Neutral Citation Number: [2020] EWHC 2542 (QB)

Case No: HQ12X00614

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 September 2020

Before :

MATHEW GULLICK
(sitting as a Deputy Judge of the High Court)

- -

Between :

GOKNUR GIDA MADDELERI ENERJI IMALAT ITHALAT IHRACAT TICARET VE SANATI A.S.	**Claimant**
- and –	
(1) ORGANIC VILLAGE LTD **(2) MR CENGIZ AYTACLI**	**Defendants**

- -
- -

Mr Imran Benson (instructed by **Hudson Morgan Williams**) for the **Claimant**
Ms Nerin Bilgin, Director, represented **the First Defendant**
The Second Defendant appeared in person

Hearing date: 14 July 2020
Further written submissions: 16 July 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10:30 on Wednesday 30 September 2020.

Deputy Judge Mathew Gullick:

Introduction

1. By an application notice issued on 15 May 2020, the Claimant ("Goknur") seeks a non-party costs order against the Second Defendant ("Mr Aytacli"). The application arises following the conclusion of long-running litigation, conducted over the best part of a decade, between Goknur and the First Defendant ("Organic Village"). That litigation was case managed by Master Kay QC, as the assigned Master, and culminated in a five-day trial of Organic Village's counterclaim before Mr Martin Chamberlain QC, sitting as a Deputy High Court Judge, in June 2019. Mr Aytacli, the respondent to the application for a non-party costs order, was formerly the managing director of Organic Village and was its main witness at the trial of the counterclaim.

2. In a reserved judgment handed down on 12 August 2019, [2019] EWHC 2201 (QB) ("the Trial Judgment"), Mr Chamberlain QC upheld Organic Village's counterclaim. In a separate judgment on damages and costs ("the Damages & Costs Judgment"), the Deputy Judge awarded only nominal damages and as a result considered that Goknur had been the successful party in relation to the counterclaim, for the purposes of CPR 44.2(2)(a). With reductions to reflect the way in which the litigation had been conducted, he ordered that Organic Village should pay one quarter of Goknur's costs of the counterclaim, such costs to be the subject of detailed assessment if not agreed. No order was made for Organic Village to make a payment on account of those costs.

3. By the time of trial of the counterclaim, Goknur's claim against Organic Village had already been struck out. Goknur had been ordered to pay Organic Village's costs of the claim, also to be assessed if not agreed, and to pay £110,000 on account of Organic Village's costs of the claim. During the course of the litigation, a number of other costs orders were made in favour of Organic Village. Some of the costs were assessed summarily. Other costs orders provided that the costs would be subject to detailed assessment but required Goknur make immediate payments on account of those costs. The total paid by Goknur on account of the various orders for Organic Village's costs which were expressed to be subject to detailed assessment was £185,300. Goknur was also ordered to pay £13,000 into court as security for Organic Village's costs in respect of the enforcement of orders in Turkey.

4. Neither party appealed against the order made by Mr Chamberlain QC at the conclusion of the trial of the counterclaim. The parties proceeded to negotiate about the amounts due under the various costs orders made in the litigation. At this point, the firm of solicitors which had been acting for Organic Village ceased to represent it. The negotiations, which were principally conducted by Mr Aytacli on behalf of Organic Village, did not result in agreement regarding the overall level of costs payable. Goknur initiated CPR Part 47 proceedings for the detailed assessment of its costs of the counterclaim, pursuant to Mr Chamberlain QC's order. Organic Village did not respond. On 20 April 2020, a Default Costs Certificate was issued, assessing the costs due to Goknur in the sum of £64,305.43. Organic Village is therefore required to pay this sum to Goknur, in satisfaction of the order for costs made by Mr Chamberlain QC. It is common ground that it lacks the resources with which to do so.

5. Following the breakdown of negotiations about the costs of the litigation at the end of 2019, Organic Village did not commence proceedings for the detailed assessment of any of the costs due to it under the various orders that had been made in its favour. On 9 March 2020, Goknur made an application for an order under CPR 47.8 that Organic Village be required to commence detailed assessment. Master McCloud made an order

that unless Organic Village commenced detailed assessment proceedings by 16 March 2020 then its costs would be disallowed and it would be required to pay into court the £185,300 that had been paid by Goknur on account of its costs. Organic Village did not commence the detailed assessment of its costs as required by the Master's order and has not subsequently sought relief from the sanction imposed. Accordingly, as things now stand the costs awarded to Organic Village in the litigation have been disallowed and it is required to pay into court the sum of £185,300 that was paid on account of costs by Goknur. It is common ground that Organic Village does not have the means to pay this sum; the monies that were paid on account of its costs by Goknur were paid directly to its former solicitors.

6. On 24 March 2020, Goknur made an application that, following Organic Village's non-compliance with Master McCloud's order to pay the sums received as payments on account of costs into court, Organic Village should be required to pay the sum of £185,300 directly to Goknur. I was told at the hearing that Master McCloud had made that order and that a sealed copy was awaited. The lack of a sealed order requiring the payment on account to be returned directly to Goknur, rather than paid into court, is not material to the issues that arise on the application.

7. On 15 May 2020, Goknur filed this application for a non-party costs order to be made against Mr Aytacli. Prior to the application being made, Mr Aytacli had not been given notice by Goknur that he might be the subject of such an application. Goknur seeks an order that Mr Aytacli pay to Goknur both its assessed costs of the counterclaim, in the sum of £64,305.43, and the payments on account of Organic Village's costs that are due to be returned by Organic Village, in the sum of £185,300. The total amount now sought by Goknur from Mr Aytacli is therefore £249,605.43.

8. The hearing of the application for a non-party costs order against Mr Aytacli took place before me on 14 July 2020, by way of a remote video hearing using the Skype platform. Goknur was represented by Mr Imran Benson of counsel, who had not appeared at the trial before Mr Chamberlain QC. Organic Village was represented by its director, Ms Bilgin, who is married to Mr Aytacli. Mr Aytacli appeared as a litigant in person, although for a period before the hearing he had been assisted by counsel whom he had instructed directly.

