Case No: QB/2010/0435
Claim No: HQ09X00538

Neutral Citation Number: [2010] EWHC 3559 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 23 November 2010

BEFORE:

MR JUSTICE DAVIS

BETWEEN:

ADRIAN KIRBY

Applicant/Claimant

- and -

ALEXANDER HOFF

Respondent/Defendant

MS V BUEHRLEN QC (instructed by Mackrell Turner Garrett) appeared on behalf of the Claimant

MR G BLAKER (instructed by Barlow Robbins LLP) appeared on behalf of the Defendant

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Approved Judgment

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1. MR JUSTICE DAVIS:

Introduction

2. This is an appeal brought by Mr Adrian Kirby against a decision of Master Fontaine delivered on 30 June 2010. By that decision the Master ordered that Mr Kirby pay the costs of certain proceedings which had been commenced by a company at one stage known as Atlantic Air Limited and subsequently known as Mutanderis Recoveries Limited, now in liquidation. Such costs were to be paid in favour of the defendant in the proceedings, Mr Alexander Hoff. The jurisdiction to make such an order against a non party, of course, is contained in section 51 of the Supreme Court Act 1981.

Background facts

3. The Master's judgment was a detailed and careful one. It had been a reserved judgment. She refused permission to appeal. Subsequently, Eady J granted Mr Kirby permission to appeal by order made in October 2010.

4. The background to the proceedings resulting in such a non party costs order can be essentially taken from the very helpful chronology prepared by Ms Buehrlen QC appearing on behalf of Mr Kirby on this appeal although she did not appear in the court below.

5. The position is that Atlantic Air Limited is a company which can effectively be taken as being a company which belonged to Mr Kirby. In strict legal terms the position may be a little more subtle than that. The registered shareholder is an overseas fiduciary company. The original directors were individuals based in Guernsey. Latterly since October 2008 the sole director was a German citizen resident in Switzerland. But it is not really disputed that this was a company owned and controlled by Mr Kirby himself, Mr Kirby being resident in the United Kingdom.

6. The main business of the company seems to have been that of chartering helicopters. In that context the company acquired on 28 February 2006 a new helicopter called a Dauphin helicopter from a company called Rotor Mobile and that was in due course delivered. It then transpired that a necessary inspection, called a T inspection, of that helicopter had not taken place although it is said the intention was that the helicopter only be acquired if it had had the necessary T inspection. In the result substantial delays and costs were caused to the company occasioned by the need for a fresh T inspection. In due course proceedings were contemplated.

7. For that purpose the company, which had retained the solicitors Mackrell Turner Garrett, consulted Mr Michael McLaren QC. He gave a very lengthy written advice dated 27 February 2007, advising on various potential issues including whether or not the company might have any claim against the vendors of the aircraft, Rotor Mobile, and whether the company might have any claim against its former solicitors who had given advice with regard to the relevant sale agreement, which agreement had not contained an express stipulation as to there having been a T inspection.

8. On 14 March 2007 the company terminated the employment of Mr Alexander Hoff who had been a pilot employed by it. His responsibilities seem to have been described

as being that of "corporate pilot/manager" and it appears that he was the sole employee of the company.

9. It would appear that Mr Kirby strongly blamed Mr Hoff for what had eventuated with regard to the helicopter. Mr Hoff felt it necessary to resign but in due course he issued a claim against Atlantic in the Employment Tribunal alleging constructive unfair dismissal.

10. His claim was heard over a number of days in September 2007. Mr Hoff was represented by lawyers as was the company. On 15 October 2007 the tribunal issued a reserved judgment concluding that Mr Hoff had been constructively unfairly dismissed by the company and awarding him compensation totalling some £18,000, although Mr Hoff had mounted a claim in excess of £40,000.

11. Shortly after that a further written advice was obtained from Mr McLaren QC. On this occasion, as the advice says at the outset, Mr McLaren had been instructed on behalf of Atlantic to advise now as to the merits of potential claims which Atlantic may have against Mr Hoff. It is perhaps unfortunate that whilst privilege has been waived and the advice has been produced the actual instructions to Mr McLaren have not been produced in the course of these proceedings.

12. At all events Mr McLaren again went through the matter in very great detail. He advised that there was scope for an action against Mr Hoff for breach of the duty of care implied into his contract of employment. Mr McLaren also considered certain other possible claims against Mr Hoff which he rejected as essentially not arguable.

13. With regard to the claim against Mr Hoff for breach of duty of care, towards the end of his advice at paragraph 85 Mr McLaren said this:

> "It is most unusual for an employer to bring a claim against an employee (even a manager) for breach of the duty of care implied into his contract of employment, in order to recover damages from the employer's pure economic loss. Whilst (as discussed above) there is no bar to such a claim, there is a real risk that a court would consider that in doing so the employer is acting heavy-handedly and oppressively, perhaps out of a desire for "revenge"."

