Neutral Citation Number: [2021] EWCA Civ 1242

Case No: A3/2020/1191

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
BUSINESS LIST (ChD)
HHJ Simon Barker QC sitting as a Judge of the High Court

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 August 2021

Before :

LORD JUSTICE BEAN
LORD JUSTICE NUGEE
and
SIR STEPHEN IRWIN

- -

Between :

HEATHFIELD INTERNATIONAL LLC	**Claimant and Respondent**
- and -	
(1) AXIOM STONE (LONDON) LTD	**Defendant and Appellant**
(2) MEDECALL LTD	**Defendant**

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- -

Mr Gideon Roseman (instructed by **Axiom Stone Solicitors**) for **the Appellant**
Mr Martin Budworth (instructed by **The Wilkes Partnership Solicitors**) for **the Respondent**

Hearing date: 15 July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by e-mail, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 16 August 2021

Lord Justice Nugee:

Introduction

1. In this action the Claimant, Heathfield International LLC, (**"Heathfield"**) claims various sums said to be due on invoices from one or other of the Defendants for the provision of medical reports for use in litigation. The 1st Defendant, Axiom Stone (London) Ltd (**"ASLL"**) defends the claim on the basis that it was the 2nd Defendant, Medecall Ltd (**"Medecall"**) that was the contracting party rather than ASLL.

2. Heathfield is a Delaware company. On this and other grounds ASLL applied for security for costs. The application was heard by HHJ Simon Barker QC sitting as a Judge of the High Court (**"the Judge"**) on 26 June 2020. He gave an oral judgment the same day (**"the Judgment" or "Jmt"**). He refused the application, primarily because he did not understand how or why ASLL's defence was being funded.

3. ASLL sought permission to appeal on a number of grounds. By Order dated 17 February 2021 I refused permission save for a single ground, namely that the Judge erred in taking into account the funding position of ASLL. Heathfield filed a Respondent's notice seeking to uphold the Judge's decision on alternative grounds.

4. We first heard Mr Gideon Roseman, who appeared for ASLL, in support of its appeal. Having done so we decided that we did not need to hear Mr Martin Budworth, who appeared for Heathfield, or any argument on the Respondent's notice, and we announced our decision that the appeal should be dismissed.

5. In this judgment I give my reasons for agreeing to this course.

Facts

6. ASLL is an English company. It formerly operated a solicitors' practice under the trading name Quality Solicitors Axiom Stone, but it has ceased practising and is now dormant. Its practice included personal injury claims.

7. Heathfield's case, as set out in the Particulars of Claim, can be shortly stated, as follows:

    (1) Heathfield claims as the assignee of Quantum Medical Ltd (**"Quantum"**), a company which provided medical reports for use in the assessment of personal injury claims arising out of road traffic accidents.

    (2) By a written contract dated 1 March 2012 made between ASLL and Quantum, ASLL instructed Quantum to provide it with medical reports on an ongoing basis at agreed rates.

    (3) By the terms of that contract payment was due within 10 days of the case being settled or 12 months after invoice, whichever was the earliest.

    (4) Quantum thereafter provided reports to ASLL. The claim relates to a large number of reports provided by Quantum between 2012 and early 2014 which ASLL did not pay for. The total principal sum claimed is over £250,000, and

there are also claims for interest (pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 or section 35A of the Senior Courts Act 1981).

(5) In July 2018 Quantum assigned its claims to Heathfield.

8. ASLL's case, as set out in its Defence, can also be shortly summarised:

(1) ASLL never contracted with Quantum. The written contract relied on is a fraudulent contract, and the ostensible signature of ASLL's director which appears on it is a forgery.

(2) The true contractual arrangements were as follows. ASLL engaged Medecall to provide or obtain medical reports for its clients who had personal injury claims. Medecall would either provide a report itself or obtain one from a third party such as Quantum.

(3) It was Medecall who instructed Quantum to provide medical reports for its professional clients such as ASLL, and it was Medecall who was liable to Quantum for its charges.

9. Heathfield issued its claim form on 6 August 2018 and served it on 1 November 2018. Its claim is primarily advanced against ASLL, with a further or alternative claim against Medecall.