Dealing with the application when not the trial judge

9. At the beginning of the hearing, I raised with the parties whether the application for a non-party costs order ought instead to be heard by the trial judge, now Mr Justice Chamberlain. This had not been raised as an issue in the witness statements or the skeleton arguments that had been filed, although it was a point clearly made in the authorities that were relied on by Goknur. I referred the parties to what had been said on this issue by the Court of Appeal in *Symphony Group Plc v Hodgson* [1994] QB 179 and in *Deutsche Bank AG v Sebastian Holdings Ltd & Another* [2016] EWCA Civ 23, [2016] 4 WLR 17. In the latter case, the Court of Appeal considered at [56] that the advantages of the trial judge hearing an application for a non-party costs order were such that it was difficult to imagine the rare circumstances in which such an application ought be heard by another judge.

10. Mr Benson submitted that I could and should proceed to hear the application. He pointed out that an adjournment would involve a delay of several months, and submitted that given the application was being heard over a year after the trial and did not turn on events that took place during the trial, I was as well-placed as the trial judge to determine it. He submitted that the litigation and the application for a non-party costs

order were not particularly complex, in terms of matters which proceed in the High Court, that much of the factual basis for the application was not controversial and that an adjournment would not be in the interests of justice. Having had their attention drawn to these authorities and having heard Mr Benson's submissions, both Mr Aytacli and Ms Bilgin agreed to the hearing proceeding before me. I indicated to the parties that I would proceed to hear the application, and that I would give my reasons for doing so in this judgment.

11. As I have already noted, the issue of the application being heard by the trial judge was not raised in either the witness statements or the skeleton arguments that had been filed. The standard form N244 application notice completed by Goknur's solicitors contained the following statement in response to the standard question that appears on it regarding the level of judge required to hear the application: "Mr Justice Chamberlain, if available, or any other QBD judge". It is unfortunate, in my judgment, that Goknur's solicitors answered the standard question on the form in this way. The authorities to which I have already made reference make it very clear that a non-party costs order application determined after a trial should, save in rare and exceptional circumstances, be dealt with by the trial judge. By framing their statement in terms of the trial judge's availability, and by indicating that any other judge could hear the application, Goknur's solicitors did not convey to those responsible for listing this application the importance ascribed by the Court of Appeal to it being heard by the trial judge. In circumstances where that Court has made its views very clear on the issue, in the authorities to which I have made reference, I would expect the application notice or at least the witness statement in support of the application to make the point, if necessary by express reference to those authorities or to the relevant passages of a work such as *Civil Procedure* (2020 Edition), where it is set out at paragraph 46.2.2. I express the hope that future applicants for non-party costs orders will not repeat the error made in this case.

12. The position adopted by all the parties before me was that I should proceed to hear the application. I considered that it was in the interests of justice, and in accordance with the overriding objective in CPR 1.1, that I do so in the exceptional circumstances of this case, for the following reasons:

    i) The application had been listed before me in error. All the parties had, however, had their attention drawn to the relevant authorities and were in agreement that I could and should hear the application, although I did not regard their views as being determinative.

    ii) An adjournment of the application would have necessitated a delay of several months to enable it to be re-listed during the Michaelmas Term, with the possibility that it might be heard as long as 18 months after the trial. It would not have been desirable to put the application, already made nearly a year after the conclusion of the substantive part of the litigation, off for so long. It would have caused additional costs and inconvenience to the parties, as well as a significant waste of court time.

    iii) The application did not, save in minor respects, refer to events which had taken place during the trial. It was made 11 months after the conclusion of the trial. A substantial part of the application was in respect of costs which had not been incurred in connection with the trial (i.e. the £185,300 that was paid on account of Organic Village's pre-trial costs by Goknur). I considered that I was sufficiently well-placed to determine the application for a non-party costs order in the particular circumstances of this case and that any disadvantage that I might

have had from not being the trial judge caused no prejudice and was outweighed by the other considerations to which I have referred.

13. None of this, I apprehend, detracts from or is inconsistent with the view of the Court of Appeal that an application for a non-party costs order should, save in rare and exceptional circumstances, be determined by the trial judge. I again express the hope that the circumstances in which this application came to be listed before me, rather than before the trial judge, will not recur.

Background to the application

14. I now turn to the history of the litigation between Goknur and Organic Village. Goknur is a large company, based in Turkey, which is involved in the manufacturing and wholesale supply of fruit juice. It has a turnover in the region of £100 million per annum and supplies its juices to customers all over the world. Organic Village is a company incorporated in 2007 in England & Wales by Mr Aytacli and Ms Bilgin. It was a small family-run wholesale business, with a six-figure turnover, in which Mr Aytacli, Ms Bilgin and their son were involved. Mr Aytacli was, prior to his resignation as a director (which was notified to Companies House on 27 March 2017) the managing director. In October 2010, he gave a personal guarantee of Organic Village's liabilities to its bank, his maximum liability being limited to £150,000.

15. Organic Village became one of only two UK suppliers of Goknur's fruit juices and also supplied those juices in other countries, where it was one of many suppliers. The contract between Goknur and Organic Village stipulated that the fruit juices supplied by Goknur would be 'not from concentrate', i.e. that they would not have been reduced to a concentrated form and then later reconstituted by water being added back. The fruit juices supplied by Organic Village to its own customers were labelled for sale as being 'not from concentrate'. In 2011, a French competitor of Organic Village and the French authorities both tested samples of Organic Village's juices. These were found to contain added water. Organic Village conducted its own tests, with the same result in five out of six cases (the exception being the cherry juice). The same conclusion was later reached by the joint expert, Dr Simon Kelly, who gave evidence at the trial of the counterclaim. The added water was found to be exogenous, i.e. it was from a source other than the fruit itself, such as ground water or tap water.