14. In addition Mr McLaren went on to say that, although he had identified some potentially good claims for Atlantic to bring against Mr Hoff, "the risks of those claims failing are significant."

15. At paragraph 86 Mr McLaren said this:

> "Atlantic needs to take a hard commercial view as to whether Mr. Hoff would be worth suing. There would be little point in Atlantic racking up substantial legal costs on claims which are not straightforward (some of which costs will be irrecoverable even if Atlantic win), only to recover relatively modest damages."

16. It was further the advice of Mr McLaren that any proceedings, if to be brought, should not be issued until after the employment proceedings had been finally disposed of. In this context it should be mentioned Atlantic had sought to appeal against the decision of the tribunal.

17. That appeal came before the Employment Appeal Tribunal and it was dismissed on 11 July 2008. The Employment Appeal Tribunal refused permission to appeal and in addition awarded a contribution of £2,000 towards the costs of Mr Hoff.

18. Notwithstanding that, Atlantic then sought to appeal to the Court of Appeal. Leave to appeal was refused by Wall LJ on the papers. That did not deter Atlantic either, because it then sought to renew its application for leave to appeal before the full court and that eventually was refused on 4 September 2008.

19. All of these steps show how determined Atlantic had been to try and put right, as it would say, the original judgment of the Employment Tribunal and to establish that Mr Hoff had not been wrongfully or unfairly dismissed.

20. On 5 September 2008, after the appellate process had been exhausted, Mr Hoff obtained from the County Court an order for the recovery of his award in the Employment Tribunal.

21. On 19 September 2008 Atlantic, by its solicitors, issued a detailed letter of claim setting out its claim against Mr Hoff with regard to the purchase of the Dauphin helicopter and making a proposal that the sum which had been awarded to Mr Hoff by the tribunal be paid into a joint account in the name of solicitors pending resolution of the company's claims, on the footing that those claims, as and when formulated by proceedings, would constitute a counterclaim and could be set off.

22. On 18 November 2008 Mr Hoff, through his solicitors, responded denying all liability. In due course, however, agreement was reached that the amount of the award plus interest should be paid into a solicitor's joint account. That sum as I gather was around £22,000.

23. On 4 December 2008 the company made a without prejudice offer save as to costs proposing, among other things, that both parties drop hands and not pursue their respective claims further. In addition an apology from Mr Hoff was sought. That offer was rejected by Mr Hoff through his solicitors on 10 December 2008. That letter in terms also indicated that should proceedings be commenced by the company an immediate application for security for costs would follow.

24. In the context of the correspondence the solicitors for Atlantic had made clear that they were proceeding on the footing that Mr Hoff had no significant assets. It was noted that the matrimonial home did not appear to be in his name, that the Employment Tribunal proceedings had been funded so far as Mr Hoff was concerned by his father-in-law and in effect that all that Mr Hoff realistically might be good for was the amount of the award he had obtained.

25. Final confirmation that the amount to be paid into the solicitors' joint account in the sum of £22,736 was given in February 2009. On 11 February 2009 the company

issued proceedings in the High Court of Justice, Queen's Bench Division, against Mr Hoff for breach of contract and negligence. The amount of the claim was stated on the front of the claim form as "Not exceeding £300,000". The actual particulars of loss subsequently given might perhaps indicate a claim of about £160,000, plus of course interest and costs.

26. Those proceedings were not served at the time but were served on 8 June 2009. At that time also a letter was sent to the solicitors who had acted for the company in connection with the purchase of the helicopter, intimating a claim by the company against those solicitors for negligence. In the event, for reasons which are not explained in the papers before me, no proceedings against the solicitors were or have been commenced.

27. The particulars of claim contain a statement of truth in somewhat unorthodox form. It does not identify the status or indeed name of the person signing it. But it is not disputed that the signatory was in fact Mr Kirby. The solicitors for Mr Hoff, entirely properly, pressed at the time for details of who the signatory was, in appropriate terms. Confirmation was given in June 2009 that the signatory was Mr Kirby and the solicitors for the company were then asked to confirm his relationship to the company. The response was in effect to refer to the Employment Tribunal's judgment which had made a finding that the company was "in effect Mr Kirby's company."

28. On 9 July 2009 Mr Hoff's solicitors made, as previously foreshadowed, a request for security for costs. The sum sought was £75,000. They also took issue with the statement of truth details.

29. On 28 July 2009 the company changed its name to Mutanderis Recoveries Limited. The evidence indicates that by that time the helicopter which had belonged to Atlantic had been remortgaged and was then transferred to a different company having an Isle of Man incorporation, as it would appear. It would also appear that on 28 July 2009 Atlantic itself effectively ceased trading.