10. By application notice dated 2 January 2020 ASLL applied for security for costs. The grounds on which it did so were that Heathfield was based in Delaware; that there was no financial information about it available; and that there was no apparent reason why the claims had been assigned to it, the inference being that this was done to avoid adverse costs orders.

11. By further application notice dated 2 June 2020, ASLL applied for summary judgment on the claim or for the claim to be struck out.

12. The adjourned Costs and Case Management Conference was listed for 26 June 2020. By e-mail from the Judge's clerk dated 24 June 2020 the Judge made it clear to the parties that he would not be hearing the summary judgment application at that hearing. He did however both deal with costs budgeting and hear ASLL's application for security. He dismissed the application for reasons given in the Judgment.

The Judgment

13. We have not seen an approved transcript of the Judgment, but we have a note of it agreed by counsel. There is no reason to think that this is not accurate.

14. The Judgment is quite short. At [3] the Judge said that he was not satisfied to accept that the word of any lay party was close to reliable, and at [4] that he approached the underlying facts and evidence with a degree of caution. I add here that the parties have each accused the other of various acts of impropriety. Heathfield, by its director Mr Nishad Nijamali, has said that ASLL's position (at any rate in pre-action correspondence – this forms no part of their pleaded Defence) was that payment was only due on successful cases, something that Mr Nijamali suggested was improper, contrary to the requirements of the CPR, and either close to, or actually constituting,

an illegal act. ASLL for its part has raised a number of concerns about Mr Nijamali, including the allegation that the written contract sued on was fraudulent, what were said to be attempts to alter company documents, and his association with Dr Abdul Choudhuri, the former director of Quantum, who in 2013 was convicted of theft and perverting the course of justice. These allegations are vigorously disputed on both sides. The Judge did not of course seek to resolve the rights and wrongs of them, but it is perhaps unsurprising that he expressed doubts about his ability to rely on either side's account.

15. At [5]-[6] he summarised the applicable rules. At [7] he referred to the grounds relied on by ASLL; he said that it was common ground that Heathfield was unable to pay and outside the jurisdiction, and that it appeared to be a nominal claimant in the sense that it was an assignee of the claim.

16. At [9]-[13] he considered various points on the merits of the substantive claim. He recognised that there were difficulties in the claim, but also that ASLL had ordered services which were provided by Quantum; his conclusion at [13] was that he was not in a position to find that the defence was so strong that there was a clear probability that the claim would fail, but that he was far from persuaded that it was bound to prevail either. It was the kind of case where the outcome might go either way.

17. He continued:

> "14. What is really surprising is that [ASLL], which is being sued, is a dormant company with negligible assets, which has filed non-trading accounts [and] is being pursued for a reasonably substantial sum of money.
>
> 15. That raises two questions: how is [ASLL] funding its defence which is being advanced strongly and are the costs those of [ASLL] actually being incurred? Mr Roseman's answer, rightly, [is that] the costs are its costs as the solicitors for [ASLL] have said that the costs are those it needs to pay. Who is getting the benefit of the security if it is to be given?
>
> 16. Looking at whether security should be given, it is not [ASLL] who on the face of it is funding its defence."

At [17] he considered and rejected a submission by Heathfield that an order would stifle the claim; Mr Nijamali had given no details of his own circumstances, and all he said was that Heathfield was not in a position to give security. But he was still in a position to pay substantial sums on an ongoing basis as was shown by the costs budget. He continued:

> "18. [Heathfield] is also running multiple claims, at least 5 other claims on a similar basis. I conclude I have not been given an adequate insight by either party how they are really at risk in relation to its own costs. That weighs heavily on this application."

Then after referring to the amounts at stake, he expressed his conclusion as follows:

> "21. The conclusion on the burden of costs lies where it falls on each party's account. I do not have an adequate understanding of the funding of the litigation. It is baffling to me why, on the one hand, [ASLL], not having any assets and which is not trading, why a company with no assets should bother defending at all. The appropriate order is to decline an order for security for costs.
>
> 22. Having said that, if the application for summary judgment fails, there may be further evidence about funding arrangements and this judgment will not stand in the way of security for costs."