16. In November 2011, Organic Village wrote to Goknur rejecting the stock that it had already received and in due course stopped cheques that had been written for payment for it. In February 2012, Goknur issued a claim against Organic Village for the sum of £104,465.17 in respect of stock which had been delivered to Organic Village but not paid for. Organic Village then counterclaimed for £352,015.04 in respect of losses alleged to flow from Goknur's failure to supply products which conformed to the contractual description. Organic Village made claims against Goknur for breach of contract, misrepresentation and in the tort of deceit.

17. There were many interlocutory hearings in the period of more than seven years between the issue of the claim form and the trial of the counterclaim, including three unsuccessful appeals by Goknur against decisions made by Master Kay QC. As I have already set out, several orders for costs were made against Goknur during this period. Orders for payments on account of Organic Village's costs, where those costs were expressed to be subject to detailed assessment, were made. In due course Goknur paid more than £185,000 on account of such costs.

18. Although it had achieved a substantial six-figure turnover in earlier years, Organic Village ceased trading in 2013-2014 and was apparently balance sheet insolvent from

about this point onwards. Nonetheless, it pursued the litigation with Goknur. From 2015 until shortly after the conclusion of the trial, Organic Village was represented by Hugh-Jones LLP, solicitors ("Hugh-Jones") pursuant to a Conditional Fee Agreement (CFA) dated 23 June 2015. This agreement provided for Organic Village to pay half of Hugh-Jones' fees irrespective of the outcome of the litigation, with the balance (together with a 90 per cent success fee) payable in the event of any award of damages being made to Organic. On the same date as the CFA was entered into, Mr Aytacli and Ms Bilgin both provided a personal guarantee in respect of all monies due to Hugh-Jones from Organic Village. The guarantee was expressed to be joint and several.

19. On 7 January 2014, Mr Aytacli agreed to borrow £160,000 from Mr & Mrs Patel. Just over £50,000 of that sum was expressed in the loan agreement as being intended to provide working capital for Organic Village; the remainder was to repay existing loans. Mr Aytacli gave a charge over the family home, a leasehold property in North London registered in his sole name, as security for this loan. That charge was registered against the property at the Land Registry on 11 February 2014.

20. In 2015, both sides in the litigation applied for security for costs. Master Kay QC allowed Organic Village's application and ordered Goknur to pay £18,000 into court as security for the costs of enforcement (the amount was subsequently varied on appeal to £13,000). Master Kay QC dismissed Goknur's application for security for its costs to be given by Organic Village.

21. In August 2016, Hugh-Jones informed Mr Aytacli that they were not prepared to continue acting in the litigation unless their outstanding unpaid bills (amounting at that point to just under £30,000) were paid or an adequate security was provided. On 24 August 2016, the partner at Hugh-Jones with conduct of the litigation sent an email to Mr Aytacli in which he stated, "I cannot continue without payment and inadequate security… I am lodging the application to come off the court record tomorrow." Mr Aytacli then offered to provide Hugh-Jones with a charge over the family home. By an agreement made on 26 September 2016 between Hugh-Jones and Mr Aytacli, the property was charged as security for Organic Village's indebtedness to Hugh Jones, subject to a proviso that such indebtedness should not exceed £60,000 without Mr Aytacli's prior written agreement. That charge was registered against the property at the Land Registry on 25 October 2016.

22. On 1 October 2016, Mr Aytacli resigned as a director of Organic Village. Ms Bilgin, who had been the company secretary, was appointed director in his place. These changes were registered with Companies House on 27 March 2017.

23. On 14 July 2017, Master Kay QC ordered that unless by 24 July Goknur complied with a previous costs order then its claim would be struck out. It did not comply and the claim was automatically struck out. Goknur was ordered to pay Organic Village's costs of the claim on the standard basis.

24. There was a hearing of various issues relating to costs before Master Kay QC over three days in April, May and June 2018. Mr Gareth Church, a costs lawyer at Abbey Costs Consultants Ltd, filed a witness statement supporting and explaining the calculation of a statement of Organic Village's costs of the claim, filed by Hugh-Jones, amounting to £269,196.30. The statement was signed by a partner in Hugh-Jones and appended to it were detailed schedules of work done on documents and of disbursements incurred. Goknur's then solicitors filed a witness statement criticising, in some detail, the way in which this figure had been arrived at. In his reserved judgment, given on 30 July 2018, Master Kay QC concluded that the figure of £269,196.30 for the costs of the claim that

had been arrived at by Mr Church was "a proper starting point for considering the appropriate quantum of an order for costs on account". He decided to order a payment on account of 70 per cent of that figure, i.e. £153,768.51. That figure was subsequently varied to £138,800 by Foskett J on an appeal by Goknur, but his reason for doing so was due to an error in the way in which Master Kay QC had addressed, when calculating the amount of the payment on account, payments that already been made by Goknur on account of the same costs. Foskett J stated at [68] of his judgment on the appeal, [2018] EWHC 3372 (QB), that this variation was "purely procedural and does not go to the substance of the appeal", i.e. he upheld the Master's view that a payment on account of 70 per cent of the costs of the claim, as calculated by Organic Village's costs lawyer, was appropriate.

25. As I have already noted, by the time of the trial in June 2019 only the counterclaim remained. In the Trial Judgment, Mr Chamberlain QC found that juices supplied by Goknur to Organic Village had contained added exogenous water at the time of supply. Organic Village's counterclaim for breach of contract and misrepresentation succeeded. However, the Deputy Judge rejected Organic Village's case that Goknur had lacked an honest belief in the truth of its representations that the juice supplied would be 'not from concentrate' and contain no added water when they were made. Organic Village's counterclaim in the tort of deceit failed.