30. As it happened, on 29 July 2009, the day after, Mr Hoff issued his application for security for costs in the sum of nearly £105,000: that figure being approximated to what Atlantic itself had indicated its own costs might be.

31. The return date for the application for security for costs was 12 October 2009. On 8 October 2009 a witness statement was put in by the solicitors for the company. In part that dealt with the question of Mr Kirby's signing of the statement of truth. As to the application for security for costs the witness statement said this at paragraph 9:

> "The Claimant is presently in the course of restructuring. The Claimant has now contacted Administrators. Although the Claimant has not yet been formally put into administration this now appears probable. In the circumstances the Claimant is not prepared to make any final decision with regard to the Claim until an administrator is appointed. Clearly if an administrator is appointed any decisions with regarding this litigation will be made by the Administrator."

That was the entirety of what was said by Atlantic with regard to the application for security for costs.

32. In the event Master Fontaine on 12 October 2009 ordered security for costs in the sum of £105,000 and directed that if such sum was not paid by 26 October the claim would be struck out with costs. The company failed to comply with the terms of the order.

33. On 27 October 2009 Mr Hoff's solicitors requested confirmation that monies held in the joint escrow account would now be released and shortly thereafter applied for a third party debt order in respect of those monies.

34. On 3 November 2009 a formal order was made striking out the claim and requiring the company to pay Mr Hoff's costs of the claim. At this time the company had resolved to proceed towards liquidation and on 17 November 2009 a notice of meeting of creditors was given.

35. On 18 November 2009 Mr Hoff by letter from his solicitors threatened to make an application for a non party costs order against Mr Kirby on the expressed basis that he had been driving and funding vexatious litigation against Mr Hoff.

36. On 24 November 2009 an accountant informed the creditors that he had been instructed to assist in placing the company into creditors' voluntary liquidation. In the result on 11 December 2009 a special general meeting was held at which the company was placed into liquidation. Before that, on 26 November, Mr Hoff's solicitors had served an interim third party debt order.

37. The Chairman's report presented at the creditors' meeting indicated a likely estimated deficiency with regards to unsecured creditors of £1,180,754. Those unsecured creditors are recorded as Mr Hoff in the sum of £24,198, Mr Kirby in the sum of £1,121,556 and Mackrell Turner Garrett in the sum of £35,000. I add that Mackrell Turner Garrett have since acted for Mr Kirby personally in these proceedings which have ended up before me.

38. There was then a debate about what was to be done with regard to the monies held in the joint account. That debate seems not to have been resolved. As I understand it the liquidator is claiming those monies for the company: although as it seems to me there at the very least seems to be a very respectable argument that those monies were in effect placed in a trust account and in the events which have happened should now be payable to Mr Hoff. However, Ms Buehrlen of course has no instructions on behalf of the liquidator. The point was not argued before me and it would be inappropriate for me to express any concluded view on that point.

39. In the event Mr Hoff did pursue his application for costs against Mr Kirby by way of a non party costs order. The matter was heard by the Master on 30 March 2010 and on 23 April 2010. As I have said the Master then made the order on 30 June 2010.

40. It is I think worth alluding to some of the financial information relating to the company. The filed financial accounts of the company would appear to indicate that it had been loss-making virtually throughout its existence. The accounts for the year ending 31 December 2008 indicate that there had been an operating loss in that year of over £353,000 with a total loss for the financial year of over £407,000. Net current liabilities were put at over £2.3 million and there was a deficit with regard to

shareholders' funds of nearly £1.3 million. Those financial statements were approved by the board on 29 July 2009.

41. By a note to those accounts this is said, amongst other things:

> "The financial statements have been prepared on a going concern basis as the loan creditor has undertaken to financially support the company for the foreseeable future to enable it to meet its liabilities as they fall due."

The loan creditor was Mr Kirby.

42. So far as the liquidators' report is concerned that indicates that in early 2009 the company had been endeavouring to sell the aircraft without success. However, in July it was reported it was understood that Mr Kirby remortgaged the helicopter following which the aircraft was transferred to a company based in the Isle of Man. The proceeds of sale were credited to Mr Kirby's loan account. It was recorded that the company ceased trading in July 2009 on that event.

43. It was further recorded that Mr Kirby had personally agreed to fund the pre and post appointment costs and expenses of the winding up.

44. The reasons for failure, as attributed by the Director of the company, were amongst other things:

> "Unwillingness of the principal funder to support the company."

The statement of affairs indicated that preferential creditors were nil. Unsecured creditors totalled £1,180,000-odd of which £24,000-odd represented Mr Hoff, £1.12 million represented Mr Kirby and £35,000 represented Mackrell Turner Garrett. It follows that Mr Kirby was far and away the principal creditor of the company.