18. By his Order dated 19 June 2020 he therefore dismissed the application. He also refused permission to appeal, giving quite full reasons in the N460 form. These were as follows:

> "Grounds: Error of law to take into account D1's failure to set out its funding arrangements; this is not a relevant consideration.
>
> It was common ground that the conditions at CPR 25.13(2)(a) and (c) are met. The application turned on whether, having regard to all the circumstances, it would be just to order security. D1 has filed consecutive accounts as a non-trading company with assets of only £1.1k. Its costs budget is in the order of £200k. D1 has recently issued a summary judgment application (not yet listed). The costs incurred and budgeted to the point when that application is likely to be heard are £70k. That is a significant sum for a non-trading impecunious company. On the other hand it is common ground that C is an impecunious Delaware corporation. C is nevertheless funding this and 5 other similar actions. I am not confident that the factual witnesses are being candid in their evidence. The costs the subject of an application must be D1's costs (CPR 25.12(1) – "his costs of the proceedings") and D1's solicitor has signed a statement that the costs in the budget are reasonable and proportionate for D1 to incur. When considering all the circumstances, including the balance of prejudice, it may be – and in this case is – relevant to consider the actual costs risks and consequences. It is unexplained and far from clear why an impecunious Delaware corporation is pursuing a claim against a non-trading marginally solvent English company; conversely, it is unclear why a marginally solvent non-trading English company is arranging to fund an expensive defence to a claim by an impecunious Delaware corporation. My view of the merits is that, although the claim is open to, and was the subject of, sustained detailed attack it is not unrealistic and I did not conclude that it probably will fail. The fact that the funding arrangements are unexplained, is, in the circumstances of this case, a relevant consideration."

19. On 17 February 2021 I granted ASLL permission to appeal, limited to the question whether it was relevant that ASLL was not funding its own defence.

The Court's power to order security

20. The procedure in relation to security for costs is governed by section II of CPR Part 25. The relevant rules are CPR r 25.12 and r 25.13 which, so far as material, read as follows:

> "**25.12 Security for costs**
>
> (1) A defendant to any claim may apply under this section of this Part for security for his costs of the proceedings.
>
> (Part 3 provides for the court to order payment of sums into court in other circumstances. Rule 20.3 provides for this section of this part to apply to Part 20 claims).
>
> (2) An application for security for costs must be supported by written evidence.
>
> (3) Where the court makes an order for security for costs, it will—
>
> (a) determine the amount of security; and
>
> (b) direct—
>
> (i) the manner in which; and
>
> (ii) the time within which
>
> the security must be given.
>
> **25.13 Conditions to be satisfied**
>
> (1) The court may make an order for security for costs under rule 25.12 if—
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b) (i) one or more of the conditions in paragraph (2) applies, or
>
> (ii) an enactment permits the court to require security for costs.
>
> (2) The conditions are—
>
> (a) the claimant is—
>
> (i) resident out of the jurisdiction; but
>
> (ii) not resident in a Brussels Contracting State, a State bound b y the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982;
>
> …

> (c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;
>
> …
>
> (f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;
>
> …"

21. The effect of CPR r 25.13 is clear and was not disputed. The Court has to be satisfied that one of the conditions in r 25.13(2) applies (or that there is a relevant statutory power). The conditions or gateways in r 25.13(2) are not questions for the Court's discretion: they are matters of fact on which the Court needs to be satisfied. In the present case it was common ground that the gateways in (a) and (c) were satisfied (and it appeared to the Judge that that in (f) was satisfied as well).

22. Once however the case has passed through one of the gateways, the question whether to order security is a matter for the Court's discretion, the Court being expressly required to consider whether it is just to do so having regard to all the circumstances of the case. The rule makes it clear that a defendant does not have a *right* to security on proof that the case passes through one or more gateways. That means that the challenge to the Judge's decision not to order security is a challenge to a case management decision made in the exercise of his discretion and on well-established principles it is therefore not for an appellate court to disturb the decision unless the Judge has erred in principle.

Point of general principle?