26. Mr Chamberlain QC further held, when considering the measure of damages for those causes of action that had been established by Organic Village, that it was not within the reasonable contemplation of the parties that if Organic Village ceased purchasing organic 'not from concentrate' fruit juices from Goknur by reason of defective supply, it would be unable to obtain alternative supplies of the same juices on the open market. The result was that although Organic Village's counterclaim succeeded on liability, the ordinary measure of damages, i.e. excluding a claim for lost profits, applied. The Deputy Judge held that only nominal damages should be awarded to Organic Village, which he fixed in the sum of £2. As I have already set out, in the Damages & Costs Judgment he decided to order Organic Village to pay one quarter of Goknur's costs of the counterclaim, to be assessed if not agreed.

27. On 5 September 2019, Hugh-Jones wrote to Goknur's solicitors stating that although the costs of the litigation had not been resolved, it was "highly likely that your client will owe our client a significant figure in costs once the figures have been finalised." They stated that a costs draftsman had been instructed and that the funds deposited in court as security for the costs of enforcement should not be released to Goknur until the costs issues had been finalised. Hugh-Jones' costs lawyer, Mr Darren Ede of Abbey Law Costs Consultants Ltd, then corresponded with Goknur's solicitors. He was of the view that formal Bills of Costs ought not to be necessary and that the parties should exchange schedules of the costs being claimed and should negotiate an agreed outcome. Goknur's solicitors were receptive to this idea.

28. Following the conclusion of the trial, Hugh-Jones considered that, notwithstanding the award of only nominal damages, success had been achieved in the litigation for the purpose of its CFA and that Organic Village was therefore liable to pay its charges in full, including the success fee. The outstanding amount, according to Hugh-Jones' calculations, was £427,998.11. On 21 October 2019, Ms Bilgin gave notice to Goknur's solicitors that Hugh-Jones were no longer representing Organic Village and that correspondence should be sent directly to her, copied to Mr Aytacli. On 23 October, Hugh-Jones served separate statutory demands in respect of the sum due under its outstanding bills on Mr Aytacli, on Ms Bilgin and on Organic Village.

29. On 5 November 2019, Mr Aytacli sent a schedule of Organic Village's claim for costs to Goknur's solicitors. In response, the solicitors stated that they did not agree with the sums claimed on Organic Village's schedule as the majority of the costs claimed were not, in their view, related to the pre-trial matters. They stated that Organic Village should proceed to serve its detailed Bill of Costs, failing which they would make an application "to have your costs struck out [sic]". They stated that Goknur's Bill of Costs would be served when it was ready.

30. During November 2019, Mr Aytacli and Ms Bilgin had some discussions with the costs lawyer, Mr Ede, regarding instructing him to make progress with the costs proceedings against Goknur. Mr Ede estimated his firm's charges for preparing Organic Village's Bill of Costs at £16,000 to £20,000 plus VAT and for attending a detailed assessment hearing at £7,500 to £9,000 plus VAT. On 26 November 2019, Mr Ede wrote an email to Ms Bilgin and Mr Aytacli in which he stated there was no reason to believe that the statements of costs previously prepared, on which the figures for payments on account had been based, were anything other than correct. Mr Ede concluded his email by reminding Ms Bilgin and Mr Aytacli that if Organic Village failed to commence detailed assessment proceedings then Goknur could apply for an order that the costs should be disallowed and for the return of the £185,300 that had been paid on account.

31. On 21 January 2020, Mr Aytacli wrote to Goknur's solicitors requesting service of Goknur's Bill of Costs. Goknur's solicitors indicated that the Bill would be served by the end of January. On 24 January, Goknur's solicitors requested that Organic Village's Bill be served and that an offer be made to settle all the outstanding costs.

32. On 21 February 2020, Goknur's solicitors commenced the detailed assessment process under CPR 47 and served the Bill of Costs due to Goknur under Mr Chamberlain QC's order on Mr Aytacli and Ms Bilgin. Organic Village did not respond to the detailed assessment proceedings and a Default Costs Certificate was issued on 24 April in the sum of £64,305.43. On 27 April, Goknur's solicitors sent that certificate to Mr Aytacli and Ms Bilgin, requesting payment. Mr Aytacli responded, stating that Organic Village had no assets and was unable to pay Goknur's costs. He also disclosed that Hugh-Jones was pursuing the winding-up of Organic Village as a result of the non-payment of its bills.

33. As I have already set out above, on 9 March 2020, Goknur made an application for an order under CPR 47.8 that Organic Village be required to commence detailed assessment and Master McCloud made an order that unless Organic Village commenced detailed assessment proceedings by 16 March then its costs would be disallowed and it would be required to pay into court the £185,300 paid by Goknur on account of its costs. Organic Village did not commence the detailed assessment of its costs as required by the Master's order. On 24 March 2020, Goknur made an application that, following Organic Village's non-compliance with Master McCloud's order to pay the sums received as payments on account into court, Organic Village should be required to pay the sum of £185,300 directly to Goknur.

34. On 15 May 2020, Goknur issued the application for a non-party costs order which I now have to determine. In support of that application, Goknur filed a witness statement from the solicitor with conduct of the case, Mr Zafer Armutlu. Both Mr Aytacli and Ms Bilgin filed witness statements opposing the application. Mr Armutlu then filed a second witness statement, responding to the evidence of Mr Aytacli and Ms Bilgin. Mr Benson did not, however, seek to cross-examine either Mr Aytacli or Ms Bilgin on the content of their witness statements. Mr Benson submitted that cross-examination was unnecessary because there were, on analysis, no important factual disputes. Nor was

Mr Armutlu cross-examined on his evidence. For reasons that will become apparent, the outcome of this application does not turn on matters on which the witnesses might have been cross-examined.

