Neutral Citation Number: [2021] EWHC 817 (Ch)

Case No: CR-2020-BRS-000017

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

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

Date: 01/04/2021

Before :

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

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Between :

Sir Henry Royce Memorial Foundation	**Claimant**
- and -	
Mark Gregory Hardy	**Defendant**

- -
- -

Charlie Newington-Bridges (instructed by **Willans LLP**) for the **Claimant**
The Defendant appeared in person

Consequential matters dealt with on paper

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Approved Judgment

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

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 12 noon.

HHJ Paul Matthews :
Introduction

1. On 19 January 2021, I heard this claim for an order under section 117 of the Companies Act 2006. I handed down my written judgment on 26 March 2021, having circulated a draft in advance (see now [2021] EWHC 714 (Ch)). In brief, I decided that the defendant's request for copy documents or inspection under section 116 was invalid, and in addition was not made for a proper purpose. The parties have attempted to agree an order, but have been unsuccessful. The claimant seeks its costs of the claim on the indemnity basis with summary assessment, whereas the defendant seeks no order as to costs, or at any rate a detailed assessment of costs ordered on the claim, and on the standard basis only. The defendant also seeks permission to appeal against my decision, which the claimant resists.

2. When circulating the draft judgment, I directed the parties to let me have any written submissions on consequential matters by email by 4 pm on 26 March, and any written submissions in reply to the other side's submissions by 4 pm on Monday 29 March 2021. I subsequently extended time for both sides for submissions in reply to Wednesday 31 March 2021, at 4 pm. I received submissions from the defendant on 24 March 2021 (earlier than required) and from the claimant on 26 March 2021. These latter submissions also replied to the defendant's submissions, which had been filed early. I then received submissions in reply from the defendant on 31 March 2021, but I did not receive any further submissions from the claimant, no doubt because those submissions had already been made.

Costs

3. I have now considered the written submissions by both parties and here give reasons for my decision. I begin with the question of costs. This concerns both the general law, and also a specific rule in section 117 of the 2006 Act. The specific rule is that:

> "(3) If on an application under this section the court is satisfied that the inspection or copy is not sought for a proper purpose –
>
> (a) it shall direct the company not to comply with the request, and
> (b) it may further order that the company's costs … on the application be paid in whole or in part by the person who made the request, even if he is not a party to the application."

In my judgment this adds nothing to the general rules on costs, beyond conferring a further power on the court to make a non-party costs order against the person who made the request, over and above that which arises under section 51 of the Senior Courts Act 1981. So I turn to consider the general law.

4. Under the general law, costs are in the discretion of the court, but if the court decides to make an order about costs, the general rule is that the unsuccessful party in the proceedings pays the costs of the successful party: CPR rule 44.2. In my judgment it is appropriate to make a costs order in the present case. Overall, the claimant is clearly the successful party. Is there any reason why the general rule should not apply in this case? The defendant argues that the claimant failed to show that two of the three purposes for the request were not proper, and this should be taken into account. In my judgment, the fact that the claimant did not succeed on all its arguments does not change matters. Even if it had only succeeded on one point, the invalidity of the request, it would still have succeeded in the claim. I consider that the general rule should apply, and that the defendant should pay the claimant's costs of the claim.

Basis of assessment

5. The claimant seeks an order that its costs be paid on the indemnity basis. It refers to the decision of the Court of Appeal in *Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspen and Johnson* [2002] EWCA Civ 67. In that case, Lord Woolf CJ said:

> "32. … before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."

Waller LJ agreed, saying:

> "39. The question will always be: is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs?"

Laws LJ agreed with both judgments.

6. The claimant relies on a number of features of the present case in support of its argument. It says that the defendant's conduct of the case, including taking every possible point, has escalated costs, and that his correspondence has included offensive remarks. I have been referred to some examples of the latter, which show the defendant (on his own admission) to be using intemperate language, and (in my reading) in a rather condescending manner. In my judgment, this behaviour is unnecessary, and indeed counter-productive, because more time and resources are then spent on dealing with these problems of tone and language than in addressing the real issues in the case.

7. As to the former, I have read the correspondence between the parties in October and November 2020, before the PTR. This shows that the defendant was vigorously insisting that the remote trial of the claim should be live streamed on the Internet, because there was great public interest, and indeed there would be "possibly hundreds of requests to join". Yet, at the PTR itself, as I recall, the defendant conceded the point without argument, and accepted that anyone interested could obtain a link from the court and participate that way. In the event, no more than 14 members of the public

did. The defendant's correspondence once again shows him as difficult to deal with, condescending and indeed offensive.

