Neutral Citation Number: [2022] EWHC 1416 (Ch)

Case No: CR-2022-BRS-000042

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
INSOLVENCY AND COMPANIES LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 15 June 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

RUSHBROOKE UK LTD	**Applicant**
- and -	
4 DESIGNS CONCEPT LTD	**Respondent**

- -
- -

Charlie Newington-Bridges (instructed by **Neath Raisbeck Golding Law**) for the **Applicant**
John Churchill (instructed by **Temple Bright LLP**) for the **Respondent**

Applications dealt with on paper

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on Wednesday 15 June 2022.

HHJ Paul Matthews :

Introduction

1. On 9 May 2022 I heard the claimant company's application (by notice dated 20 April 2022) for an injunction to restrain presentation of a winding-up petition. On 13 May 2022, I handed down judgment in this matter, giving my reasons for striking out the application. This was on the basis that one of the only two directors of the company, Mr Mark Steventon-Smith, had no authority on his own to make or give instructions to make the application on the company's behalf: see [2022] EWHC 1110 (Ch). I invited written submissions on consequential matters, and received those from both sides on 13 May 2022 (primary submissions) and 16 May 2022 (responsive submissions).

2. A primary submission from the respondent was that the applicant's solicitors, Neath Raisbeck Golding Law ("NRG"), should show cause why they should not be ordered to be jointly liable with the company (and Mr Steventon-Smith) for the wasted costs of the application of 20 April 2022. The responsive submission of the applicant suggested that the solicitors should file their evidence by the 30 May 2022, and that the respondent should file any evidence in answer by 7 June 2022. I therefore gave directions (albeit with slightly different dates), and duly received such written evidence. Having considered it, I decided that the most appropriate way to deal with the wasted costs issue was to invite written submissions from the parties and from NRG on that issue. So that matter will be dealt with in a separate judgment. The present ruling deals with all the other costs-related issues. The delay in producing it was due to other more urgent work which in the circumstances had to take priority. Nevertheless, I am sorry for the delay.

The rival positions

3. The successful respondent seeks two costs orders. The first is an order that the applicant company and Mr Steventon-Smith jointly and severally pay the respondent's costs. The basis for this form of order is said to be either (i) the applicant is liable to pay the respondent's costs under the general rule in CPR rule 44.2(2)(a), and Mr Steventon-Smith is liable to indemnify the applicant, so he should pay the respondent directly, or (ii) Mr Steventon-Smith should be made liable for the costs as a non-party, because he is the real party to the litigation. The second order sought is one that the applicant's solicitors NRG should be jointly liable to pay the wasted costs of the application.

4. So far as concerns the quantum of costs, the respondent has submitted both an original and an updated costs schedule. The second schedule covers the additional work undertaken between the filing of the original schedule and the hearing itself, as well as additional work undertaken following the hearing, including the primary written submissions. The original schedule gives a total of £3425 plus VAT of £685, making £4110, and the updated a figure of £4065, plus VAT of £813, making £4878. The total of the two schedules therefore is £8988, including VAT.

5. The applicant accepts that the application has been struck out by the court, and that costs should follow the event. However, the applicant challenges the updated costs schedule on the grounds that it was filed and served after the hearing, instead of 24

hours before. It also challenges the quantum of the costs sought. I will come back to these challenges. In addition, by its responsive submissions, the applicant argues that it is not an appropriate case for Mr Steventon-Smith to be made liable as a non-party, both on procedural and on merits grounds. The applicant says that Mr Steventon-Smith has not been added as a party to the proceedings pursuant to CPR rule 46.2, and that the applicant company, rather than he, was the real party to the litigation. Mr Steventon-Smith himself has not filed or served any written submissions.

6. The respondent by its responsive submissions says that, since both costs schedules have been filed with sufficient time for the applicant to respond to them, there is no prejudice to it, and therefore both schedules should be taken into account. It also asks for its costs to be assessed on the indemnity rather than standard basis. In any event, however, the court should not feel bound to apply the costs guideline hourly rates. It also says that Mr Steventon-Smith was forewarned of an application under rule 46.2 in the respondent's skeleton argument for 9 May 2022, and indeed filed a witness statement after that skeleton was filed. Accordingly it says that no further period should be given to enable Mr Steventon-Smith to file written submissions.

