



Neutral Citation Number: [2022] EWHC 1944 (Ch)

Case No: CF084/2021CA

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE CARDIFF
ON APPEAL FROM THE CAERNARFON COUNTY COURT
ORDER OF HHJ JARMAN QC DATED 20 JANUARY 2022
County Court Case Number: H00CJ088

Cardiff Civil and Family Justice Centre
2 Park Street
Cardiff CA10 1ET

Date: 26 July 2022

Before :

THE HONOURABLE MR JUSTICE ZACAROLI

Between:

(1) BRENDA ELIZABETH TURNER
(2) MARILYN MARGARET JONES
(3) ALAN TREVOR JONES

**Claimant/
Respondents**

- and -

(1) MR OWEN GWILYM THOMAS
(2) O G THOMAS AMAETHYDDIAETH CYG

**First
Defendant**

**Second
Defendant/
Appellant**

Gavin Bennison (instructed by Ebery Williams) for the Appellant
William Batstone (instructed by JCP Solicitors) for the Respondents

Written Submissions 8 June 2022

COSTS JUDGMENT

Mr Justice Zacaroli:

1. This judgment addresses one point of dispute on the draft order following the handing down of my judgment dated 26 May 2022 dismissing the appeal of the appellant (the “Company”) against the Order of HHJ Jarman QC dated 20 January 2022.
2. The parties have agreed an order that the respondents shall have their costs of the appeal in the agreed sum of £12,750. The point of dispute is whether that order should be made as against both Mr Thomas (the first defendant in the action) and the Company (the second defendant in the action), or just against the Company.
3. Mr Thomas’ position before HHJ Jarman QC was that he should not have been joined to the proceedings, since the tenancy was vested in the Company alone. He took no substantive part in the proceedings, and on that basis it was contended that no costs order should be made against him.
4. The respondents provided written submissions seeking costs of the proceedings in front of the judge on one of two bases. First, both defendants were substantively liable for an order for possession and damages, so an order for costs should be made against both of them. Second, the court should proceed by analogy with the cases where costs are sought against a non-party, on the basis that Mr Thomas funded and/or controlled the defence of the Company and stood to benefit from a successful defence.
5. In his order of 20 January 2022, HHJ Jarman QC ordered the defendants (i.e. both Mr Thomas and the Company) to pay the costs of the claimants (that is, the respondents).
6. In response to a request by the solicitors for Mr Thomas and the Company that the judge provide reasons for that decision, in an email sent by HHJ Jarman’s clerk to the appellant’s solicitor on 10 June 2022 it was stated that the reason for the costs order was that the claimants were wholly successful and there was no conduct of the parties which justified a different order.
7. Mr Thomas has not appealed any part of HHJ Jarman’s order. The Company alone appealed the substantive decision of HHJ Jarman QC.
8. Mr Thomas contends that, as he is not a party to the appeal, he should not be liable for the costs of the appeal.
9. The brief reasons provided by the judge do not indicate which of the two bases advanced by the respondents for making a costs order against both defendants he adopted. I need to consider the matter afresh in relation to the costs of the appeal.
10. The respondents contend that I should order Mr Thomas to pay the costs on the following basis:
 - (1) Such an order is well within the discretion afforded by section 51(1) and (3) of the Senior Courts Act;
 - (2) The court need not be concerned with the provisions of CPR 46.2(1) (which require a non-party to be added to proceedings if a costs order is sought against them, and for them to be given a reasonable opportunity to attend a hearing at which the Court

will consider the matter further). That is because Mr Thomas is already a party to the proceedings.

- (3) In any event, Mr Thomas has had ample opportunity to respond to this application. He is represented by the same solicitors as the Company. The respondents' intention to seek a costs order against him in relation to the appeal has been known since long before the appeal hearing. It was canvassed at the appeal hearing and the parties, including Mr Thomas, have had a full opportunity to address the point in submissions.
- (4) The principles relevant to costs orders against third parties apply, either directly or by analogy. Those principles were recently summarised by the Court of Appeal in *Grizzly Business Ltd v Stena Drilling Ltd* [2017] EWCA Civ 94, at §51, as follows:

“51. The power to make a non-party costs order under section 51 of the Senior Courts Act 1981 has been considered in a number of recent decisions of this court. Furthermore, it has been extended by analogy in *Threlfall* to cases of a co-defendant. We derive the following propositions from these recent cases:-

- 1) “Where a non-party Director can be described as the “real party”, seeking his own benefit, controlling and/or funding the litigation, then even where he has acted in good faith or without any impropriety, justice may well demand that he be liable in costs on a fact-sensitive and objective assessment of the circumstances.” (*Goodwood Recoveries Ltd v Breen* [2005] EWCA Civ 414; [2006] I WLR 2723 per Rix LJ at [59])

- 2) It is not the case that both control and funding of the litigation must be present. (*Systemcare UK Ltd v Services Designed Technology Ltd* [2011] EWCA Civ 546; [2012] 1 DCLC 14 per Lewison LJ)

- 3) “The very fact that the making of such an order is discretionary demonstrates that the question is not one of rights and obligations of a non-party, for no obligations exist unless and until the court exercises its discretion. Moreover the fact that the discretion, if exercised, is exercised against a non-party underlines the proposition that the non-party has no substantive liability in respect of the cause of action in question. ... [T]he court is not fettered by the legal realities. It is entitled to look to the economic realities. It is in this sense that many of the cases pose the question whether the non-party is “the real party” in the case.” (*Threlfall v ECD Insight Ltd* per Lewison LJ at [13])

