IN THE HIGH COURT OF JUSTICE **Claim No: HC13E00211**
CHANCERY DIVISION **Neutral Citation no. [2013] EWHC 2974 (Ch)**

BETWEEN:

HARCUS SINCLAIR (a firm)

Claimant

-and-

(1) BUTTONWOOD LEGAL CAPITAL LIMITED
(2) RYLATT CHUBB (a firm)
(3) ALTERNATIVE REAL ESTATE FUND LIMITED
(4) ROSKILL ADVISORS (CAYMAN) LIMITED

Defendants

Before:
David Donaldson Q.C. sitting as a Deputy High Court Judge

9 October 2013

The interpleader proceedings

1. On 20 May 2013 I handed down judgment ([2013] EWHC 1193 (Ch)) on an interpleader issue ordered in an action commenced on 16 January 2013 by Harcus Sinclair, a firm of solicitors holding monies entrusted to them in effect as stakeholders for the purpose of an Agreement concluded between the First Defendants ("BLC") as Lenders and the Third and Fourth Defendants (to whom I shall refer jointly as "AREF") as Borrowers for the funding of substantial litigation brought by AREF in the Commercial Court ("the Underlying Action"). The Second Defendants in the proceedings before me were Rylatt Chubb ("RC"), solicitors to AREF in both those proceedings and the Underlying Action. I ruled that the Funding Agreement had been validly terminated by BLC and all the monies held by the Claimants should be returned to BLC. It was in short a victory for BLC as against AREF, whom I ordered to pay BLC's costs. BLC asked me also to make an order against RC to pay those costs. I intimated that any such application should be made formally and properly prepared both evidentially and by written submissions, and I heard argument on BLC's ensuing application on 1 July 2013.

2. The contents of my judgment of 20 May 2013 were subject to a temporary embargo on publication to eliminate any possibility of affecting the Underlying Action. That embargo has however since expired following the termination of the action, which was struck out on 30 July 2013 following a failure to provide security for the costs of those proceedings. I can therefore set out the following extracts from the judgment, relevant to the application now before me:

> "7. The Agreement provided that the total Facility Amount of £6,145,374 would be drawn down in one advance on the Drawdown Date, which was in the event, as I understand it, 16 September 2011. Clause 3.3 provided that:
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> *"[T]he Lender shall make the advance of the Loan on the Drawdown Date as follows:*
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> *3.3.1 by paying to the Lender an amount equal to the Fund Protection Fee;*
> *3.3.2 by paying to the Insurer(s) an amount equal to the Funded Premium ...*
> *3.3.3 by paying to the Borrower's Solicitor the Security for Costs; and*
> *3.3.4 by paying the balance of the Loan, after deducting the payments made under 3.3.1 to 3.3.3 above into the 1st Class Legal Client Account to be applied as provided in this Agreement."*
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> 8. The client account referred to in Clause 3.3.4, which despite some inaccuracy I shall for convenience call the escrow account, was held by 1st

Class Legal (IS) Limited ("1st Class Legal"), at that time BLC's Investment Manager in the United Kingdom, with RBS, and the Agreement provided for the Borrower to execute a charge over that account in favour of the Lender to the extent of the funds in it designated to the Borrower. On 16 September 2011 the escrow account received a large sum under Clause 3.3.4, representing the balance of the Loan after certain deductions. The first of these was the Fund Protection Fee of £1,387,989. The second was the ATE premium of £2,634,462 ... Schedule 1 to the Agreement, showing the constituent elements of the Loan, ... include[d] a sum of £250,000 in respect of "Security for Costs", indicating and reflecting the expectation of the parties that the court would in due course require the provision of security in at least this amount.

9. The sole mechanism for release of monies from the escrow account was set out in Clause 3.4. This required the submission of a Release Request, which had to be in substantially the form set out in Schedule 5,

> *"accompanied by a bill of costs from the Borrower's Solicitors, together with any disbursement vouchers, detailing the Borrower's Solicitors Costs in the period covered by the bill of costs".*

The Request had to specify a Release Date at least 5 business days later, at which point the Lender was required (under Clause 3.7) to instruct the release of the monies from the escrow account ...

