Neutral Citation Number: [2021] EWHC 1404 (Ch)

Case No: CH-2019-000208

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS
CHANCERY APPEALS (ChD)

IN THE MATTER OF MOISES GERTNER
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Friday 21st May 2021

Before :

MR JUSTICE MARCUS SMITH

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Between :

LASER TRUST	**Appellant/ Applicant**
- and -	
CFL FINANCE LIMITED	**Respondent**
- and -	
COLOSSEUM CONSULTING LIMITED	**Additional Party for Costs Only**

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FELICITY TOUBE QC, and **ROBERT AMEY** (instructed by **Stephenson Harwood LLP**) for the **Appellant/Applicant**

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Approved Judgment

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MR JUSTICE MARCUS SMITH:

1. I have before me an application by Laser Trust for a third party costs order against Colosseum Consulting Limited (**Colosseum**). Laser Trust has the benefit of three separate costs orders against CFL Finance Limited (**CFL**). Over £330,000, plus interest, remains outstanding (some £100,000 having been paid), and CFL's statutory accounts, as well as its stated position in correspondence and evidence served in the underlying proceedings, make it clear that CFL lacks the funds to satisfy the balance.

2. CFL's participation in this litigation was always known by me, the trial judge, to have been funded by a third party. It is now known that that third party is Colosseum. I have been shown the arrangements pursuant to which Colosseum funded CFL's participation in this litigation.

3. In her very full written submissions, which I draw upon, Ms Toube QC contended that it was clear from the terms of that funding arrangement that Colosseum had "absolute control" over the conduct of the litigation by CFL. It is certainly control of an extraordinarily high order. As a result, there is an application by Laser Trust, before me, for a third party costs order pursuant to CPR 46.2 against Colosseum.

4. It is significant, and worth putting on the record, that on the same day that this application was served on Colosseum, Colosseum's sole director resolved to place Colosseum into voluntary liquidation. I stress that it is voluntary liquidation; for that reason there is no moratorium on this application and the application proceeds as normal.

5. It remains to be seen, of course, if I make the order for a third party costs order, what the fruits of that will be, but that is not really a matter for my consideration.

6. I have had very full written and oral submissions from Ms Toube. I have read and listened to them very carefully. I have also read, and taken full account of, the two witness statements in support of the application, from Mr. Cahn, that is to say his third and his fourth witness statements.

7. I have been taken through the funding agreement and the various items of correspondence that have taken place between the parties interested in this application.

8. The law regarding applications such as this is very fully set out in paragraphs 19*ff* of Ms. Toube's skeleton on behalf of Laser Trust. Essentially, and drawing very much on the written submissions that I have seen, the Senior Courts Act provides that the court has full power to determine by whom, and to what extent, costs shall be paid. Section 51 of that Act provides that third party costs orders, as we know them, can be made.

9. Of course, orders against non-parties are exceptional, in the sense that it is outside the ordinary run of cases for non-parties to be required to pay the costs of parties. But at the end of the day, this is a fact-specific jurisdiction and one must have a look at the specific facts in each case.

10. Generally speaking, the discretion to order a non-party to pay costs will not be exercised against pure funders. However, the jurisdiction can, and will, be exercised against those persons who go beyond the mere funding of litigation. In this case, it seems to me, that that test has been clearly exceeded. There is, as I indicated at the outset, through the funding agreement, a considerable degree of control over the litigation between Laser Trust and CFL by Colosseum, which I have been shown, and which I will not read into the record. Suffice it to say that it is quite clear that under the terms of the funding agreement, the control that Colosseum had was massive. It may not quite be the absolute control that Ms. Toube contends for, but it is very close to that.

11. The extent to which that power was in fact exercised is something on which I have rather less information. It seems to me that Laser Trust, having through its solicitors made enquiry of both Colosseum and CFL as to the extent to which Colosseum ran the show, have not been given a completely full and frank answer.

12. I do not criticise either Colosseum or CFL for that failure to provide a full picture, but it seems to me that if the natural inference of the terms of the funding agreement between Colosseum and CFL – namely extreme control by Colosseum – is to be gainsaid, then a very high degree of frankness is to be observed by Colosseum and/or CFL. That has not happened. It seems to me that I must treat the funding agreement as saying what it says and, reading the funding agreement in that light, it seems to me that the test for imposing a third party costs order has absolutely been met in this case.

13. It seems to me, therefore, that a third party costs order ought to be made in this case, and ought to be made without reference to the cap which can be said to apply, that is to say to limit the costs order to those costs which have actually been paid by the funder.

14. It seems to me that the nature of the interest of Colosseum in these proceedings was so great that the so-called *Arkin*-cap (*Arkin v. Borchard Lines Ltd*, [2005] 1 WLR 3055 at [41]) should not apply. It seems to me, therefore, that it is entirely appropriate that, in this case, I exercise the jurisdiction to order Colosseum to pay costs in the amounts that have already been assessed, without requiring the costs to be re-assessed. It seems to me that the orders of costs that have been made, and the manner in which costs have been determined against CFL, afford Colosseum all the protection that it deserves in terms of the amount of costs that I am going to order it to pay.

15. Accordingly, I am minded to oblige Colosseum, by way of third party costs order, to pay the costs that have already been ordered against CFL, and that is the conclusion that I have reached.

There followed a discussion on costs, please see separate transcript.

16. As a rider to the judgment that I have just given, I indicated that there was one matter of costs that was at large, my being happy about the assessment of the three costs orders which are incorporated in the draft order that I have just been taken through. The costs set out as a grand total in the summary costs schedule before me come to some £89,500, just under that, which Ms. Toube recognises is high, and so it is.

17. I entirely accept that the matter is a difficult one, in the sense that third party costs orders are not made every day and do have to be justified, and justified with some care. I have derived considerable benefit, as is clear from my judgment just given, from the written submissions of Ms Toube and she has, quite rightly, with her junior, ensured that I have a completely balanced view of the law in this area, so that I could, with confidence, make the order and the ruling that I did in the absence of Colosseum, and it seems to me that there are costs involved in that which properly ought to be recoverable.

18. Equally, this is not your run-of-the-mill third party costs order. There have been complications. The details of the arrangement have had to be extracted from CFL and Colosseum so that I can see, for instance, the funding agreement that is, in this case, so significant. Furthermore, there have been complexities because of the voluntary liquidation of Colosseum, and all of these will have caused costs to increase.

19. Nevertheless, I do think I must apply a proportionate brush to the costs and, without in any way going into the detail of the summary schedule, and certainly I am not being encouraged to send this off for detailed assessment, and I am not going to, I am going to make a summary assessment of costs in the amount of £50,000. I have shaved about £30,000 off and, frankly, I do that in a fairly arbitrary way, because one has to have a look at the proportionate relationship between the application and the costs and that is the best I can do with the data that I have. That is the order that I make for recovery of costs in this case.

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