- 4) Each case turns on its own facts. Since the decision involves an exercise of discretion, limited assistance is likely to be gained from the citation of other decisions at first instance in which judges have or have not granted an order of this kind. (*Deutsche Bank v Sebastian Holdings Inc.* [2016] EWCA Civ 23 per Moore-Bick LJ at [61], [62])

- 5) An order of this kind is “exceptional” only in the sense that it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. (*Deutsche Bank* per Moore-Bick LJ at [62])
- 6) “...The only immutable principle is that the discretion must be exercised justly.” (*Deutsche Bank* per Moore-Bick LJ at [62])
- 7) “By funding, the funder takes a risk, a risk as to the nature of which he has the opportunity to inform himself both before offering funding and during the course of the litigation which he funds.” (*Excalibur Ventures LLC v Texas Keystone Inc.* [2016] EWCA Civ 1144 per Tomlinson LJ at [29])
- 8) “The single question is whether in the circumstances it is just to make a discretionary order requiring the non-party to pay costs because of the nature of its involvement in the litigation.” (*Excalibur Ventures LLC* per Tomlinson LJ at [51])”
- (5) The position as regards company directors was summarised by Coulson LJ, with whom Lewison and Dingemans LJJs agreed, in *Goknur v Aytacli* [2021] EWCA Civ 1037, at §40-41
- “(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*), section 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 section 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 section 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 section 51 order is just.”

- (6) The circumstances of this case justify an order against Mr Thomas given that: (a) he must be funding the Company’s appeal; (b) the Company is impecunious, its latest filed accounts indicating that it has negative capital reserves of £3,776; and (c) he is the person who stood to benefit from the appeal succeeding.

11. Mr Thomas resists the making of a costs order. He contends that:

- (1) The procedural conditions for making a non-party costs order have not been met, because Mr Thomas has neither been added as a party nor given the opportunity to attend a hearing to consider the matter;
- (2) An order against a non-party may only be made in exceptional cases;
- (3) Mr Thomas should not have been added as a defendant to the proceedings, and one cannot infer merely from the fact that he was a co-defendant that the relationship

between him and the Company is one that makes a non-party costs order appropriate;

- (4) He cannot be described as the “real party” to the claim, indeed he was a redundant party to the claim at first instance and has not sought to appeal. The proceedings were brought for the sole benefit of the Company, which remains the tenant (citing *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613, per Millett LJ at p.1620);
- (5) The appeal has not been pursued at Mr Thomas’ expense (although it is not said who has funded it), and so it has not been funded from Mr Thomas’s own resources;
- (6) Mr Thomas is a farmer with limited resources – to order him to pay costs would erode the fundamental doctrine of separate liability of a company, particularly where, as here, there is no allegation of bad faith or impropriety.

12. I agree with Mr Thomas to this extent, that the fact that he was made a defendant to the action is not sufficient reason to make a costs order against him on this appeal. I consider the correct approach is to apply by analogy the principles derived from cases where costs orders are sought against non-parties. Applying those principles, and bearing in mind the points made on behalf of Mr Thomas:

- (1) The purpose of the procedural requirements relating to those who are not parties at all is to ensure they have proper notice of, and are able to respond to, claims for costs against them. That purpose is satisfied here, where Mr Thomas is already a party, and where he has had ample notice of the respondents’ intention to claim costs against him and has instructed Counsel to make submissions on his behalf. Accordingly I reject the submission that the Court cannot make a costs order against him because the procedural requirements that relate to someone who is not a party at all have not been followed to the letter.
- (2) As to the submission that a costs order against a non-party can only be made in “exceptional cases”, that is intended to mean only that it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense: see *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23, per Moore-Bick LJ at §62. As was there stated: “the only immutable principle is that the discretion must be exercised justly”.
- (3) I accept that the mere fact that Mr Thomas was a co-defendant does not justify a costs order against him. That is not an answer, however, to a costs order by an analogy with a costs order against a non-party.
- (4) I also accept that it is the Company that is the proper party to the appeal, as the lease is vested in it, and that the Company alone would have benefitted in a direct sense if the appeal had been allowed. But that does not answer the question whether Mr Thomas was the “real” party in the sense intended in the authorities dealing with non-party costs orders. There, the question looks to the substance of the relationship between the director and the Company, to see whether – notwithstanding the Company is a separate legal personality – it is the director who would in substance have benefitted from the appeal.

- (5) In addressing that question, I consider that it is relevant that Mr Thomas is not merely a director of the Company but, according to the facts as agreed for the hearing below was, at the time of the notice to quit, the sole shareholder of the Company and the person responsible for the management of the farming enterprise on behalf of the Company. Mr Thomas has not suggested that the position is any different now. The Company's participation in the proceedings can therefore only have been controlled by Mr Thomas. In those circumstances, I consider that the available evidence indicates that Mr Thomas was indeed the real party in the sense intended in cases such as *Goknur*: he would have benefitted from a successful appeal, as it would have enabled him (as the "farmer" of the relevant land – as described in the submissions made on his behalf) to continue farming the land that he had originally leased from the respondents' predecessor in title, through the medium of the Company.
- (6) The fact that Mr Thomas has not funded the appeal out of his personal resources does not detract from that position: it is not an essential element that the person who would benefit from the litigation (and is in that sense a real party) must have funded the litigation before a costs order can be made against them.
13. In all the circumstances, therefore, and where the unchallenged evidence is that the Company is impecunious, I consider that it is just to order that the costs of the appeal be paid by Mr Thomas.