8. Another example was the defendant's insistence on exhibiting a 500 page transcript of a meeting of the Club (not the company at all) to an unauthorised witness statement, which when challenged led to an order made by the district judge that the defendant should make a further witness statement, not exceeding five pages in length, identifying relevant passages in the transcript said to be relevant (and why). The defendant thereupon made a five-page witness statement, exhibiting the same 500 pages of transcript, but without identifying the relevant passages, as required by the court. Instead, the defendant summarised what he said the transcript said, and excerpted eight short passages, on which he commented. In any event, none of this was more than remotely relevant to the issues in the case.

9. A further example is the defendant's excessive correspondence with the claimant, contained in two lever arch files of the trial bundle. I am told that this is not the whole of his correspondence. In December 2020 the defendant sent 46 emails or letters to the claimant, whereas the claimant sent 9 to the defendant. Overall, there are 185 emails or letters in the bundle from the defendant to the claimant or its solicitors. At bottom, this is a straightforward claim based on a request for inspection or copy of the members register. It does not require such disproportionate efforts on the part of the defendant.

10. Finally, there were serious allegations made in pre-trial correspondence by the defendant against Mrs Jane Pedler, of deceiving the court, and perverting the course of justice. In my judgment I expressly stated that I found Mrs Pedler to be telling the truth in the evidence she gave to the court. There was also an accusation in correspondence by the defendant that "she is guilty of fraud … proven to the criminal standard". But no such thing was in fact proved before me. In his original email submissions to me of 24 March, the defendant said that the evidence before me showed that the directors had admitted committing wrongdoing. But this was not particularised or supported by reference to the evidence.

11. In his reply submissions of 31 March the defendant returned to this theme. He said that the directors of the claimant had indeed admitted their guilt of the offences of which he accused them, and referred to the amended accounts of *the Club* (not the claimant), which he said reflected "correction of fraudulent accounting policies and refunds of monies misappropriated from its members as alleged by the Defendant". But the defendant was not entitled to do this. He should have put this in his original submissions. In any event, it does not follow from the fact that the directors of the Club have amended its accounts that the persons who are the directors of the claimant company are admitting any wrongdoing. This is a long way from proof to the criminal standard of any offence having been committed.

12. He also says more generally that "the conduct of the applicant [that is, the claimant] was so egregious that any consideration of the indemnity basis is wholly inappropriate and unwarranted". He relies on an allegation that the applicant's costs have already been met by non-refundable donations from third parties, and that this has been withheld from the court in breach of what he says are the duties of candour towards the court the claimant's company secretary, solicitors and counsel as "all officers of the court". (As an aside, I am not aware of any authority for saying that a company

secretary or a barrister is an officer of the court. In relation to the latter, indeed, the recent Irish case of *Bond v Dunne* [2017] IEHC 646, [14]-[15] says the opposite.)

13. Strictly speaking, I am not obliged to consider this argument, which should have been made in the initial submissions, so that the claimant had an opportunity to respond to it. But in my judgment there is nothing in it anyway. I assume that the defendant's argument is that, if the claimant has received monies from third parties to cover its legal costs, it would be a breach of the indemnity principle for the claimant to recover its costs from the defendant.

14. The indemnity principle was originally explained by Bramwell B, giving the judgment of the Court of Exchequer in *Harold v Smith* (1860) 5 H & N 381, 385, in this way:

> "Costs as between party and party are given by the law as an indemnity to the person entitled to: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained."

15. Thus, for example, if the solicitor agrees not to charge the client costs, the client being successful cannot obtain an order for costs against the other party: *Gundrey v Sainsbury* [1910] 1 KB 645, CA. On the other hand, if there is an agreement between the solicitor and the client to charge costs, and the solicitor subsequently becomes aware that the client is unable through impecuniosity to pay them, the client being successful can still obtain an order for costs: *Burstein v Times Newspapers Ltd (No 2)* [2002] EWCA Civ 1739.

16. In the present case, the claimant incurred costs with its solicitors under the contract of engagement which it had entered into. The indemnity principle prevents the claimant recovering more than its liability to the solicitors. That liability is certified in the N260 statement of costs by a partner in the claimant's solicitors. I have no basis for going behind the certificate. The fact that third parties may have made donations with a view to covering this liability, in whole or in part, does not breach the indemnity principle. Those donations simply form part of the funds of the claimant held for the purposes of the charity, which must include discharging its proper liabilities, Including those to the solicitors.

17. Of course it is possible, in an appropriate case, to consider a person who makes a donation to cover legal costs as a person who is financing litigation, and who therefore is potentially exposed to an order to pay the costs of the successful opponent. In a case such as this, where it appears there were many donations to make a fund to pay the legal costs, I doubt that it would be appropriate to order those many donors pay towards the costs of a successful opponent. But in any event the claimant has been successful, and that question simply does not arise.