The law on non-party costs orders

35. In *Aiden Shipping Co Ltd v Interbulk* Ltd [1986] AC 965, the House of Lords held that section 51 of the Senior Courts Act 1981 Act empowers a court to make an order for costs against a person who was not a party to the litigation. That section provides as follows:

> "(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) the civil division of the Court of Appeal;
>
> (b) the High Court;
>
> (ba) the family court; and
>
> (c) the county court,
>
> shall be in the discretion of the court.
>
> (2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings including, in particular, prescribing scales of costs to be paid to legal or other representatives or for securing that the amount awarded to a party in respect of the costs to be paid by him to such representatives is not limited to what would have been payable by him to them if he had not been awarded costs.
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid…"

36. The Civil Procedure Rules make provision for applications for non-party costs orders in CPR 46.2. That rule states, so far as is material:

> "(1) Where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must –
>
> (a) be added as a party to the proceedings for the purposes of costs only; and
>
> (b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further…"

37. The power to make a non-party costs order has been considered on several occasions by the Court of Appeal (including, notably, in *Symphony Group Plc v Hodgson* [1994] QB 179), but the leading authority is the decision of the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd & Ors (No. 2)* [2004] UKPC 39, [2004] 1

WLR 2807, where the principles to be applied were set out by the Board at [24-29], with a particular focus on the position of company directors:

> "24. What, then, are the principles by which the discretion to order costs to be paid by a non-party is to be exercised and, in the light of these principles, should the Board make the order here sought against Associated?
>
> 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 paragraph 40 of *Hamilton v Al Fayed* 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 *Knight* and Millett LJ's judgment in *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 WLR 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12 as "the defendants in all but name". Nor, indeed, is it necessary that the non-party be "the only real party" to the litigation in the sense explained in Knight, provided that he is "a real party in ... very important and critical respects" - see *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406,

referred to in *Kebaro* at pp 32-3, 35 and 37. Some reflection of this concept of "the real party" is to be found in CPR 25.13 (1) (f) which allows a security for costs order to be made where "the claimant is acting as a nominal claimant".

(4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests. Since this particular difficulty may be thought to lie at the heart of the present case, it would be helpful to examine it in the light of a number of statements taken from the authorities. First, Tompkins J's judgment in *Carborundum* at p765:

> "Where proceedings are initiated by and controlled by a person who, although not a party to the proceedings, has a direct personal financial interest in their result, such as a receiver or manager appointed by a secure creditor, a substantial unsecured creditor or a substantial shareholder, it would rarely be just for such a person pursuing his own interests, to be able to do so with no risk to himself should the proceedings fail or be discontinued. That will be so whether or not the person is acting improperly or fraudulently. In many cases a major consideration will be the reason for the non-party causing a party, normally but not always an insolvent company, to bring or defend the proceedings. If a non-party does so for his own financial benefit, either to gain the fruits of the litigation or to preserve assets in which the person has an interest, it may, depending upon the circumstances, be appropriate to make an order for costs against that person. The relevant factors will include the financial position of the party through whom these proceedings are brought or defended and the likelihood of it being able to meet any order of costs, the degree of possible benefit to the non-party and whether, in all the circumstances, the bringing or defending of the claim - although in the end unsuccessful - was a reasonable course to adopt. The directors of a company may frequently be in a position different from other non-parties with a direct financial interest in promoting or defending proceedings. Even where a company is in receivership, directors may have a duty to prosecute or defend a claim through the company in the interests of creditors other than the creditor that had appointed the receiver, or in the interests of the shareholders. Other creditors and shareholders are entitled to expect that those responsible for the management of the company will use all proper endeavours to ensure that their financial interests are protected or that there is a fund out of which such creditors can be paid ..."

26. In a more recent case in the High Court of New Zealand, *Arklow Investments Ltd v MacLean* (unreported, 19 May 2000), Fisher J said:

> "19. The guiding principle here is that costs orders against third parties are exceptional but that they are warranted in cases where there would otherwise be a situation in which a person could fund litigation in order to pursue his or her own interests and without risk to himself or herself should the proceedings fail or be discontinued.
>
> 20. ... [W]here a person is a major shareholder and dominant director in a company which brings proceedings, that alone will not justify a third party costs order. Something additional is normally warranted as a matter of discretion. The critical element will often be a fresh injection of capital for the known purpose of funding litigation.
>
> 21. ... [T]he overall rationale [is] that it is wrong to allow someone to fund litigation in the hope of gaining a benefit without a corresponding risk that that person will share in the costs of the proceedings if they ultimately fail."

27. In the High Court of Australia in *Knight*, Mason CJ and Deane J at p595 said this:

> "For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. The category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."

28. The final judgment from which their Lordships would cite in this connection is that of Millett LJ in *Metalloy Supplies* already referred to, at p424-425:

> "[An order] may be made in a wide variety of circumstances where the third party is considered to be the real party interested in the outcome of the suit ... It is not, however, sufficient to render a director liable for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are brought bona fide and for the benefit of the company, the company is the real plaintiff. If in such a case an order for costs could be made against a director in the absence of some impropriety or bad faith on his part, the doctrine of the separate liability of the company would be eroded and the principle that such orders should be exceptional would be nullified.

> The position of a liquidator is a fortiori. Where a limited company is in insolvent liquidation, the liquidator is under a statutory duty to collect in its assets. This may require him to bring proceedings. ... If he brings the proceedings in the name of the company, the company is the real plaintiff and he is not. He is under no obligation to the defendant to protect his interests by ensuring that he has sufficient funds in hand to pay their costs as well as his own if the proceedings fail."
>
> 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."