The basis of assessment of costs

7. I deal first with the basis of assessment of costs. The respondent seeks an award of costs on the indemnity basis, by reason of what are called "the principles outlined in *Smith v Butler* [2012] EWCA Civ 314 [40]-[47]". I discussed this case in my substantive judgment on this application. There I said this about it:

> "40. … This case concerned the affairs of the company, Contact Holdings Ltd. This was in substance a dispute between the two shareholders, Mr Smith, with 68.8% of the shares, and Mr Butler, with 31.2% of the shares. They were both directors, along with a third person, Mr Harris, the finance director. In addition, Mr Smith was the chairman of the board, and Mr Butler was the managing director of the company. Mr Butler was concerned about allegations that Mr Smith had utilised his company credit card for the payment of personal expenses amounting to £78,000.
>
> 41. Having consulted Mr Harris, who agreed with him, Mr Butler took it upon himself on 1 July 2011, without the benefit of a resolution of the Board of Directors, to suspend Mr Smith from office and to exclude him from the company's premises. Mr Smith served on the company requisition for the convening and holding of an extraordinary general meeting to consider resolutions for the removal of Mr Butler and Mr Harris as directors. But Mr Butler made clear that he would not attend such a meeting, so that the meeting would then be inquorate, and ineffective. Subsequently Mr Smith applied to the court for a declaration as against both Mr Butler and the company that Mr Butler's actions were outside his powers, and for an order convening a general meeting with a quorum of one. At first instance Mr Smith succeeded, and Mr Butler appealed.
>
> 42. In the Court of Appeal, Arden LJ gave the leading judgment. She decided that the judge had been right to conclude that Mr Butler had no authority is managing director to suspend Mr Smith from his role as chairman or to procure the company to defend his proceedings, and would dismiss the appeal. Rimer LJ

> agreed with her on these points, and would also dismiss the appeal. But he added that he preferred not to express any general view as to a managing director's implied authority to commence or defend legal proceedings on behalf of the company. The third member of the court, Ryder J, also agreed with Arden LJ's reasons and conclusions and would likewise dismiss the appeal. Unlike Rimer LJ, however, he did not express any reservation in relation to implied authority to commence or defend legal proceedings.
>
> […]
>
> 44. It is clear from their judgments in *Smith v Butler* that the majority of the court (Arden LJ and Ryder J) qualified the decision in *Mitchell & Hobbs (UK) Ltd v Mill*, so that, in some cases at least, paragraph 72 of Table A may confer authority on a managing director to commence or defend proceedings on behalf of the company. However, in a case like *Mitchell & Hobbs*, where there were only two directors, who had fallen out, and therefore would not agree to all ratify the commencement of proceedings, the court considered that the decision in that case, that there was no authority to commence the proceedings, was correct."

8. In *Smith v Butler*, Arden LJ said:

> "43. Section 1157 [of the Companies Act 2006] empowers the court to grant relief where a director is found to have acted in breach of duty and it appears to the court that he:
>
> > 'acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit.'
>
> […]
>
> 45. I have no doubt that the judge had power to order Mr Butler to pay the Company's costs (see section 51 of the Senior Courts Act 1981). The judge had a wide discretion with respect to such an order. Moreover, Mr Dougherty has not satisfied me that there was any matter which the judge could take into account under section 1157 of the 2006 Act in this case but not under his discretion to make an order as to costs.
>
> 46. More fundamentally, however, if I am right in my conclusion on the primary issue that Mr Butler had no authority to cause the Company actively to defend Mr Smith's applications, then it followed that *Mr Butler was liable to pay the Company's costs on an indemnity basis* under the well-established practice applying where proceedings are brought in a company's name without authority (see generally, *Buckley on the Companies Acts*, paragraph 127.10)" (emphasis supplied).