The Law

45. Ms Buehrlen QC has rightly accepted that the Master had jurisdiction to make the order that she made. What she challenges is the exercise of the discretion pursuant to that jurisdiction. She submits that the Master was wrong in ordering as she did and furthermore engaged in illegitimate reasoning for reaching the conclusion that she reached.

46. In order to give some context to the submissions which I will come on to recite it might be helpful at this stage if I refer to some (although not all) of the authorities which were cited before me. It is I think convenient to do so although I accept the submissions of both counsel that cases of this kind are not to be the subject of a plethora of authorities and further, that cases of this kind ultimately have to be decided by reference to their own circumstances and their own facts. Nevertheless the authorities do establish at least some groundwork or principles by reference to which the courts ordinarily will wish to work in this context.

47. Ms Buehrlen placed particular reliance on aspects of the judgment of Millett LJ in the case of Metalloy Supplies Ltd v MA (UK) Ltd [1997] 1 WLR 1613. It is not necessary

for me to refer to the facts of that particular case. What Millett LJ said in his judgment, starting at page 1619, is this:

> "It is not an abuse of the process of the Court or in any way improper or unreasonable for an impecunious plaintiff to bring proceedings which are otherwise proper and bona fide while lacking the means to pay the defendant's costs if they should fail. Litigants do it every day, with or without legal aid."

Ms Buehrlen places great reliance on that particular statement and of course regard must be had to it. But it is to be stressed that Millett LJ was not stating some invariable and inflexible rule which governs all situations regardless of the circumstances of the particular case. That is clear from Millett LJ's immediately following comments. He goes on to say as follows:

> "The court has a discretion to make a costs order against a non-party. Such an order is, however, exceptional, since it is rarely appropriate. It 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 may also be made where the third party has been responsible for bringing the proceedings and they have been brought in bad faith or for an ulterior purpose or there is some other conduct on his part which makes it just and reasonable to make the order against him. 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 bought 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."

48. Then I was referred to the case of Dymocks Franchise Systems (NSW) Pty Ltd v Todd & Ors [2004] 1 WLR 2807. It is again not necessary to refer to the facts of that particular case but of particular note are the passages of the opinion of Lord Brown (this I should add being a report of the Privy Council) set out in particular in between paragraphs 24 to 29. I will not set those out *in extenso* although I have had regard to them, but it is to be noted in particular that in the course of paragraph 25 Lord Brown says this:

> "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."

49. Lord Brown then went on to cite highly pertinent comments in that regard from the decision of Tomkins J in the New Zealand case of Carborundum and also the comments of Fisher J in the New Zealand case of Arklow Investments Ltd.

50. At paragraph 29 Lord Brown said this:

> "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 failed. As explained in the cases, however, that is not to say the orders are invariably made in such cases, particularly so where the non parties themselves are a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially shareholders and creditors) than in his own interests."

51. At paragraph 33 Lord Browne said this:

> "Thirdly Associated submit that there is no impropriety involved in their promoting this appeal. On the contrary, they and the Todds had independently received encouraging advice from leading counsel. This cannot however avail them. The authorities establish that whilst any impropriety or the pursuit of speculative litigation may of itself support the making of an order against a non party its absence does not preclude the making of such an order."

52. Finally I think it is sufficient if I refer briefly to the Court of Appeal decision in the case of Petromec Inc v Petroleo Brasileiro SA (Petrobras) 2006 EWCA Civ 1038. In that case the judge at first instance had made a non party costs order against a Mr Efromovich. As Longmore LJ succinctly summarised it at paragraph 3:

> "The judge found that Mr Eframovich controlled the proceedings brought by Petromec, funded those proceedings and would have benefited from them if they had been successful. He therefore thought it right that Mr Eframovich should pay the successful party their costs."

53. In paragraph 10 Longmore LJ said this:

> "In these circumstances it is not necessary to discuss the authorities at any length. I would only observe that, although funding took place in most of the reported cases, it is not, in my view, essential, in the sense of being a jurisdictional pre-requisite to the exercise of the court's discretion. If the evidence is that a respondent (whether director or shareholder or controller of a relevant company) has effectively controlled the proceedings and has sought to derive potential benefit from them, that will be enough to establish the jurisdiction. Whether such jurisdiction should be exercised is, of course, another matter entirely and the extent to which a respondent has, in fact, funded any proceedings may be very relevant to the exercise of discretion. In the present case, however, the judge rightly drew no distinction between the pre- and post-October 2003 proceedings because the reality was that Mr Eframovich was funding them throughout."

That case makes clear (as does Dymocks) that it is not necessary for bad faith or impropriety to be alleged in order for a non party costs order to be made. That case also makes clear, as must be right, that it is one thing to establish jurisdiction it is another thing as to how the jurisdiction should be exercised.