10. A number of Release Requests were submitted by the Borrower's solicitors, Rylatt Chubb, for ongoing costs and disbursements triggering substantial payments released to them out of the escrow account. By May 2012 the amount in that account had been reduced to £1,556,199.53. At that point it was agreed to transfer those funds to Harcus Sinclair, the interpleaders in this action, who accepted the monies on the terms of a written undertaking dated 24 May 2012 addressed to BLC and Rylatt Chubb, by which it undertook to hold those monies

> *"for payment to be made therefrom in accordance with the terms of the Agreement and to include the payment of the legal costs and disbursements of [Rylatt Chubb]".* "

3. Under Clause 6 the Loan was to be repaid two years after the date of the Agreement, i.e. 31 August 2013. It was also (under Clause 12.3) to be repaid immediately if the Agreement was terminated by BLC following an Event of Default, one of which was that

> *"in the reasonable opinion of the Lender the Borrower's prospects of success in the*

Proceedings are 60% or less".

The primary and essential issue before me was whether there had been such an Event so as to validate a termination notified by BLC on 8 January 2013, alternatively whether BLC was estopped from reliance on that notice of termination. I ruled in favour of BLC on that issue and on consequent claims by AREF which would have resulted in the release to RC of the monies certified in two Request Releases totalling some £160,000 for disbursements (including its own profit costs) and a further £250,000 to be paid over as the first instalment of an order in the Underlying Action for security for costs made on 30 November 2012.

4. AREF was represented in the interpleader proceedings by RC on the terms of a client care letter dated 7 February 2013 providing for their fees to be paid by AREF. The work was expected to be done in large part by Ms Virginia Rylatt, a partner in RC, whose fees were fixed at £350 per hour (+VAT). In the event, she also gave evidence as a witness of fact.

5. In addition she obtained for AREF an ATE insurance policy issued on 8 April 2013 with a substantial premium of £84,000 (equal to 35% of the cover) payable only in the event of success in the interpleader proceedings. In return the policy provided cover up to £240,000 against opponents' costs and own disbursements (the latter consisting in very large part of unpaid Counsel's fees of £99,750). Own disbursements did not however extend to the costs of the insured's own solicitors[1]. It was not suggested by RC that AREF had any significant (or potentially significant) assets other than the claim (if good) in the Underlying Action. There was therefore no realistic prospect of RC recovering from AREF its costs of representing AREF in the interpleader proceedings, if they proved unsuccessful, unless (a) alternative funding could be obtained for the Underlying Action and (b) that action were to result in a substantial financial recovery by AREF.

6. It does however appear likely that at least a substantial part of the costs order which I made against AREF in favour of BLC will be covered by the ATE policy. Any order which I might be minded to make against RC would have to take account of any payment or potential payment to BLC from this source[2]. In its practical effect, this application is therefore likely to be concerned only with any

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[1] In this the policy differed from the ATE cover obtained for the purpose of the Underlying Action.

[2] Indeed, it is possible that by the time I hand down this judgment payment will have been made.

excess of the costs order over the policy limit[3]. And it is well conceivable that the eye-watering figure for costs claimed by BLC may be pruned by the costs judge to a level resulting in that excess being only modest, or even non-existent.

The application for costs against Rylatt Chubb

7. The application is advanced on two alternative grounds of jurisdiction. Firstly, it is said that an order for costs can and should be made against RC as an unsuccessful party. In the alternative, the order is sought under the discretionary powers given to the court by section 51(1) and (3) of the Senior Courts Act, 1981, as glossed in the case-law, to make an order against a non-party.

(a) unsuccessful party ?

8. The submissions of Counsel for BLC proceeded on the basis, in the first instance largely assumed as self-evident, that as a defendant to the action brought by Harcus Sinclair RC was a party for the purpose of this jurisdiction. He then sought to establish that RC had been unsuccessful, and argued that thereafter the court's discretion was restricted to deciding whether there should be some limited departure or subtraction from the "natural" order that the loser pays (for example by basing the order on issues or extent of the victory). I found somewhat problematic his attempt to deal with the question of win-or-loss in the abstract: it appeared to me that the question was rather whether there had been success or failure *as a party*, which would have required a more detailed analysis than counsel appeared prepared to contemplate. Moreover, his approach sought in my view to truncate the court's discretion artificially.

9. It also became clear in the course of the submissions that BLC's argument under this head was premised on an illegitimate assumption, namely that RC was a party in any relevant sense.

10. It was unclear why Harcus Sinclair had joined RC as the Second Defendant. It may have been because the undertaking letter was addressed to BLC and RC (though it was to my mind tolerably clear that RC was being treated as agent for AREF). However that may be, Harcus Sinclair then dropped out of the matter,

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[3] This may be affected by whether AREF chooses to appropriate any part of the £240,000 to own disbursements. In this connection, one should also note Ms Rylatt's belief that the recovery of own disbursements is capped by the Policy at £90,000, as appears in the quotation (or Indication of Terms) from the insurers but does not feature in the Certificate of Insurance and Schedule of Cover.

content to abide by whatever order the court might make following adversarial contest between the rival claimants to the money. To this end the court ordered on 23 January 2013 what before the advent of the CPR was called an interpleader issue. The order provided that the issues raised as to the application, use and ownership and entitlement to the monies held by Harcus Sinclair be determined pursuant to specified directions, in particular that (i) BLC should serve and file Points of Claim setting out its entitlement to those monies (ii) AREF should serve and file Points of Defence and Counterclaim (iii) BLC should serve and file Points of Reply and Defence to Counterclaim. In short, RC was not made party to the interpleader issue which I heard and determined and was between BLC and AREF. Even if the mere presence of RC as a defendant in the *action* had provided a technical basis of jurisdiction, RC was not visited by my decision with failure on the interpleader issue. Whether or not a party, it could not succeed or fail in an issue to which it was not joined by the court order.

11. Even if that were wrong, in the circumstances of this case I would not have thought it appropriate to make a costs order against RC *qua* party, unless I had also been prepared to make the order on a non-party basis under the 1981 Act. To that question - to my mind the central one in this case - I now turn.

(b) as a non-party ?

12. The starting-point for claims under section 51(1) and (3) of the 1981 Act is now generally regarded to be *Dymocks Franchise Systems v Todd* [2004] 1 WLR 2807, and in particular the summary given by Lord Brown of Eaton-under-Heywood:

> *"25. A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows.*
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> *(1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.*
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> *(2) Generally speaking the discretion will not be exercised against "pure funders", described in para 40 of Hamilton v Al Fayed (No 2) [2003] QB 1175 , 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its*

course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.

(3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence-see, for example, the judgments of the High Court of Australia in the Knight case 174 CLR 178 and Millett LJ's judgment in Metalloy Supplies Ltd v MA (UK) Ltd [1997] 1 WLR 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in T G A Chapman Ltd v Christopher [1998] 1 WLR 12 , 22 as "the defendants in all but name". Nor, indeed, is it necessary that the non-party be "the only real party" to the litigation in the sense explained in the Knight case, provided that he is "a real party in ... very important and critical respects": see Arundel Chiropractic Centre Pty Ltd v Deputy Comr of Taxation (2001) 179 ALR 406, 414, referred to in the Kebaro case [2003] FCAFC 5 , at [96], [103] and [111]. Some reflection of this concept of "the real party" is to be found in CPR r 25.13(2)(f) which allows a security for costs order to be made where "the claimant is acting as a nominal claimant".