9. On the question of the liability of the director to pay the company's costs on the indemnity basis, what Arden LJ said represented the view of the Court of Appeal, and is accordingly binding upon me sitting here. Like her, I can see nothing that I could take into account under section 1157 of the 2006 Act in relation to this case but not

under the court's discretion to make an order as to costs. I therefore proceed on the basis that Mr Steventon-Smith, as a matter between him and the applicant, must indemnify the applicant company for the costs which it must pay to the respondent. But that does not mean of course that the applicant company must pay the *respondent's* costs on the indemnity basis. That is a question arising as between the applicant and the respondent. Mr Steventon-Smith's conduct vis-à-vis the applicant is another matter entirely.

10. The respondent does not advance any other basis for seeking its costs on the indemnity basis against the applicant. There is nothing therefore to show that the applicant's behaviour was "out of the norm", as it is usually put: *Hosking v Apax Partners Ltd* [2019] 1 WLR 3347, [42], [43]. In at least a half of all cases before the court, a party puts forward submissions with which a judge disagrees, but obviously that by itself is not "conduct out of the norm" for this purpose. Accordingly, I see no justification for the award of costs against the applicant on the indemnity basis, and I decline so to order.

Mode of assessment, and quantum

11. I turn therefore to the question of assessment. This was an application which lasted less than one day. Therefore the general rule is that the court should assess the costs summarily: CPR rule 44.6, PD 44 para 9.2. No good reason not to do so was suggested to me, and I can see none. I will therefore assess them summarily. The applicant objects that the updated costs schedule was not served in accordance with CPR PD 44 para 9.5(4)(b). It was served on 13 May 2022. I agree that it was not served in time. But costs statements are short, and the substance of them can be taken on board in a matter of minutes. There are plenty of cases in the books where the court has proceeded with a summary assessment of costs based on assessment delivered to the other side only a short time before the hearing. The reality in this case is the applicant has had sufficient time to consider and take instructions on the contents of the updated costs schedule, and will suffer no prejudice as a result. I will therefore take into account both the original and the updated schedules.

12. The first objection taken by the applicant is that the respondent's solicitor is a grade A fee-earner, practising in Bristol, in national band 1 of the costs guideline hourly rates, and the relevant rate is therefore £261. However, he has apparently charged at the rate of £350, £89 more. Secondly it is complained that there was no delegation to a less expensive fee-earner for those parts of the work which could properly be done by such a fee-earner. No objection is taken to counsel's fees, either in the first or the updated costs schedules. The respondent contends that the hourly rate of £350 for the respondent solicitor should be allowed by the court, and that there has been no attempt to identify work which could have been more properly incurred by a lower level of fee-earner.

13. In my judgment, both criticisms of the respondent's costs schedules by the applicant have some force. The new costs guideline hourly rates came into force in October 2021. They are of course merely guidelines, but they represent a consensus view of what average work should cost in particular areas of the country (so taking into account regional variations) and the experience and expertise of the relevant fee-earner. I see nothing in the present case to suggest that the work done here was above average either in difficulty, or in complexity, or in novelty, or in importance to the

client, or in some other way. This was, if I may respectfully say so, typical business work. A figure slightly above the guideline, so to say, within touching distance of it, would not be too high. A figure £89 (34%) above the guideline in my opinion is too high.

14. Secondly, I am unhappy with the notion that everything here has been done by a single grade A fee-earner. One of the important skills of a solicitor is to know how to delegate less important work to less expensive fee-earners. Sometimes it is said that, well, there was no one else to delegate to (I do not know whether that is the case here). The answer to that plea, of course, is that, as between himself and his solicitor, the client is quite entitled to insist on the grade A fee-earner doing everything. On the other hand, as between him and his opponent, he or she is not necessarily entitled to require the opponent to pay for it. At that stage the question is instead whether the costs are reasonably incurred and reasonable in amount. And reasonableness takes account of potential delegation. Moreover, it is not for the paying party to have to identify work which could have been done by a more junior fee-earner. In my former experience over 30 years as a practising commercial litigation solicitor, there were *no* litigation cases that I was involved in in which *no* work whatsoever could have been delegated to a more junior lawyer. In the present case, for whatever reason, it seems that it has simply not been considered. For example (and it is only an obvious example), there was no need for the grade A fee-earner to attend at the hearing and sit behind experienced counsel, who did all the advocacy. A grade C or D fee-earner would have been fine.