54. That then is, briefly put, the legal framework.

The judgment under Appeal

55. Turning then to the Master's judgment, as I have said that is careful and detailed. She went through the background with considerable care. She recorded that it was not in dispute between the parties that Mr Kirby at all times effectively controlled Atlantic. She recorded the various competing submissions set against a number of the legal authorities which had been cited. She recorded amongst other things that it had been submitted that Mr Kirby had shown bad faith against Mr Hoff.

56. The Master at paragraph 55 concluded that since the circumstances of the case were exceptional there was jurisdiction to make an order against Mr Kirby; and she did so on four specified bases.

57. The first was that Mr Kirby had effectively controlled the proceedings but was not a director of the claimant company:

> "so that there is no issue of eroding the principle of the separate liability of the company."

Put like that I think that is a misstatement of the true position. Mr Kirby may not have been a director but he was an ultimate controller of the company and the principle of there being a separate liability for the company did still continue to apply. I add that Mr Blaker, on behalf of Mr Hoff, has made clear that he had not pursued any allegation that this was an alter ego or sham company. The second point identified by the Master was that Mr Kirby would have derived potential benefit from the proceedings in that any damages awarded would result in a surplus accruing to Atlantic in which, as the most substantial creditor of the company, Mr Kirby had an interest. The third point the Master relied on was that Mr Kirby had funded the company by making a substantial loan without which the company could not have continued to operate as a going concern. The fourth point was that Mr Kirby had taken the decision to put the company into compulsory liquidation rather than injecting funds to allow the High Court proceedings to continue.

58. The Master then said this:

> "However, I would not necessarily regard these matters on their own as being sufficient for the courts discretion to be exercised in favour of making a non-party costs order against Mr Kirby, given that there is evidence of a prima facie claim against Mr Hoff, namely Mr McLaren's advice. I will therefore consider the other factors in respect of which submissions were made."

59. The Master then went on to accept the submission on behalf of Mr Hoff that there was evidence of personal antipathy between Mr Kirby and Mr Hoff but as the Master said that did not necessarily mean that there was bad faith or impropriety on the part of Mr Kirby.

60. At paragraph 58 the Master then said this:

> "I do not conclude that there is any evidence of impropriety against Mr Kirby, but I <u>do</u> conclude that there is evidence of bad faith as follows:"

She then set out five points in support of that conclusion that she had drawn.

61. The points she made were that the conduct after the end of the employment claim meant that Mr Hoff, having incurred considerable costs in the employment claim, was unable to recover the award; second, the approach of the company to the security for costs application by opposing the application by putting in one paragraph of evidence but not making any points of substance in opposition caused Mr Hoff to incur the costs of a prospectively contested application; third, the timing of the entry of the company into creditors' voluntary liquidation; fourth, that it could not be coincidental that, Mr Hoff having been put to maximum costs in the Employment Tribunal, these proceedings were then launched but there was then no real attempt made to comply with the security for costs order or to pursue the claim following that order; finally the lack of any explanation by Mr Kirby as to why, having decided to bring the claim where it must have been likely that a security for costs application would be made and succeed, it was decided at such an early stage to abandon the claim and put the company into liquidation.

62. The Master then dealt with the question of whether suitable warning had been given by Mr Hoff of his intention to ask for a non party costs order and the Master found:

> "It was only when it became apparent that the company was not prepared to fund any adverse costs orders that the warning became necessary."

63. The Master in conclusion stated that she considered the court's discretion should be exercised in favour of Mr Hoff on the application, saying this:

> "i) I accept that Mr Kirby had advice that, although Atlantic Air was advised against bringing the proceedings on a commercial basis, there were some genuine claims. However, it is entirely unclear why Mr Kirby should give instructions for Atlantic Air to bring proceedings, and then decide to discontinue funding the company at such an early stage in the proceedings, if it was seriously intended to pursue the claim against Mr Hoff. Mr Kirby must have considered at the outset of these proceedings how the company was to fund them to their conclusion, and on the evidence of their company accounts that can only have been if he was prepared to make further funding available to the company, a decision which rested entirely with him.
>
> ii) The only conclusion I have drawn, in the absence of any evidence from Mr Kirby as to this, is that he did so to cause the maximum amount of costs and inconvenience to Mr Hoff because of his antipathy towards Mr Hoff, caused by his disagreement with Mr Hoff over the work to the Dauphin, and the fact that Mr Hoff had secured what Mr Kirby obviously considered to be an unwarranted award in the employment claim. The timing of the entry into liquidation, very shortly before the third party debt order over the funds in the escrow account was to be made final, reinforces this conclusion.
>
> iii) The evidence, the lack of any evidence to the contrary from Mr Kirby, and the chronology of events, are such that I have concluded that it is most likely that Mr Kirby embarked upon these proceedings, knowing that if an adverse costs order were to be made against Atlantic Air

> either at the end of the proceedings or during the proceedings, or if a security for costs order was made against the company, he could simply take the decision to put Atlantic Air, an entity controlled only by him, into liquidation, in the knowledge that there would be no assets to meet any such adverse costs orders of security for costs order, because the viability of the company as a going concern depended up on his continuing to fund the company."