23. Mr Roseman opened his submissions by suggesting that the appeal raised a point of general importance. There was now, he said, High Court authority for the proposition that a defendant who could not afford to fund his own defence could be refused security on that ground alone. This was a point he returned to at various points in his argument, suggesting that this decision would lead to a significant change in practice, with claimants routinely trawling through information about company defendants and demanding to know how impecunious defendants were funding their defence. There was, he said, no general requirement for defendants to set out how they were funding their defence, and a decision that defendants were unable to obtain security unless they provided full details of how they were funding their defence would have a chilling effect, deterring such defendants from making an application for security, and potentially leading to satellite litigation.

24. As can be seen this submission is all premised on the Judge having intended to lay down a general principle debarring defendants from obtaining security unless they provided details of their funding. But I do not think the Judge was doing any such thing, and I do not think he was enunciating any principle of general application. I read his Judgment as firmly grounded in the particular features of this case.

25. As the reasons given by the Judge in the N460 form show, there were a number of things about the case that he thought unusual. He could form no clear idea about the underlying facts and the merits of the claim, as he regarded the evidence (on both sides) as unreliable. Mr Roseman said it was unfair on his client to tar it with the same brush as Mr Nijamali, but the Judge evidently thought that there were features of its case that were unexplained. That seems to me a judgment that he was fully entitled to make: on ASLL's own case, it regularly ordered medical reports for the benefit of its clients bringing personal injury claims; those reports were provided by Quantum; those services, as the Judge said *"were not provided charitably"*; but ASLL nevertheless disclaimed any responsibility for paying for them. That is, to say the least, an unusual arrangement. There was also the contention that ASLL had suggested in pre-trial correspondence that Quantum would only be paid if the claims succeeded. Mr Roseman disputed that that had ever been ASLL's position, but this was certainly asserted by Heathfield, and without getting into the details, there does seem to me to have been material which on one view could be said to support it.

26. Then there was the complete lack of explanation on both sides as to what was really going on and why the litigation was being fought at all. So far as Heathfield was concerned, it must have been funded to bring this action (and several others), but there was no explanation why it was pursuing ASLL which had no assets. Claimants, as Bean LJ remarked in argument, do not usually bring claims against companies with no assets. And if they do, defendants do not usually defend them. In the present case ASLL was a dormant company with no more than £1100 on its balance sheet, and there was no explanation why it was defending the action at all. Mr Roseman said there might be a great number of reasons why directors and shareholders of a dormant company might wish to fund its defence. So there might, but the Judge thought, with good reason, that he had been given no explanation as to what they might be in this case.

27. Then there was the question of who was really bearing the risks of the litigation. Mr Roseman said that, at the hearing, the Judge himself had raised the question of the indemnity principle, but it was then accepted that ASLL was genuinely incurring a liability to its solicitors. In those circumstances, he said, what mattered was that ASLL was in fact incurring that liability in order to fund its defence; it did not matter *how* ASLL was funding that liability, whether by means of an ATE insurer, or by borrowing from a bank, or by another third party lending, or giving, money to it. But that I think does not fully answer the point. We know that at the point at which it was sued, ASLL had no more than £1100 in assets. Yet it is proposing to incur something like £200,000 in defending the action. It can only be risking £1100 of its own money in doing so for the simple reason that it does not have any more than that. Once it has spent the £1100, any further liability it incurs must be at someone else's risk, either at the risk of whoever is lending it money or otherwise funding the litigation, or at the risk of its solicitors, or indeed both. That to my mind justified the Judge's conclusion (Jmt at [18]) that he had not been given an adequate insight by ASLL (or for that matter by Heathfield) as to how it was really at risk in relation to its own costs.

28. In those circumstances the Judge was not I think seeking to lay down any general principle that defendants should routinely disclose the source of their funding on applications for security. I read his judgment as no more than an exercise of his discretion on the particular facts of this case where, as Bean LJ said, everything was

rather mysterious. Unless he was obliged to ignore the question of funding entirely, that was a decision that was open to him.

Was the question of funding irrelevant?