15. For both these reasons, therefore, I consider that the quantum of costs claimed by the respondent is too high. At the same time, a summary assessment of costs is not a "line by line" exercise, but much more "broadbrush": see *eg Football Association Premier League v The Lord Chancellor* [2021] EWHC 1001 (QB), [20]. As I have said, the total sought by the respondent is £8988, including VAT. Looking at the matter in the round, and reducing the solicitors' costs for both excessive rates and failure to delegate, I will award a total of £6600, plus VAT of £1320, making a total of £7920.

The position of Mr Steventon-Smith

Impact of the applicant's indemnity against Mr Steventon-Smith

16. I now turn to the question of Mr Steventon-Smith's liability for those costs. As I have already said, Mr Steventon-Smith is liable to indemnify the applicant in respect of the respondent's costs, and so the respondent says that he should pay the respondent directly. No authority was cited to me for making an order on this basis (as opposed to making a non-party costs order). It has something of the flavour of a "cut-through" order, where a claimant sues two defendants not knowing which is liable, and succeeds against only one. The unsuccessful defendant may be ordered to pay the costs of the successful defendant directly: see *Sanderson v Blyth Theatre Co* [1903] 2 KB 533, CA. But the situation here is different, because Mr Steventon-Smith is not a party, and therefore the ordinary discretion of the court on costs as between the parties does not apply.

17. Another analogy is with the right of the creditor of a trustee to be subrogated to the right of indemnity out of the trust fund which the trustee usually enjoys: see *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2019] AC 271, [59] (vi). But it is not

necessary for me to consider this point further, as on the facts of the present case it cannot apply anyway. This is because in my judgment on the application I found (at [53], [54]) that the company's directors knew or should have known that the company was or was likely to become insolvent. In those circumstances the respondent should not be entitled to priority over the general creditors in relation to one asset of the company, namely, the right to be indemnified by Mr Steventon-Smith.

A non-party costs order

18. The alternative basis for making Mr Steventon-Smith liable for the respondent's costs is under the non-party costs jurisdiction, on the basis that he is the "real" party to the litigation. This jurisdiction arises under section 51 of the Senior Courts Act 1981, and CPR rule 46.2. Since the decision of the House of Lords in *Aiden Shipping Co v Interbulk* [1986] AC 965, section 51 has been consistently interpreted by the courts as conferring power to award costs against non-parties in appropriate cases.

19. So far as material, the latter rule provides:

> "(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."

20. In *Housemaker Services Ltd v Cole* [2017] EWHC 924 (Ch), I said:

> "9. … 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.
>
> 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.
>
> […]
>
> 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. …"

21. This decision, as well as many others, was considered in the recent decision of the Court of Appeal in *Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Ticaret ve Sanayi As v Aytacli* [2021] 4 WLR 101. There Coulson LJ (with whom Lewison and Dingemans LJJ agreed) summarised the position as follows:

> "40. Without in any way suggesting that these authorities give rise to a sort of mandatory checklist applicable to a company director or shareholder against whom a s.51 order is sought, I consider that the relevant guidance can usefully be summarised in this way:
>
> a) An order against a non-party is exceptional and it will only be made if it is just to do so in all the circumstances of the case (*Gardiner*, *Dymocks*, *Threlfall*).
>
> b) The touchstone is whether, despite not being a party to the litigation, the director can fairly be described as "the real party to the litigation" (*Dymocks*, *Goodwood*, *Threlfall*).
>
> c) In the case of an insolvent company involved in litigation which has resulted in a costs liability that the company cannot pay, a director of that company may be made the subject of such an order. Although such instances will necessarily be rare (*Taylor v Pace*), s.51 orders may be made to avoid the injustice of an individual director hiding behind a corporate identity, so as to engage in risk-free litigation for his own purposes (*North West Holdings*). Such an order does not impinge on the principle of limited liability (*Dymocks*, *Goodwood*, *Threlfall*).
>
> d) In order to assess whether the director was the real party to the litigation, the court may look to see if the director controlled or funded the company's pursuit or defence of the litigation. But what will probably matter most in such a situation is whether it can be said that the individual director was seeking to benefit personally from the litigation. If the proceedings were pursued for the benefit of the company, then usually the company is the real party (*Metalloy*). But if the company's stance was dictated by the real or perceived benefit to the individual director (whether financial, reputational or otherwise), then it might be said that the director, not the company, was the 'real party', and could justly be made the subject of a s.51 order (*North West Holdings*, *Dymocks*, *Goodwood*).
>
> e) In this way, matters such as the control and/or funding of the litigation, and particularly the alleged personal benefit to the director of so doing, are helpful *indicia* as to whether or not a s.51 order would be just. But they remain merely elements of the guidance given by the authorities, not a checklist that needs to be completed in every case (*SystemCare*).
>
> f) If the litigation was pursued or maintained for the benefit of the company, then common sense dictates that a party seeking a non-party costs