38. Mr Aytacli referred me to the decision of His Honour Judge Paul Matthews, sitting as a Judge of the High Court, in *Housemaker Services Ltd & Another v Cole & Another* [2017] EWHC 924 (Ch). The learned Judge was there dealing with an application for a non-party costs order against the sole director of a limited company which was unable to pay the successful party's costs. He stated as follows:

> "**The law**
>
> 8. In the course of the submissions, I was referred to a number of decided cases, including *Aiden Shipping Co v Interbulk* [1986] AC 965, HL, *Symphony Group v Hodgson* [1994] QB 179, CA, *Gardiner v FX Music Ltd*, unreported, 27 March 2000, Ch D, *Barndeal v Richmond LBC* [2005] EWHC 1377 (QB), and *Deutsche Bank v Sebastian Holdings Inc* [2016] 4 WLR 17, CA. I have read them all. These decisions (and those cited within them) establish a number of relevant propositions, as follows.
>
> *Generally*
>
> 9. The court has jurisdiction to make an order that a nonparty pay the costs of litigation under section 51 of the Senior Courts Act 1981, and CPR rule 46.2. The court's jurisdiction is to be exercised on the basis of a judicial discretion. This means that it must be exercised justly. It is therefore very fact specific. But the procedure is summary in nature.
>
> 10. A decision to make a nonparty costs order is exceptional, but this only means that it is outside the ordinary run of cases. In a case where a nonparty funds and controls or benefits from proceedings, it is ordinarily just to make him pay the costs, if his side is unsuccessful, because the nonparty was gaining access to justice for himself, and thus can be regarded as the real party to the litigation.
>
> *Company directors*

> 11. However, the director of a limited company is in a special position. It is not an abuse of the process for a limited company with no assets to bring a claim in good faith. It is always open to a defendant to such a claim to apply for security for costs. The mere fact that a director who controls the company's litigation also funds the claim is not enough in the ordinary case to justify a nonparty costs order against him if the company's case fails.
>
> 12. A company is indeed owned by its members. But this does not mean that the shareholder is the "real" party to the claim. In law, the assets of the company (including any claim) belong to the company, and not to the members. Where the proceedings are brought in good faith and for the benefit of the company (rather than for some collateral purpose), the company is indeed the real claimant. If it were otherwise, the principle of the separate liability of the company from its members would be eroded.
>
> 13. Moreover, it is not an unusual thing, let alone wrong, that a director who is a shareholder of a company and who funds the company's claim will ultimately benefit from it if it is successful. It is simply a consequence of the policies adopted by our company law, allowing businessmen to take some risks in seeking profit without incurring unlimited liability. Subject to certain exceptions, such as the rules on wrongful trading, a director and shareholder can simply walk away from an insolvent company.
>
> 14. A person choosing to deal voluntarily with (or to sue) a limited liability company does so against that legal background. Any potential unfairness caused to a party who is (involuntarily) sued by such a company is remedied by the security for costs jurisdiction.
>
> 15. Accordingly, in order to make it just to order a director to pay the costs of unsuccessful company litigation, it is necessary to show something more. This might be, for example, that the claim is not made in good faith, or for the benefit of the company, or it might be that the claim has been improperly conducted by the director. So, for example, in both *Gardiner v FX Music Ltd* and *Deutsche Bank v Sebastian Holdings Inc*, a director of the unsuccessful corporate party was ordered to pay the costs to the successful party. But in each case the director had given false evidence and fabricated documents."

39. Mr Benson criticised this statement of the law on non-party costs order applications against company directors as inaccurate, in particular the reference in paragraph 15 to it being necessary to show "something more". He submitted that I should not apply it and that that it was inconsistent with the decision of the Privy Council in the *Dymocks* case. I reject Mr Benson's submissions on this point. I am not persuaded that the statement of the law by Judge Matthews was incorrect. In my judgment, the learned Judge was right, for the reasons that he gave, to say that "something more" is required in the case of a director and shareholder of a company who funds litigation by the company. In *Dymocks* itself, the Privy Council referred to a number of authorities from

several common law jurisdictions, including at [28] of its judgment to what had been said by Millett LJ in *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 WLR 1613, where the Lord Justice stated:

> "… It is not, however, sufficient to render a director liable for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are brought bona fide and for the benefit of the company, the company is the real plaintiff. If in such a case an order for costs could be made against a director in the absence of some impropriety or bad faith on his part, the doctrine of the separate liability of the company would be eroded and the principle that such orders should be exceptional would be nullified…"

40. If I may respectfully say so, I consider Judge Matthews' statement in the *Housemaker Services* case of the law regarding the making of non-party costs orders against company directors to be an accurate one, given what was said on the issue by the Court of Appeal in *Metalloy Supplies* and by the Privy Council in *Dymocks* at [29].

Discussion

41. Mr Benson submitted that it was clear that Mr Aytacli was the 'real party' to the litigation, on the basis that the criteria of control, funding and benefit were all satisfied, and that it was just to exercise the court's discretion to make a non-party costs order against him.

42. This litigation was conducted over a period of seven and a half years, between the claim being issued in February 2012 and judgment being given on the counterclaim in August 2019. Although Mr Aytacli was only a director of Organic Village for about two-thirds of that period, I do not consider that a distinction ought to be made in respect of the approach to be applied, in the circumstances of this case, between the periods when Mr Aytacli was and was not a director of Organic Village. That is particularly so given Mr Aytacli continued to be bound throughout by the security which he had given in respect of Organic Village's debts whilst he was a director, and because Organic Village was a small family-run business in whose affairs Mr Aytacli remained intimately involved throughout.