Submissions

64. The first point that should be made is that this appeal before me is to be by way of review, not rehearing. Given that it is accepted, rightly, that the Master had jurisdiction to make a non party costs order against Mr Kirby and given that, rightly, it is not said that it would be wholly perverse to make such an order, it has to be asked on what basis this court can interfere in what is essentially a discretionary matter. It is irrelevant as to whether or not this court may or may not reach the same conclusion. The essential point is: was this a conclusion which the Master, correctly directing herself, could properly have reached?

65. Ms Buehrlen, in the course of her excellent arguments on behalf of Mr Kirby, submits that the Master's reasoning was indeed flawed. She first points to the statement in paragraph 55(1) of the Master's judgment which I do agree is an incorrect statement. However, set in the context of everything else the Master said I would not regard that as of itself entitling an appellate court to interfere. It is quite clear that the Master had in mind the various statements in the authorities that the principle of limited liability is to be respected and that it is only in an exceptional case that the court will make a non party costs order, as it were overcoming the principle of limited liability.

66. Altogether more cogent was Ms Buehrlen's submission that the Master completely misstated the position when she stated that she did not conclude that there was evidence of impropriety but did conclude that there was evidence of bad faith. I must say it seems to me there is very considerable force in Ms Buehrlen's submission. I find it extremely difficult to understand how the Master can say that there is no evidence of impropriety but there is evidence of bad faith. Clearly bad faith is a species of impropriety but not all impropriety involves bad faith as such. I find this comment extremely puzzling.

67. Mr Blaker on behalf of Mr Hoff sought to sidestep this by saying that bad faith is a fluid and flexible context. He submitted (and he cited for this purpose one particular authority, namely the decision of Lightman J in the case of Melton Medes Ltd v SIB 1995 Ch 137) that bad faith does not necessarily connote subjective dishonesty. I am bound to say that that does not look as though that was the way the matter was argued before the Master. In any event the authorities in this particular field, that is to say with regard to non party costs orders, quite clearly distinguish between impropriety and bad faith. I see no reason to depart from the conventional view that bad faith ordinarily conveys with it an element of subjective dishonesty. Indeed it is a serious and grave allegation to make.

68. Mr Blaker before me said that he was not asserting that there was actual dishonesty on the part of Mr Kirby in and about the way these proceedings were brought. In those

circumstances I find it difficult to accept the way in which the Master approached this particular matter. If she was not concluding that there was evidence of impropriety I cannot see how she could go on to conclude that there was evidence of bad faith.

69. In the event Mr Kirby has sought to put in further evidence seeking to rebut this finding of bad faith by the Master. There was debate before me as to whether a witness statement of Mr Kirby dated 10 November 2010 should be put in. I ruled at the outset of this hearing that it should be admitted *de bene esse* and I rule now that leave should formally be given. While it may be that some of the points made before the Master perhaps should have been anticipated by Mr Kirby the fact is as I see it that no clear and explicit allegation of bad faith was ever made until the hearing actually got under way. It may be that criticism could be made of Mr Kirby thereafter only putting in a witness statement to deal with this point as late as 10 November 2010 but Mr Blaker fairly acknowledges that no prejudice has been caused to his side by that and in the circumstances I think it would be unfair, and might cause a sense of grievance to Mr Kirby, if such witness statement was not admitted.

70. That said, the witness statement is in my view as much revealing for what it does not say as for what it does say. In the witness statement Mr Kirby sets out details as to how it was that the company was placed into liquidation. In effect what it comes to is that after it had succeeded in selling the helicopter in July insolvency practitioners were consulted with a view to placing the company into liquidation and the timing of this litigation had nothing to do with the third party debt order obtained by Mr Hoff.

71. Mr Kirby then goes on further to deal with the allegation of bad faith made against him. He denies bad faith and he gives an explanation as to the timing of the issue of the proceedings as indicated by Mr McLaren's advice. He refers to the drop hands offer made in correspondence and says this:

> "The aim was not, as I understand is now being alleged, to cause Mr Hoff to incur maximum costs and inconvenience but to pursue what I believe were valid claims by the company."

72. At paragraph 13 he says this:

> "I did not agree to the issue of proceedings by the company against Mr Hoff in February 2009 knowing that if an adverse costs order was made against the company I could simply take the decision to put the company in liquidation in the knowledge that there would be no assets to meet a costs order. Indeed, I did not think in those terms at all. It would not have made sense for me to think like that either since at the time the proceedings were issued the company was the owner of the Dauphin, a key asset whose value I wished to protect."