29. So the question is whether it was in principle irrelevant that the Judge had no information about ASLL's funding. Mr Roseman said that it was. He referred us to *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 2 BCLC 395 (***"Keary"***) at 396 per Peter Gibson LJ where he said (citing Bingham LJ in *Kloeckner & Co AG v Gatoil Overseas Inc* (unreported 16th March 1990)) that the system of justice which prevails in this country is founded on the premise that the interests of justice are ordinarily best served if successful litigants recoup the costs of their litigation, or the bulk of those costs, and unsuccessful litigants pay them; that being the fundamental approach, it was not surprising that the question arose as to what should be done, if it appeared that a defendant, if successful, would not be able to enforce an order for costs in his favour against the plaintiff, and the answer, although not a comprehensive one, lay in the power of the Court to grant security. Mr Roseman submitted that the general principle underlying the grant of security was therefore the risk of injustice to the defendant, and on that question the fact that the defendant was unable to fund his defence himself, or the means he adopted to fund his defence, was irrelevant. There was no hint in any of the notes in the White Book (*Civil Procedure 2021*) that these were relevant considerations and it was, he suggested, impossible to see how that made any difference. He further submitted that the Judge was wrong to equate the position of the claimant and the defendant: a claimant always has a choice whether to sue or not, but a defendant who is sued has no choice in the matter. That is why only defendants (or those in the position of defendants) can apply for security.

30. I accept that the general principle underlying the grant of security is that articulated by Peter Gibson LJ in *Keary*. I also accept that there is a real difference between the position of claimants, for whom issuing proceedings is always a voluntary act, and defendants, for whom being sued is not. Nevertheless, I do not think it follows that the matters taken into by the Judge here are always irrelevant. For reasons that I have already given, the Judge unsurprisingly thought this was very far from an ordinary case; in particular he could not understand who really stood to win or lose from the substantial costs being incurred on both sides. That was not just a question of how ASLL was funding its defence; it was a more fundamental question of why either side was litigating at all. Some litigation is not primarily about money but litigation of the present type, which on the face of it is solely about money, is usually conducted along commercial lines, and parties only spend the large sums of money that they do for sound commercial reasons. Where the Judge could not understand why either side was proposing to spend large sums on litigation that appeared both futile to bring and senseless to defend, I see nothing wrong in his concluding that he did not have any insight into who was really bearing the costs risks and why. The fact that he had no information at all about who was funding ASLL and on what terms and for what purpose, was in my judgment something that he was in those circumstances entitled to regard as relevant.

31. Nor do I think that he was wrong to consider the position of Heathfield as claimant as well as that of ASLL as defendant. It is true that the purpose of ordering security is to guard against the risk of injustice to the defendant; but it cannot be said to be irrelevant to consider the impact of the order on the claimant as well, as what is just

requires justice to both parties. Just as the Judge could not really understand who was bearing the costs risks on the defendant's side or why, equally he could not understand who was bearing them on Heathfield's side or why: that was relevant to the suggestion that the claim would be stifled by an order for security.

32. By CPR r 25.13(1)(a) the Judge could only make an order for security if satisfied that it was just to do so *"having regard to all the circumstances of the case"*. Since the mystery as to what was really going on (including the mystery as to the funding of ASLL) was one of the circumstances of the case, it seems difficult to say that he should have ignored it as irrelevant; and once he was entitled to take all this into account, I do not think he can be criticised for deciding in the particular circumstances of this case to give weight to it and for concluding that he was not satisfied that it was just to order security.

33. That does not mean, as I have already sought to explain, that the means by which a defendant is funding a defence will inevitably be a decisive factor, or even one that should be given any particular weight at all. For example, Mr Roseman said that no logical distinction could be drawn between a corporate defendant such as ASLL and an individual defendant, and, on the basis of the Judgment, the latter could be obliged to disclose details of his funding. But I do not think this necessarily follows: there is usually nothing mysterious about an individual defending a claim that he cannot afford to meet as the alternative is that the claim will be undefended and judgment will be entered, which might well lead to his bankruptcy, something which not only still carries a stigma but also has practical consequences. That seems to me a very different type of case from that of a dormant company with no assets of any substance such as ASLL where there is no obvious reason for the corporate defendant, or for anyone else, to fund the defence at all.

34. For the reasons I have given, the Judge was in my judgment entitled to have regard to the matters he did, including the lack of information as to ASLL's funding, and there is no basis for this Court to interfere with the exercise of his discretion. Those were the reasons why I agreed that this appeal should be dismissed.

Sir Stephen Irwin:

35. I agree.

Lord Justice Bean:

36. I also agree.