43. I accept Mr Benson's submission that Mr Aytacli controlled Organic Village, and the conduct of the litigation with Goknur, throughout. Mr Aytacli was the sole director of Organic Village until he resigned in October 2016. He made many witness statements on behalf of Organic Village, both before and after his resignation as a director, and was throughout the main witness in support of Organic Village's case. Prior to Hugh-Jones' involvement, he conducted the litigation himself on behalf of the company, involving lawyers only on an *ad hoc* basis. The statement of costs prepared on Organic Village's behalf indicates that he spent 402 hours working on the litigation prior to the instruction of Hugh-Jones. Although Mr Aytacli ceased to be a director of Organic Village, in my judgment he thereafter exercised a high degree of control over the conduct of the litigation, including giving instructions regarding the conduct of the litigation to Organic Village's solicitors. For example, on 8 August 2017, Hugh-Jones wrote to Ms Bilgin (who was by that time the sole director of Organic Village) stating that Mr Aytacli had "instructed" Hugh-Jones to object to an application that had been made by Goknur, and asking for her agreement. That Mr Aytacli was dealing with Organic Village's solicitors in this way and at this point in time demonstrates the degree

of control which he exercised despite no longer being a director. That he did so is, perhaps, unremarkable in circumstances where Organic Village was a small family company (and Ms Bilgin, who replaced him as director, was in full-time employment) and where Mr Aytacli remained personally responsible for Organic Village's debts. But the fact of control is, in my judgment, established on the evidence. Indeed, Mr Aytacli very frankly accepted that he had been in control of the litigation both before and after his resignation as a director and that his resignation as director of Organic Village had occurred because he understood that he would be unable to claim certain state benefits if he was registered as a company director.

44. I turn now to the question of funding. During his oral submissions, Mr Benson abandoned reliance on an argument that had previously been advanced, which was that Mr Aytacli had provided money to Organic Village which had the purpose or effect of enabling it to conduct the litigation against Goknur. Rather, Mr Benson was content to rely, as constituting funding of the litigation, on Mr Aytacli's personal guarantee of Organic Village's debts to Hugh-Jones and on his agreement to enter a charge against his property in respect of some of that debt. I accept that by providing security for Organic Village's indebtedness to its solicitors in this way, Mr Aytacli funded the conduct of the litigation by Organic Village. In my judgment, however, it is relevant when considering how the discretion should be exercised to take into account the manner in which litigation has been funded by the respondent to the non-party costs order. A director who provides substantial sums in cash to a company to enable it to pay its legal bills – or who pays the company's lawyers directly himself – clearly funds the litigation. That is not what Mr Aytacli did in this case; but a director who provides a guarantee or other security for the company's legal fees in the event of non-payment by the company may properly, in my judgment, be said to have funded the litigation for the purposes of a non-party costs order being made. The type and level of funding provided is, in my judgment, a matter relevant to the exercise of the discretion to make the order. So too is the fact that insofar as Mr Aytacli funded the litigation by providing security for the solicitors' fees, that funding only commenced approximately halfway through this lengthy piece of litigation.

45. As to whether the litigation was being conducted by Mr Aytacli for his own benefit, Mr Benson submitted that Mr Aytacli would have benefited from Organic Village being successful in the litigation and recovering substantial damages and costs, because his personal exposure for its various debts – including to its bank and its solicitors – would have been reduced or extinguished had Organic Village recovered from Goknur the substantial damages and legal costs which it was seeking. I have a little more difficulty with this argument than with Mr Benson's argument in relation to funding. Its premise is that because Mr Aytacli had guaranteed Organic Village's debts, then he would have benefited financially from the litigation even if he had never himself seen a penny of any of the money recovered from Goknur. If Organic Village had recovered substantial damages and costs then on this premise they would, in the first instance, have been applied to discharge its legal fees and its substantial indebtedness to third parties, such as its bankers. The beneficiary of such a successful conclusion would, in those circumstances, have been Organic Village because its (genuine) indebtedness to its creditors would have been reduced or extinguished by success in the litigation. In my judgment, it is not correct – and ignores the separate and primary liability of the company for its debts – to conclude that, in the circumstances of this case, proceedings were pursued solely or substantially for Mr Aytacli's own financial benefit, rather than for the benefit of Organic Village and its creditors. This case is, in my judgment, precisely the sort of situation referred to by Millett LJ in the passage from his judgment in the *Metalloy Supplies* case, which I have set out above.

46. Although he did not accept the need for there to be "something more" (as Judge Matthews put it in the *Housemaker Services* case) to justify the making of a non-party costs order, Mr Benson also relied in the alternative on what Mr Chamberlain QC had said in the Trial Judgment at [53], where he rejected part of the evidence given by Mr Aytacli as being "difficult to accept". That was evidence regarding there having been 832 emails in existence showing Mr Aytacli's attempts to mitigate certain of Organic Village's claimed losses. Those emails were never disclosed to Goknur and it was alleged at the trial that they had been accidentally destroyed. Mr Chamberlain QC stated that he did not accept Mr Aytacli's evidence about the existence of these emails and found, on the balance of probabilities, that they had not existed. However, on other matters Mr Aytacli's evidence at trial was accepted by the Deputy Judge (see e.g. the Trial Judgment at [31], where the Deputy Judge held that there was no reason to doubt Mr Aytacli's evidence regarding the ownership of, and his access to, the warehouses where the fruit juice was stored). There was no general finding that Mr Aytacli's evidence was untruthful or lacking in credibility and nor did the Deputy Judge uphold the general attack on Mr Aytacli's character and credibility made during the trial by Goknur, which relied on Mr Aytacli's imprisonment for contempt of court in 2003 (see the Trial Judgment at [30]) in support of its allegation that he had, in fact, watered down the fruit juice himself. I do not consider that the Deputy Judge's rejection of Mr Aytacli's evidence regarding the 832 emails amounts to a finding of impropriety or bad faith. It is not, in my judgment, sufficient to justify a non-party costs order being made. There is, additionally, no suggestion in the Trial Judgment that there was any impropriety or bad faith on the part of Organic Village or Mr Aytacli either in the defence of the claim, or in the prosecution of Organic Village's counterclaim. The Damages & Costs Judgment makes a number of findings against both Goknur and Organic Village regarding their conduct of the litigation, but those do not amount to findings of impropriety on the part of Mr Aytacli or, for that matter, Organic Village.

47. In my judgment, therefore, applying the principles set out in the authorities to which I have referred, this application for a non-party costs order should be refused. It would not be just to make a non-party costs order against Mr Aytacli in these the circumstances.