> order against the director will need to show some other reason why it is just to make such an order. That will commonly be some form of impropriety or bad faith on the part of the director in connection with the litigation (*Symphony*, *Gardiner*, *Goodwood*, *Threlfall*).
>
> g) Such impropriety or bad faith will need to be of a serious nature (*Gardiner*, *Threlfall*) and, I would suggest, would ordinarily have to be causatively linked to the applicant unnecessarily incurring costs in the litigation.
>
> 41. Therefore, without being in any way prescriptive, the reality in practice is that, in order to persuade a court to make a non-party costs order against a controlling/funding director, the applicant will usually need to establish, *either* that the director was seeking to benefit personally from the company's pursuit of or stance in the litigation, *or* that he or she was guilty of impropriety or bad faith. Without one or the other in a case involving a director, it will be very difficult to persuade the court that a s.51 order is just."

22. The respondent submits that an order should be made against Mr Steventon-Smith for four reasons. First, the unauthorised application by the company was caused by him, and he can fairly be described as the "real" party to the litigation. Second, the company appears to be insolvent, and it would be unjust to allow him to hide behind a corporate identity. Third, the application cannot have been for the benefit of the company, because the *Sequana* trigger has occurred and therefore directors' actions must be carried on in the interests of the creditors. Fourth, it was improper of Mr Steventon-Smith to bring this application without first obtaining proper authority and indeed not even attempting to consult with his co-director before doing so.

23. I accept that Mr Steventon-Smith gave the instructions for the litigation, and therefore controlled it. There is, however, nothing to show that Mr Steventon-Smith would benefit personally from this application, except in the obvious sense that he is a shareholder in the company. Nor is there anything to suggest that he was acting in bad faith in instructing the solicitors to issue the application. His evidence was that the alleged debt was disputed on substantial grounds. And it is clear that he considered that he did have the authority to instruct the solicitors. That is a belief which I have held to be wrong in law. But a mistake as to the legal position does not of itself amount to impropriety for the purposes of this jurisdiction. So, in my judgment the merits of this non-party costs application are not strong enough to justify my making an order against Mr Steventon-Smith under section 51. The "real" party was the company.

24. But, in any event, there is a procedural problem. This is that, under CPR rule 46.2 (set out above), Mr Steventon-Smith would have to be joined to proceedings and be given a reasonable opportunity to attend a hearing where the matter would be considered. No application has been made for him to be joined, and so far he has not been. That step would have to be taken before any order could be made anyway. I am not so concerned about the opportunity to attend the hearing, because in this context a "hearing" includes the exchange of written submissions taking the place of oral argument, and Mr Steventon-Smith has undoubtedly had the opportunity to take part in that exercise (as the applicant's submissions in reply accept). If I had thought there was any merit in the application for a non-party costs order, I would have invited an

application to join Mr Steventon-Smith. However, in the circumstances there is no need to do so.

Conclusion

25. For the reasons given above, I will order the applicant to pay the respondent's costs of the application, summarily assessed on the standard basis at £7920 (including VAT), by 4 pm on 29 June 2022. I will not however order that Mr Steventon-Smith be jointly liable with the applicant for those costs.