral Citation Number: [2022] EWHC 727 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Buildings
Fetter Lane
London
EC4A 1NL

Friday, 4 March 2022

BEFORE:

HIS HONOUR JUDGE PELLING QC
(Sitting as a High Court Judge)

BETWEEN:

MICHAEL WILSON AND PARTNERS LIMITED

Claimant

- and -

Defendants

**JOHN FORSTER EMMOTT
AND OTHERS**

MR DALBY appeared on behalf of the Claimant
MR KIRBY appeared on behalf of the First Defendant
MR DOUGHERTY appeared on behalf of the Second Defendant

JUDGMENT
(Approved)

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1. JUDGE PELLING: This is a without notice application by the claimant (“MWP”), in which the various other defendants are not interested but have made brief submissions, for an order giving it permission to serve the seventh defendant out of the jurisdiction.
2. The gateway upon which reliance is placed is that contained in paragraph 3.1(3) of Practice Direction 6B. That gateway, as is well-known, is in these terms:

"A claim is made against a person, the defendant, on whom the claim form has been, or will be served, otherwise than in reliance on this paragraph, and (a) there is between the claimant and the defendant a real issue that it is reasonable for the court to try; and (b) the claimant wishes to serve claim form on another person who is a necessary or proper party to that claim."

3. As will be apparent from this formulation and noting that I have not been assisted by the citation of any of the usual core authorities on applications to serve out, and in particular the recent Supreme Court decisions concerning this particular gateway and how applications of this sort should be approached. This is of itself a failure to comply with the duty of fair presentation and on one view would justify the dismissal of the application or at any rate its adjournment. This notwithstanding, I do the best that I can on the basis of the material that I have been taken to, which involves an exploration of the allegations made in the particulars of claim that have been filed in these proceedings.
4. In essence, this claim is concerned with an assertion by MWP that the first to sixth defendants who are in various capacities, or were in various capacities, lawyers who acted for the first defendant, Mr Emmott, in the proceedings between Mr Emmott and MWP, have sought costs orders, fraudulently, because (it is alleged by MWP) Mr Emmott did not have any obligation to pay his lawyers' fees in any circumstances, because, he suggests, Mr Emmott was defending the litigation only in order to protect the interests of or at the encouragement of a Mr Sinclair and it therefore follows that the indemnity principle cannot be satisfied and all the costs orders that have hitherto been made in these various proceedings in favour of the first defendant should be set aside. Although not stated in terms, MWP is seeking to recover all the sums that it has been ordered to pay on account of costs over the many years its litigation against Mr Emmott has been on foot.

5. There is, thus, in this litigation essentially two claims going on here. There is a claim as against the first defendant formulated on the basis that he has fraudulently obtained costs orders in various proceedings against MWP, and as against the second to sixth defendants on the basis that they were knowing participants in the fraudulent scheme to obtain the payment of costs or to obtain costs orders and interim payment orders knowing that Mr Emmott owed them no obligations to pay them, and therefore that there was no entitlement to the costs orders that were sought, or the interim payments on account that were sought as well.
6. That, as far as it goes, is all well and good, and I say nothing more about the merits of those particular claims because there is to be a strike out application to be heard in May of this year which, on the submission of the second to sixth defendants, will result in the claims made against them being dismissed summarily in their entirety.
7. I turn now to the claim against the seventh defendant. The seventh defendant is a corporate entity referred to in these proceedings in shorthand as “SOCOL”. The claim in relation to SOCOL, is that SOCOL was used as a vehicle for the payment of money to either Mr Emmott and/or his lawyers directly, in order to fund Mr Emmott's defence of the claim brought against him by MWP. SOCOL is or was controlled by Mr Sinclair. As I have explained in earlier judgments, Mr Sinclair has been made the subject of a bankruptcy order. MWP was able to persuade Mr Sinclair's trustee in bankruptcy to enter into a deed of assignment by which various causes of action available to Mr Sinclair were assigned to MWP. The deed is not in evidence, but I am prepared to accept for the purposes of this exercise, that the effect of the deed is to assign Mr Sinclair's rights against SOCOL to MWP. This leads Mr Dalby to submit that there is a realistically arguable cause of action available to MWP as assignee of the rights of Mr Sinclair to recover sums which were paid by Mr Sinclair to SOCOL, which SOCOL then advanced to either the first or one or more of the second to sixth defendants in order to fund Mr Emmott's defence of the claims brought against him by MWP.
- 8.. There are therefore two causes of action, which are distinct, in play in these proceedings, being a claim in effect of fraudulent conspiracy as between the first to the sixth defendants to seek costs orders from MWP in proceedings where there was no

entitlement, and known to be no entitlement to costs because there was no obligation on the part of Mr Emmet to pay his lawyers anything for the services they provided because any obligations for payment were obligations as between the funders and the second to sixth defendants; and the claim against SOCOL is to recover sums which Mr Sinclair advanced to SOCOL and which were expended in the ways I have described.

9. Against that background it is now necessary to look at the terms of the particulars of claim. I premise my remarks by saying that this is not, in any sense, a proper way in which an application should be made to the commercial court for permission to serve a party out of the jurisdiction. As will be well known to all parties, what is required is a carefully spelled out witness statement which identifies the facts and matters relied upon in order to satisfy each of the requirements for permission to serve out using the gateway relied upon.
10. With that qualification, I then return to the particulars of claim, which I was taken through in some detail by Mr Dalby. The key point for present purposes he submits is that the correct conclusion to reach is that there is a claim being advanced in restitution by MWP as assignee of Mr Sinclair's rights, against SOCOL. The relevant paragraph of the Particulars of Claim, and indeed the only relevant paragraph I have been taken to, is paragraph 38 of the particulars of claim where it is pleaded:

"The first defendant (that is Mr Emmott) has been unjustly enriched by the improper seeking and receipt of such monies and costs paid as set out in the attached appendix of costs orders. The unjust enrichment is that the expense of the claim has caused MWP to suffer and incur significant loss and damage, which is ongoing. The retention of the unjust enrichment is unjust."