48. There is a further reason why, in my judgment, a non-party costs order should not be made in this case. That applies even if my analysis above is incorrect, insofar as it rejects certain of the arguments advanced by Goknur. It concerns both the nature of the costs being sought by Goknur, and the circumstances in which they have come to be sought from Mr Aytacli personally.

49. Prior to the making of Master McCloud's order on Goknur's application of 9 March 2020 and Organic Village's non-compliance with it, the position as regards the costs of the litigation was that Organic Village had an order that its costs of the claim should be paid by Goknur, which in turn had an order that one-quarter of its costs of the counterclaim should be paid by Organic Village. A good deal of analysis had gone into calculating Organic Village's costs of the claim, put at £269,000 odd, for the purpose of the hearings before Master Kay QC in the summer of 2018, to which I have already referred. On appeal, Foskett J upheld the Master's decision to base his calculation of the payment on account on the figures put forward on behalf of Organic Village. Had Organic Village been in a position to proceed with the detailed assessment of the costs of the claim that were due to it, then its bill would - subject, of course, to potential reduction on a standard basis assessment - have been for this amount. In my judgment, the costs lawyers employed by Hugh-Jones were correct to state following the conclusion of the trial that, as things then stood, it was highly probable that the overall outcome of the costs proceedings would be a payment from Goknur to Organic Village.

In those circumstances, it would in my judgment have been highly unlikely that Goknur would have succeeded with a non-party costs order application against Mr Aytacli; Goknur would, in all likelihood, have been making a substantial overall net payment of costs to Organic Village.

50. What changed the situation was the application made to Master McCloud and Organic Village's failure to comply with the order that she made by commencing the detailed assessment of the costs of the claim that were due to it. As a result, those costs were assessed at nil and Organic Village was ordered to return the interim payment that it had received. But the reason why Organic Village did not commence the detailed assessment of its own costs was that it was unable to fund the instruction of costs lawyers, in circumstances where its solicitors had ceased to act. Thus although Organic Village's costs of the claim have now been disallowed, the reason for that is its lack of resources to fund the detailed assessment process which Goknur had, by rejecting the idea of negotiating based on anything other than formal Bills of Costs, required it to undertake.

51. In my judgment, to order Mr Aytacli to pay either or both of the sums now sought by Goknur, because of a situation which has resulted from Organic Village's inability to fund the detailed assessment of its own costs, would be to ignore the reality of this litigation, in which Goknur would (but for Organic Village's impecuniosity and inability to fund the costs of a detailed assessment) have been making a substantial overall net payment of costs to Organic Village. Whilst as between Goknur and Organic Village the position is now governed by the orders that have been made by Master McCloud, I do not consider that I am prevented from taking the wider context into account when determining the separate non-party costs application against Mr Aytacli. To make Mr Aytacli personally liable under a non-party costs order in these circumstances would, in my judgment, result in an unjust outcome for this separate and additional reason.

52. I should also refer to another matter which was addressed during the hearing, albeit it is unnecessary for me to decide the issue given the other reasons why this application fails. In his oral submissions, Mr Benson initially sought to reserve Goknur's position with regard to a possible future claim against Hugh-Jones for the return of the £185,300 paid to them on account of Organic Village's costs. After considering the position over the short adjournment, however, Mr Benson submitted that Goknur was content to proceed with the application against Mr Aytacli on the basis that no such claim against Hugh-Jones was capable of being made. No authority had been cited to me on the issue of in what circumstances (if any), a litigant's solicitors in receipt of a payment on account of costs made by the other party to the litigation might be required to return some or all of any overpayment directly to the other party, rather than the liability to repay falling on their client. I therefore gave the parties permission to make brief further written submissions about the law on this point which might, had I otherwise been minded to make a non-party costs order against Mr Aytacli, have been decisive on the issue of whether or not Mr Aytacli should be ordered to pay the £185,300 to Goknur. Mr Benson made further written submissions on behalf of Goknur; neither of the Defendants made any further submissions.

53. Mr Benson, in his further submissions, argued that any right which Goknur might have to recover directly from Hugh-Jones the money that had been paid on account of Organic Village's costs was at best uncertain and that, even if there was a mechanism by which this could be achieved, the solicitors might have potential defences to such a claim. Mr Benson very properly drew my attention to the decision of Swift J in *AB & Others v British Coal Corporation* [2007] EWHC 1948 (QB). In *AB*, a successful

appeal resulted in the redetermination of the amount of costs due to the claimants' solicitors which meant that £74 million in costs had been overpaid to them by the Department for Business, Enterprise & Regulatory Reform. It was, apparently, agreed between the parties that the overpayment could be set off by the solicitors against future costs payable or alternatively that it would be returned directly to the Department by the solicitors (see at [6-8] and [11-12] of Swift J's judgment). Mr Benson correctly pointed out that the issue before Swift J was not, therefore, whether the solicitors were liable to repay the overpayments directly to the Department in the first place, but whether or not interest was payable, in addition to the principal sums that had been overpaid. Mr Benson also drew my attention to the commentary on Swift J's decision in Chapter 26 of *Goff and Jones: The Law of Unjust Enrichment* (9th Edition, 2016). It is not, however, necessary – and nor would it be desirable, because I have not heard anything approaching full argument on the issue – for me to consider any further what, if any, claim Goknur might have against Hugh-Jones for the return of the £185,300 paid to that firm on account of the costs which have now been disallowed following Master McCloud's order. Even taking the position in this respect at its most favourable to Goknur for present purposes, i.e. that such a claim is not open to Goknur and its right to recover the £185,300 paid on account is against Organic Village only, the application for a non-party costs order against Mr Aytacli falls to be dismissed for the other reasons given above.

Conclusion

53. Goknur's application for a non-party costs order to be made against Mr Aytacli is dismissed.