73. What Mr Kirby does not say is what his thinking actually was. It is clear that at the time these proceedings were commenced it was actually intended that the helicopter be sold: and the company's sole asset, generating income, would then be gone. Quite what Mr Kirby was intending to do if, as could be expected, an application for security for costs was made, as Mr Hoff's solicitors had threatened, is also totally unexplained. Furthermore nowhere in this witness statement or indeed any other evidence is it indicated that had Mr Hoff at an earlier stage given a warning that he might seek a non

party costs order then Mr Kirby would not have caused the company to commence these proceedings at all.

74. It seems to me that whilst I should and must have regard to that statement as a denial of bad faith it leaves a number of questions unanswered. That is revealing.

75. Ms Buehrlen has submitted that in the context of non party costs orders the usual relevant factors are to be taken as these. First, given the importance of maintaining the principle of limited liability, non party costs orders are not to be granted as though they are a norm. They are only to be made in exceptional circumstances in the sense that they are not a usual kind of order to make. Second, the question has to be asked as to what extent the individual in question has control. Third, the question has to be asked what is the funding involvement of the individual third party with regard to the litigation. Fourth there has to be asked what, if any, is the benefit to the individual funding the litigation or otherwise concerning himself with the litigation. As part of that process it is sometimes convenient to ask whether the non party can be taken to be a "real party" in the proceedings. Fifth, often relevant is whether or not a warning letter indicating an intention to seek a non party costs order is given at an early stage so the individual can prepare himself or herself and take advice accordingly. Finally the question of whether there is bad faith or impropriety may also very often be relevant: although, as the authorities show, that is not a necessary requirement if an order is to be made.

76. I agree that those are usually relevant factors that need to be considered and certainly need to be considered in this case. So, what is the position in this particular case?

Disposition

77. In these respects I see no reason to disagree with the essential findings of the Master. In fact I positively agree with them. First it is completely plain on the evidence that Mr Kirby not only controls the company but has had control of the litigation itself. That is borne out not only by the evidence but by the fact that it was Mr Kirby who signed the statement of truth. It was subsequently explained that the Swiss-based director was in no position to know what had been going on.

78. In my view therefore the Master was right to conclude that Mr Kirby both controlled the company and controlled the conduct of this litigation including the decision to issue proceedings in the first place.

79. Second there is the question of funding. Ms Buehrlen makes the point that the evidence indicates that the lawyer’s costs were paid by the company and that appears to be right. However, the practical reality is that this company was only afloat and only in a position even to commence litigation because it had been kept in that position by the considerable sums of money that Mr Kirby himself had loaned to the company (and as the notes to the accounts confirm). Without that money, and Mr Kirby's undertaking, the company would have long since have ceased to exist. So, while it may be the case that Mr Kirby did not directly fund the litigation he certainly indirectly did so by virtue of his overall funding of the company.

80. I might add that such income stream as the company had seems to have derived to a considerable extent from Mr Kirby himself with regard to his personal chartering of the helicopter from the company: although a considerable source of income seems to have been also from another chartering company called Starspeed which it is said was entirely independent of Mr Kirby.

81. Thus while I have regard to Ms Buehrlen's point I do not think it has the significance which she herself would attribute to it.

82. Then I turn to the question of benefit. When one has regard to the practical reality the only real creditor behind this company was Mr Kirby himself. One can discount Mr Hoff for this purpose for obvious reasons. So far as the solicitors are concerned no doubt they are creditors but I do not think it unreasonable to infer that by one means or another Mr Kirby will ensure that they do not go out of pocket. In any event, even if that is wrong, Mr Kirby was miles and away the major creditor in this company.

83. Accordingly as it seems to me, if there was any real benefit to flow from these proceedings if judgment was obtained by the company against Mr Hoff in due course, then in reality that benefit would accrue to Mr Kirby himself since he was by far and away the largest creditor (and in effect also, if it be relevant although I doubt it is, closely connected with the shareholding of the company).

84. That of course is on the footing that a sum of £160,000-odd might be recovered. But here too there is an unusual feature. As I have said, in correspondence the company's solicitors in effect accepted that Mr Hoff was not worth suing apart from the money held in the escrow account, some £22,000. It has to be asked then, what is the commercial purpose of this company issuing High Court proceedings against a man worth at best in the perception of the company itself some £22,000 when, moreover, no proceedings were started against the solicitors who were good for the money. This is precisely the consideration that Mr McLaren had warned against in his advice. Yet these proceedings were started. So the question then is: why?