18. Because the question was raised by the defendant in his reply submissions (though again strictly he was not entitled to do so), and for the avoidance of any doubt, I do not consider that this was a *champertous* arrangement. Champerty is a form of 'maintenance', by which a person maintains (*ie* finances) a law suit in return for a

share of the proceeds. The donors did not donate in return for a share of the proceeds. There would never be any. It was not that sort of claim.

19. Nor was it even maintenance. In *Giles v Thompson* [1994] 1 AC 142, 164, Lord Mustill suggested that the current test of maintenance should ask the question whether "there is wanton and officious intermeddling with the disputes of others in which the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse." That test is not satisfied here. The donors will have had some proper interest in the affairs of the claimant, whether as members, or as persons owning Rolls-Royce motor-cars, and that will have been a good justification for donating.

20. My overall assessment is that the conduct of the defendant in the present case was well out of the norm, in the way he approached the inter partes correspondence, and in the language and tone that he employed in conducting it, in the way that he attempted to put in large amounts of irrelevant material as evidence, and in the way that he made unsupported accusations of serious offences against the claimant and its directors.

21. The defendant is (as he more than once reminded me) a litigant in person, and not a qualified lawyer, but that does not excuse him. There are not two sets of rules for litigation in this jurisdiction, one for represented litigants and one for unrepresented. As Lord Briggs said in *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, [42], "Save to the very limited extent to which the CPR now provides otherwise, there cannot fairly be one attitude to compliance with rules for represented parties and another for litigants in person, still less a general dispensation for the latter from the need to observe them".

22. In any event, the evidence has disclosed that the defendant is intelligent and articulate, and an experienced litigant in person, with access to legal resources. The problem is that, being neither professionally trained nor qualified as a lawyer, he has no sense of responsibility to the system, no duty of the kind that would be owed by a lawyer to the court (and sanctioned if breached), and no professional reputation to lose. In my judgment, this is a clear case for costs to be assessed on the indemnity basis, and I will so order.

Method of assessment

23. The next question is the method of assessment of these costs. The claimant asked that I summarily assess the costs, on the basis that a detailed assessment would take much time and incur more cost, and also that the assessment needs to be undertaken promptly. The claimant tells me that the defendant has put his home in the name of a company, of which the defendant is the only director, and which is now recorded as being in voluntary liquidation. I am further told that, according to the annual return in 2014, the shares in this company are in the name of his family. In the event that the court declines to assess costs summarily, the claimant asks for a payment on account of 60% of the amount sought in the claimant's costs schedule.

24. In response to this, the defendant says that there is no evidence that he has put his home in the name of the company to avoid paying his debts. He says that the shares in the company that owns the house were transferred to the trustees of his children's trust

in 2012 in satisfaction of a debt owed by the company to those trustees. He also points out that the property is let on a 25 year internal repairing lease to one of the directors, Judith Mary Hardy (whom I assume to be the defendant's wife, though nothing turns on that). In any event, the defendant says his impecuniosity is irrelevant to the question of assessment. I cannot resolve this factual dispute on the material before me.

25. CPR PD 44, paragraph 9.2, provides that:

> "The general rule is that the court should make a summary assessment of the costs –
> (a) at the conclusion of the trial of a case which has been dealt with on the fast track, in which case the order will deal with the costs of the whole claim; and
> (b) at the conclusion of any other hearing, which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim,
> unless there is good reason not to do so, for example where the paying party shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily."

26. The hearing in the present case lasted one day, and was the trial, and indeed disposal, of the claim. Accordingly, the court has power summarily to assess the costs, unless there are good grounds not to do so. The defendant relies once again on the non-refundable donations and the irrelevance of his impecuniosity. I have already dealt with the question of the non-refundable donations. In my judgment, they are irrelevant to the question of the method of assessment. As for his alleged impecuniosity, I have already said that I cannot make any finding as to this, and hence leave it on one side.

27. The *size* of the costs claimed is however significant. The total claimed in the summary statement of costs, for issue, preparation and trial, is £111,088 for the solicitors, and £22,700 for counsel, together with various court and other fees, and photocopying and courier charges totalling £900.68, plus VAT of £28,757.60. Whilst these figures may turn out to be justified, they are somewhat larger than I would have expected for what is essentially a short point under the Companies Act. I think in this case justice demands that there be a detailed assessment of those costs.