11. The "monies and costs" that are there referred to are the subject of paragraph 37, the preceding paragraph of the particulars of claim, which is in these terms:

"In the premises, the third defendant has applied for, pursued, sought and obtained monies and costs in enormous sums from the claimant in breach of the indemnity principle, and on the false basis that the first defendant is liable to pay costs to his lawyers, when the same is not, and never has been true, and on the first defendant's own case, is impecunious and has never had any cash, revenues, assets, and has never disclosed any such thing."

12. In paragraph 39 it is alleged that the first defendant knew all of the relevant facts or matters which had been pleaded, and in paragraph 42 MWP pleads this:

"In the premises, the claimant seeks a declaration as against all the defendants, that they are acting, or have acted, in breach of the indemnity principle and the law or rules on speccing agreements and contingency liability contracts, and accordingly that MWP is not entitled to and claims restitution of all the sums and costs paid as set out in the appendix of costs orders, without limitation and whatever became of the same."

13. The prayer to the particulars of claim seeks a declaration, which is not as particularised as it might have been, but seems to be a reference back to paragraph 42 of the particulars of claim. There is then a claim for restitution, "as set out above," which is the paragraphs that I referred to earlier, that is to say, that which deals with the unjust enrichment of the first defendant, and then interest and costs.
14. So against that background it is necessary, then, to return to the principles that apply. The first question that has to be asked is whether there is, as between the claimant and, at any rate, the first to sixth defendants', a claim which the court ought to try. As I have already indicated, there is a strike out application by the second to sixth defendants. If that succeeds by definition, there will not be such a claim as between MWP and the second to sixth defendants. As things stand at present, there is no strike out application by the first defendant, however.
15. The next question, therefore, is whether there is a real claim as between the claimant and the seventh defendant. I am prepared to conclude for the purposes of this exercise that there may well be a claim available to MWP in its capacity as assignee of Mr Sinclair to recover any sums which Mr Sinclair paid to SOCOL, for whatever reason. But that would be a cause of action which would be entirely different in its nature from any cause of action which would be available to the claimant as against the first to sixth defendants as formulated in the particulars of claim. It is also incidentally not a claim that is currently pleaded as I have explained.
16. Therefore, that focuses attention on whether or not the claimant can demonstrate that the seventh defendant is a necessary or proper party to the claim as against the first to sixth defendants. So far as that is concerned, the underlying basic principle which

applies in this area is that identified in notes 6HJ.8 in volume 1 of the current edition of the White Book under the subheading, “Necessary or proper party.” In the opening few lines, the editors of the White Book say this:

“In *Massey v Haynes* [1888] 21 QBD 330 Lord Esher, Master of the Rolls, said that whether D2 is a proper party to a claim against D1 depends on the question, “Supposing both parties had both been within the jurisdiction would they both have been proper parties to the action?””

17. There is then a description of the way in which that issue has developed with some emphasis on the fact that the word, “or,” is disjunctive, and therefore permission may be given for the service of the claim form out of the jurisdiction in a case where the party out of the jurisdiction is a proper party to an action brought against the party within the jurisdiction, even if that party is not a necessary party, because necessity is only one relevant factor to be considered.
18. I have to say, first of all that I am profoundly dissatisfied with the way in which this application has been advanced, and that is not a criticism of Mr Dalby, it is a criticism of the application, and the evidence that had been filed in support of it, which makes determining this application enormously difficult.
19. Secondly, I am profoundly sceptical as to whether or not, in the circumstances as I have explained them, it can be sensibly be said that the seventh defendant is either a necessary or a proper party in relation to the claims as against the first to sixth defendants, because as I have explained, the claims as against the first to sixth defendants are premised on a fraudulent conspiracy to seek costs orders when, to the knowledge of all those parties, there was no entitlement to recover costs from MWP, whereas the claim by the claimant against the seventh defendant is a claim to recover money which was advanced, so it is alleged, to SOCOL for the purpose of passing those funds on to the first defendant or, to his order, the second to sixth defendants, in order to fund the litigation. That is an entirely separate cause of action and one which gives rise to very real difficulty in SOCOL being either a necessary or a proper party, even assuming it could be said that such a cause of action has actually been pleaded against it.

20. In those circumstances there are, as it seems to me, two choices. The first choice is simply to refuse this application, now, and at this stage, for the reasons I have identified – that is that no cause of action has been sufficiently pleaded against SOCOL and/or if it has been, the cause of action MWP has against SOCOL does not make it a necessary or proper party to the claim against the first to sixth defendants. The second alternative would be to adjourn the application so as to give, first of all, the claimant the opportunity to amend the claim against SOCOL if so advised and to make a properly formulated application taking account of these points and to take account of the outcome of the strike out proceedings to the extent that is material.
21. Tempted as I am to dismiss this application at this stage, I am satisfied that fairness requires that I permit the claimant to identify or advance a properly formulated claim for permission to serve these proceedings out of the jurisdiction on the seventh defendant, advancing it in a conventional way using conventional evidence and taking account of the outcome of the strike out application to the extent that is material.
22. Therefore, what I am prepared to do is to adjourn the application for permission to serve these proceedings out of the jurisdiction on the seventh defendant, with the liberty to the claimant to restore that application, but not to be heard before final determination of the applications by the second to sixth defendants to strike out the claim.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge