Neutral Citation Number: [2020] EWHC 1056 (Ch)

Case No: BL-2019-000609

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 01/05/2020

Before :

MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

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Between :

KILIMANJARO AM LIMITED	**Claimant**
- and -	
(1) MANN MADE CORPORATE SERVICES (UK) LIMITED	**Defendants**
(2) MARK CUNDY	
(3) DAVID CATHERSIDES	
(4) RIZWAN HUSSAIN	
(5) ALFRED OLUTAYO OYEKOYA	
(6) RAJNISH KALIA	

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Mr Antonio Bueno QC (instructed by **Mishcon de Reya**) for the **1st to 3rd Defendants**
The **4th to 6th Defendants** did not attend and were not represented.

Hearing date: 30th April 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by Mr David Halpern QC remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 1st May 2020 at 15:00 pm

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.

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MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

Mr David Halpern QC :

1. On 10th May 2019 I gave judgment in these proceedings. I struck out the claim brought in the name of the Claimant against the First to Third Defendants (who are now the Applicants before me and whom I shall call "**the Applicants**") on the ground that Mr Oyekoya and Kilimanjaro Capital Management Ltd, who purported to be the directors of the Claimant, were not genuinely the directors, that their purported appointments were the result of fraud and forgeries, and accordingly that the proceedings had been brought in the name of the Claimant without authority. I need not repeat what I said in that judgment. The findings which I made in that judgment form the basis for the current judgment.

2. There are now four applications before me brought by the Applicants against the Fourth to Sixth Defendants, to whom I shall refer collectively as "**the Respondents**" and individually by their names. (Mr Kalia is the person whom I wrongly named in my earlier judgment as Mr Karia.) The applications are as follows:

   i) Applications dated 16th September 2019 for non-party costs orders ("**NPCOs**") on the indemnity basis against Mr Hussain and Mr Oyekoya respectively;

   ii) An application dated 16th September 2019 for a civil restraint order ("**CRO**") against Mr Hussain and Mr Oyekoya; and

   iii) An application dated 1st November 2019 for a NPCO against Mr Kalia.

3. I have heard these applications by means of a remote hearing by Skype. The Applicants are represented by Mr Antonio Bueno QC, instructed by Mishcon de Reya. The Respondents do not appear before me and are not represented, but I am satisfied that they were all given proper notice of this hearing. As the Respondents are litigants in person and were not present at the hearing, I asked Mr Bueno to draw my attention to any facts or law which supported the Respondents' case or was adverse to the Applicants' case.

4. The only communication which the court has received from the Respondents in relation to this hearing is a letter dated 29th April 2020 from Mr Hussain. He says in that letter that the applications should not proceed because the Claimant is now in liquidation. However, the fact that it is in liquidation is of no relevance to the current applications, which raise issues solely as between the Applicants and the Respondents.

The applications for NPCOs on the indemnity basis

5. The basis of the application against Mr Hussain is that he was responsible for bringing the proceedings in the name of the Claimant, assisted by Mr Oyekoya, and that he thereafter controlled the proceedings. I am satisfied that this is established. Mr Hussain claimed to have been appointed as a director and to have resigned just before he was made bankrupt, but his appointment was based on forged documents, as I found in my previous judgment. I also found that he was the ultimate beneficial owner of the Claimant. At the hearing before me on 9th May 2019 Mr Hussain said in cross-examination: "I think in terms of a personal interest, I am the founder and I would confirm that I am the driver behind this." On 14th May 2019, while Mr Hussain was an undischarged bankrupt, I gave permission under 285(3)(b) of the Insolvency Act 1986 to pursue the application against him. I have been told that he obtained his discharged on or about 27th April 2020.

6. The basis of the application against Mr Oyekoya is that he assisted Mr Hussain to initiate these proceedings in the name of the Claimant and that he held himself out, or allowed himself to be held out, as a director of the Claimant, that he made false witness statements and that he promoted forged documents in support of the proceedings. I am satisfied that this is established. Mr Oyekoya signed the Claim Form as (purported) director of the Claimant and signed witness statements to the same effect.

7. The basis of the application against Mr Kalia is that he was responsible for bringing the proceedings in the name of the Claimant, assisted by Mr Hussain and Mr Oyekoya, and that he thereafter controlled the proceedings. I am satisfied that this is established. In his second witness statement dated 28th November 2019 Mr Kalia confirms the accuracy of Mr Hussain's fifth witness statement of the same date, which states that Mr Kalia was appointed a director of the Claimant on 1st March 2019. Further, Mr Peter Wareing of counsel, who acted on the "without notice" applications to Mann J (referred to in my first judgment), prepared notes of the hearings in which he said that he received his instructions to act for the Claimant from Mr Kalia as director and Mr Hussain as ultimate beneficial owner of the Claimant. Mr Kalia also attended the hearing before me on 9th May 2019.

8. There is a slight tension between the statements in the applications against Mr Hussain and against Mr Kalia that each of them was the person who controlled the Claimant. However, I am satisfied on the evidence set out above that they both controlled the proceedings and that this apparent tension is merely the result of infelicitous language.

9. The Respondents' evidence in answer is contained in the fifth witness statement of Mr Hussain dated 28th November 2019, which Mr Oyekoya and Mr Kalia both confirm in their own witness statements. This evidence seeks to challenge some (but by no means all) of the statements made by the Second Defendant in his witness statements. However, there is nothing in the Respondents' witness statements which refutes any of the facts set out in paragraphs 5 to 7 above.

10. The procedural requirements in relation to applications for NPCO are set out in CPR rule 46.2. These have been complied with.

11. Jurisdiction to make NPCOs is conferred by section 51 of the Senior Courts Act 1981. The principles on which the court exercises its discretion are well established. Mr Bueno has referred me to *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23, in which Moore-Bick LJ said at [21]:

> "When an order for costs is sought against a third party, the critical factor in each case is the nature and degree of his connection with the proceedings, since that will ultimately determine whether it is appropriate to adopt a summary procedure of the kind envisaged in the authorities, leading to what Neuberger LJ in *Gray v Going Places Leisure Travel Ltd* [2005] EWCA Civ 189; [2005] CP Rep 21 described as "the overall order made by the court at the conclusion of the trial." It is important to note, however, that, contrary to [counsel's] submission, the guidance given in *Symphony* has not been regarded as immutable, but has been developed and modified in subsequent cases to reflect the differing circumstances under which applications for orders of this kind have been made."

I have also read, but need not set out, paragraphs [13] to [19] of that judgment and the guidance given in the White Book at 46.2.2.

12. It is unnecessary to refer to any further authority. Moore-Bick LJ's judgment is one of a number referred to at 46.2.2 in which the court has made a NPCO against a director of a company which was a party to the proceedings. The reason why I need not refer to further authority is that the present case is much clearer and more extreme than any of the cases cited at 46.2.2. The Claimant company's name was knowingly misused by purporting to make it the claimant in these proceedings, which were therefore instituted and maintained without authority and in reliance on forged documents. It is self-evident that any person who has caused this to happen or facilitated it, knowing that the real directors had not authorised the proceedings, should be personally liable for the costs. The only issue is whether each of the Respondents is such a person. On the basis of the findings of fact in my earlier judgment and the evidence set out above, I am entirely satisfied that each Respondent is such a person.

13. I am also satisfied that costs should be awarded on the indemnity basis. Adopting the phrase used by the Court of Appeal in *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson* [2002] EWCA Civ 879, "there must be some conduct or some circumstance which takes the case out of the norm". Although there is no requirement that the conduct or circumstance must be exceptional, this clearly is an exceptional case.

14. The Applicants are prima facie entitled to a reasonable sum on account of costs, pursuant to CPR r. 44.2(8). The latest costs statement shows costs in excess of £487,000 plus VAT, including counsels' fees exceeding £106,000. Even on the indemnity basis, my first impression is that this is an extraordinarily large sum in relation to proceedings which were struck out at an early stage and where the only substantive hearings at which the Applicants were represented were the hearings before me on 9th May 2019 and this hearing. It is right that I say no more, because the final decision will be one for a Costs Judge following a detailed assessment. I will award a payment on account in the sum of £200,000, inclusive of VAT.

The application for a civil restraint order

15. The application seeks a Civil Restraint Order ("CRO") against Mr Hussain and Mr Oyekoya. Paragraph 5.2 of CPR PD3C requires the application to specify whether the order is a limited, extended or general CRO. The application issued against Mr Hussain and Mr Oyekoya fails to specify this and there is no indication in the correspondence with the Respondents. Mr Bueno asked me to make a general CRO and to waive this defect but he advanced no grounds as to why I should do so. I am not satisfied that I should deprive the Respondents of receiving the notification to which they are entitled under the CPR, especially given that the Applicants seek the widest CRO that may be sought.

16. I will therefore adjourn this application to a date to be fixed, on terms that the Applicants bear the costs of and occasioned by the adjournment.