85. I asked Ms Buehrlen this several times. Ms Buehrlen was constrained in argument to accept that there was no obvious commercial purpose so far as the company was concerned if simply the sums in the account were to be recovered (or at least set off against the tribunal award). But what she said is that it was a legitimate purpose, Mr McLaren having advised that there was an arguable case, to recover those sums and thereby set up a set off against Mr Hoff's claim for the £22,000.

86. That may be so but it still does not deal with the commercial rationale. How, it can be asked, can benefiting the company to the extent of £22,000 really have mattered when one looks (quite apart from the legal costs exposure) at the reality of the company's financial position?

87. It seems to me that there is no satisfactory answer to that and at all events none is given in Mr Kirby's evidence. There is every reason to conclude, as the Master indeed concluded, that the real motivation here was borne out of Mr Kirby's personal antipathy towards Mr Hoff and by his determination that Mr Hoff should not even recover the relatively small amount that the Employment Tribunal had awarded to him.

88. Then I deal with the question of whether or not a warning letter was sent. No such letter was sent until very late in the day, as I have recounted (although I note that the authorities have held that sending such a letter is not a prerequisite for the exercise of a judge's discretion). But in agreement with the Master, in any event I do not think that a point which should count in any significant way against Mr Hoff. As the Master said, it was only when it became apparent that the company was not prepared to meet security for costs that the warning became necessary. I agree with that. It was not unreasonable, given the circumstances, for Mr Hoff and his advisors previously to take it that security for costs would be given.

89. Moreover it seems to me that the company and Mr Kirby himself must have been well aware of the principles relating to non party costs orders: because they had raised just such a point against Mr Hoff and his father-in-law with regard to the Employment Tribunal proceedings and it seems to me therefore they ought to have been alive to this possibility. If they were not that cannot be blamed on Mr Hoff. Yet further, as I have said, nowhere is there any statement in evidence by Mr Kirby that he would not have caused these proceedings to be started by the company had he appreciated or been warned by Mr Hoff that he personally might be at risk as to costs at the end of the day.

90. It seems to me, therefore, that all these factors point strongly in favour, in the circumstances of this case, of a non party costs order being made against Mr Kirby. But the Master, as I have said, identified a further factor as to why that should be so which she possibly seems to have regarded as necessary to her conclusion. That is to say her conclusion that there was bad faith.

91. As I have indicated, I do not think it would be right to accept that there was bad faith here on the part of Mr Kirby and to that extent I cannot agree with the Master's stated approach. It follows to the extent that that may have vitiated her reasoning that it is appropriate for me to exercise my own discretion afresh.

92. But even in doing that I have no difficulty at all in accepting the Master's ultimate conclusion as right. It seems to me indeed that had the Master only inverted the wording and said: "I do not conclude there is any evidence of bad faith against Mr Kirby but I do conclude there is evidence of impropriety as follows…" there would be unassailable reasoning as then set out by her. Indeed that is my own view on the evidence (including the recent statement of Mr Kirby which of course the Master did not have).

93. It seems to me, on the evidence, that the conduct of Mr Kirby here was unreasonable and unacceptable. Indeed I am perfectly prepared to apply the epithet "improper". One has to ask what is it that caused him to give instructions that these proceedings be commenced at a time when the company was insolvent and dependent on his support, at a time when he knew its only income-producing asset (the helicopter) was in the process of being sold and at a time when he knew, because he had been told, that Mr Hoff would seek security for costs if these proceedings were issued. Yet these proceedings were issued.

94. When the application for security for costs was duly made the proceedings collapsed without any explanation at all being given. Nor, as I have said, does Mr Kirby in his latest witness statement provide any explanation as to what his thinking was in causing

the company to institute proceedings notwithstanding the indication from Mr Hoff that security for costs would indeed be sought.

95. It seems to me that that reflects very poorly on Mr Kirby in such a way as to indicate, as I conclude and as the Master concluded, that these proceedings were motivated by a degree of spite and out of a degree of determination to ensure that Mr Hoff should not recover his Employment Tribunal award. I cannot see any real commercial benefit to the company itself in these proceedings being commenced and then abandoned in the way that they were, and it must have been foreseen that Mr Hoff himself would be exposed to significant legal costs in defending the claim in the interim.

96. So, whilst I acquit Mr Kirby of bad faith as such, and I am not prepared to reject his assertion that there was no bad faith in his recent witness statement, I do conclude that there was impropriety here, certainly in the sense of unreasonable and unacceptable conduct.

Conclusion

97. I am bound to say that the circumstances are such that I would in any event have concluded that a non party costs order was appropriate here irrespective of my finding of impropriety. But I do in any event find impropriety. Taking all these matters together and exercising my own discretion afresh I have reached the clear conclusion that this appeal should be dismissed. In truth but for the way in which the Master expressed herself I in other respects would endorse the points made by her. But as I say I exercise my own discretion afresh and reach, with no real hesitation, precisely the same conclusion that the Master reached.