13. Where the non-party is the solicitor to the unsuccessful litigant, the case-law mandates a close look at the questions of funding, control and benefit and how overall in the light of these factors the discretion should be applied.

14. It is probably only in a (perhaps small) minority of cases that a solicitor does not provide at least some element of financing, even if it is only by not requiring to be placed and kept in funds in excess of all potential expenditure or fees. Not infrequently such credit may be provided until judgment at earliest, and either formally - as by a CFA - or informally the solicitor may accept the risk or even the quasi-certainty that he will be neither reimbursed for expenditure nor paid his fees in the absence of success by his client against, and recovery from, his opponent. But these are - certainly in modern times - regarded as acceptable ways of facilitating access to justice. The existence of funding by a solicitor cannot therefore in itself be a sufficient basis for concluding that the solicitor is either the - or a - real party to the litigation or vulnerable to a non-party order for costs (see e.g. *Floods of Queensferry Ltd v Shand Construction Ltd*, [2002] EWCA Civ 918; [2003] Lloyd's Rep. I.R. 181 at paras 79 to 83 per Hale L.J. and *Gavin Flatman v Gill Germany* [2013] EWCA Civ 278 at paras 45 ff. per Leveson LJ). It must equally be the case that the potential benefit if victory enables the client to pay

the solicitor is not a factor which can properly open the door to an order against the solicitor.

15. What the court must seek is therefore some element which indicates that - as it is sometimes put in the case-law - the solicitor has, at least to some extent, acted outside his role as a solicitor for his client, or, as I would add, for a purpose outside that role. While this may be problematic where the applicant cannot identify any act which is not explicable or called for by the proper discharge of the solicitor's professional obligations to his client in the conduct of the litigation, that is not always fatal. In such a case, it will in my view be of great, and possibly decisive, importance whether the interests - and hence the motivations - of the solicitor and the client are in any significant respect incongruent. That was so in *Myatt v National Coal Board* [2007] 1 WLR 1559 where the solicitor had a substantial and apparently much greater additional interest in a successful appeal in that it would create a binding judicial precedent enabling him to recover his profit costs in 60 other similar cases. *Myatt* was however unusual in both its facts and result. Typically, the solicitor's interest is no more than a direct linear consequence of his client's potential success: he will be paid if his client is paid and not if not. Moreover, even if there were a significant lack of congruence, the degree of the discrepancy - possibly combined with other factors in a discretionary evaluation - may still make it inappropriate to make any order for costs, or lead the court to limit the order to only part of the costs.

16. In the present case victory for AREF in the interpleader issue would have brought benefit to RC in more than one respect.

(a) Most immediately, RC would have been paid sums totalling around £160,000 which it had earned or disbursed on its client's behalf for the purpose of the Underlying Action. The client's recovery under the Funding Agreement and the payment to the solicitors of its dues would be here co-extensive - and indeed, given the mechanism for payment, co-incident.

(b) As regards the £250,000 to be used for security for costs this would have been effected by a payment into court by or on behalf of AREF. The forensic show would then have been kept on the road for some further period. RC might then - at least initially - have been able to bill further fees to AREF and recover them under the Funding Agreement (as to which the last sentence of (a) above would apply). That Agreement was however due to expire within a few months, and I had no basis for concluding that it was likely to be refinanced. The future of the Underlying Action, and with it the basis for any earnings by RC from it, was therefore in any event fragile at best.

(c) Finally, on the assumption that BLC - had it lost the interpleader issue - would have complied with a costs order in favour of AREF, RC could have expected to

be paid its profit fees on the interpleader issue and recover its disbursements. This would be no more than the linear consequence which as I pointed out earlier occurs in the typical case.

17. In these circumstances, I do not consider that this is an appropriate case in which to make an order under section 51(1) and (3) of the 1981 Act and in the exercise of my discretion refuse to do so. Even if I had taken a different view, I would not have thought it right to make an order for more than a very modest proportion of the costs.

Conclusion

18. The application will therefore be dismissed.