Payment on account of costs

28. On the other hand, I consider that there is no good reason not to order payment of a sum on account of costs under CPR rule 42.2(8). The defendant resists any payment on account pending the resolution of what he calls the question of the donations. But in my judgment there is nothing here to resolve, and so this is not an objection. The claimant asks for 60% of the figure in the schedule of costs. This seems to me to be reasonable, leaving a sufficient margin in case any of the defendant's detailed objections to particular sums is upheld, and I will so order, to be paid within 14 days.

Permission to appeal

29. I turn now to the question of permission to appeal. The defendant seeks permission to appeal on two grounds. The first ground is that I misdirected myself in relation to the

validity of the notice. The second ground is that I have reached an incorrect conclusion in paragraphs 48-50 of my judgment. I will deal with each of these two grounds in turn.

30. Before I do that, I will simply observe that the basis upon which I am able to give permission to appeal is circumscribed by the rules. Under the Civil Procedure Rules, rule 52.6, the court may not grant permission for a first appeal (which this would be) unless *either* there is a real prospect of a successful appeal *or* there is some other compelling reason why an appeal should be heard. Here, the phrase 'real prospect' does not require a *probability* of success, but merely means that the prospect of success is 'not unreal': *Tanfern v Cameron-MacDonald* [2001] 1 WLR 1311, [21], CA. If the application passes that threshold test, however, the court is not *obliged* to give permission to appeal; instead, it has a *discretion* to exercise.

Ground 1

31. As to the first ground, the defendant says that by making the application to the court under section 117, for an order that the company refuse access to the register of members, the company *must* have accepted that the notice (as amended) was valid. He says that, if the company's view was that the notice was invalid, then the company should simply have said so, and *not* made any application to the court for an order that the purpose was not a proper one. Accordingly, says the defendant, the doctrine of estoppel applies. The claimant denies that it ever accepted that the notice was valid, or that it ever represented to the defendant that it was valid.

32. In support of his position, the defendant says that upon being served with the claim form in this case he wrote to the claimant "stating that if he had known of the existence of these two documents it would not have made the request. The [claimant] did not reply." However, the email which the defendant sent to the claimant's solicitors on 18 February 2020 does not actually say that. It refers to a particular document and says that this "is a document that I have never seen before. Was it actually sent to members? If so I never received it and clearly would not have made my application without reference to it." This email does not therefore support the defendant's argument.

33. Given that a company receiving a request under section 116 must issue proceedings under section 117 within five days, and that criminal proceedings underlie failure to comply with valid notices, I do not think that any reasonable person could take the issue of proceedings under section 117 as amounting to an acceptance, or even the representation of an acceptance, that the notice was valid. Even if it amounted to such a representation, there is nothing to show that the defendant has changed his position in reliance on such a representation, so that it would be unconscionable for the claimant to resile from it. The email of 18 February 2020 does not show that he has relied on it. In my judgment, this head of appeal is entirely fanciful, and there is no real prospect of success upon it. And, in any event, success on the first ground would not by itself grant success on the appeal. The defendant needs to win on both grounds for my order to be reversed.

Ground 2

34. As to the second ground, the defendant complains about paragraphs 48-50 of my judgment. The first two of these paragraphs however set out passages from *Fox-Davies v Burberry plc* [2017] EWCA Civ 1129 and *Houldsworth Village Management Co Ltd v Barton* [2020] EWCA Civ 980. They contain no decision or even commentary of mine. The defendant cannot appeal against my decision on the basis that what the Court of Appeal in each of those two cases said was wrong. On the other hand, in paragraph 50, I dealt with the problem arising from the fact that the matter was being tried, not summarily, but some time after the request was made, in circumstances where a number of relevant events had already taken place.

35. The defendant says this:

> "I believe that in this case where the individuals are Directors of a Registered Charity that is almost wholly dependent for its income from the members of the other company of which the individuals are directors accused of wrongdoings – and shown to have been so by the later evidence that was before you in which it was admitted – then it is a proper purpose to seek to convene a meeting to remove them as such conduct is inconsistent with the duties of any Trustee/Director of a Charity."

36. One problem for the defendant in advancing this submission is that (as I have already held) there has been no finding by the court or acceptance by the claimant that any of the directors has committed wrongdoing. Further, I found that the two companies were not 'sister' companies in any meaningful sense, and, in particular, the mere fact that a person was accused of some wrongdoing in relation to his or her directorship of one company, did not automatically reflect on his or her directorship of the other, let alone amount to a proper purpose for seeking a list of members of that other company. In my judgment there is no real prospect of an appellate court taking a different view of these evaluative facts: *R(Z) v Hackney LBC* [2020] 1 WLR 4327, [56], SC.

37. I can see no other compelling reason for permitting an appeal, and none is advanced by the defendant. Accordingly, I must refuse permission to appeal.