Neutral Citation Number: [2022] EWHC 1019 (Comm)

Claim No. CL-2021-000702

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Friday, 29th April 2022

Before:

HIS HONOUR JUDGE PELLING QC

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Between:

(1) EUROSAIL-UK 2007-4BL PLC **(2) EUROSAIL-UK 2007-3BL PLC** **(3) EUROSAIL-UK 2007-2NP PLC** **(4) EUROSAIL 2006-4NP PLC** **(5) KEYCARDS HOLDINGS INC**	**Claimants**
- and -	
(1) WILMINGTON TRUST SP SERVICES (LONDON) LIMITED **(2) DANIEL JONATHAN WYNNE**	**Defendants**

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MR. RICHARD MOTT (instructed by **Alston & Bird LLP**) appeared for the **Defendants.**

THE CLAIMANTS were not present nor represented.

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Approved Judgment

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HIS HONOUR JUDGE PELLING QC :

1. This is an application by the defendants to these proceedings for an order striking out a claim brought in the name of the first to fourth claimants against Wilmington Trust SP Services (London) Limited ("Wilmington") and Mr. Wynne, a director of Wilmington. This is the latest in a long line of spurious claims, which have as their central common denominator the involvement of Mr. Hussain whose *modus operandi* in relation to the issues covered by these cases is fundamentally similar. Similar points have come before the courts on multiple different occasions: in the Commercial Court before me, in the Circuit Commercial Court and in the Chancery Division. They have become not merely a major waste of time and money for those have to respond to these spurious claims but a significant waste of public resources and a real source of delay for other litigants with real cases to resolve.

2. The simple point that arises in this case is as follows. Keycards Holdings Inc., the fifth claimant in these proceedings ("Keycards"), is a company incorporated in the Marshall Islands. The evidence demonstrates it is annulled, but for the purposes of this exercise I am prepared to accept that notwithstanding that Keycards has been annulled, it continues to exist for at least some purposes according to the laws of its country of incorporation, namely the Marshall Islands, for a period of three years following its annulment. The first defendant is a corporate trustee and, as I have said, Mr. Wynne, the second defendant, is a director of Wilmington and has been since 9th March 2017.

3. Keycards' case, is that a Mr. Paul Anthony and a company called United Technology Holdings Limited became de facto directors, in effect, on its own nomination and therefore was able to take in each and every one of the steps which are referred to in the evidence thereafter and which is designed to obtain control of the first to fourth claimants. It is on this basis that it is claimed that the affairs of the first to fourth claimants have been taken over by Keynotes and/or Mr Anthony or Technology Holdings Limited and is the basis on which "Mr Anthony" purports to be authorised to commence these proceedings on behalf of the first to fourth defendants.

4. As is submitted by Mr. Mott on behalf of the defendants, this assertion is legally absurd as a matter of law and cannot be maintained. It is in those circumstances that the defendants apply to strike out the claim on the grounds identified in rule 3.4(2) of the Civil Procedure Rules, namely that the statement of case discloses no reasonable grounds for bringing or defending the claim.

5. The short point that arises in relation to this case, as I have explained, is that Keycards asserts that as a result of notices which it itself served, the consequence was that the corporation and individual referred to in the evidence became de facto directors. As a matter of law, that is not possible: see BMF Assets No 1 Ltd and Others v Sanne Group Plc and Others [2021] EWHC 3306 (Ch), where, at paragraphs 49 and 50, Miles J set out the principles which apply in this area. He said at paragraph 49:

> "The concept of a *de facto* director is one that is used in law for a person who actually acts as a director and participates at the relevant level in the governing structure of a company. It is a label used when seeking to establish the liability against such a person, notwithstanding that that person has not, strictly speaking and formally, been appointed as a director ..."

Miles J then added at paragraph 50:

> i) "What is entirely clear is that people cannot make themselves directors of a company simply by saying that they are prepared to assume that position. It is legally nonsensical to think that a stranger to a company could – by a unilateral act of saying they are prepared to assume the position - become a director of a company. It would mean that anyone could become a director of any company simply by saying so, regardless of the constitutional, regulatory and corporate governance requirements. That is legally absurd. What it seems to me has happened here is that the four de facto directors, as they call themselves, are corporate cuckoos, trying to push themselves into the Issuers and Holdings and forcing out the true directors. There is no basis in law for that."

All this is with respect plainly right. What Miles J describes is precisely the *modus operandi* that has been adopted in this case and is legally fundamentally flawed for the reasons there identified.

6. An additional point is made on behalf of the defendants, which is that even if what I have said so far was at least realistically arguably wrong, that would not assist, because in order to become a *de jure* director certain formal requirements have to be complied with being those set out in Articles 70 and 71 of the Articles of Association of the first to fourth claimants. I accept that submission as well and this, I note, was a conclusion which Miles J reached in the BMF Assets litigation for exactly similar reasons.

7. In those circumstances, it seems to me these proceedings must be struck out because they have no substantive merit of any sort. It is therefore not necessary for me to go further into the factual issues that arise. For the reasons which I have endeavoured to summarise, it is necessary that the claims against the Eurosail Entities be struck out because they none of Keynotes, Mr Anthony or or Technology Holdings Limited had either actual or any other authority to act on behalf of them in relation to the commencement of these proceedings and there is no legal of factual foundation for any of the claims (including claims brought by Keynotes) for any of the claims the subject of this claim.

8. I would only add this. On the basis of the material contained in the application bundle, it is clear that the statement of case is purportedly signed by Mr. Paul Anthony. Since Mr. Paul Anthony is not a director for the reasons I have identified, it is perfectly plain that the claim could not have been, and has not been, properly issued on any view and therefore on that technical ground as well the claim would fail.

9. In those circumstances, I direct that these proceedings be struck out.

[Further Argument]

10. This is an application for an order that the fifth claimant should pay the defendants' costs of the application and of the proceedings as well. Manifestly, the fifth claimant must pay those costs since, tested by reference to the concept of success, it is plain that the defendants have succeeded and the fifth claimant has lost in relation to all the applications and this claim, which in any event was misconceived.

11. The next point is whether or not these costs should be assessed on the indemnity basis. It is plain that they should be for these reasons: first, the *Excelsior* test of whether or not the proceedings or claim falls outside the norm to be expected of commercial litigation is one which is manifestly satisfied in the circumstances of this case for the reasons that has I have already identified; and secondly, in relation to the costs of proceedings which inevitably include the costs of the application it is appropriate that the costs should be ordered on an indemnity basis since, for the reasons I have identified, there Mr Anthony had no authority to authorise or sign the claim form on behalf of the Eurosail entities and therefore independently of the Excelsior test it is appropriate that costs should be ordered on the indemnity basis.

[Further Argument]

12. This is the assessment of the defendants' costs of the application I disposed of a moment ago. I directed that those costs should be assessed on the indemnity basis. The consequence of that is that proportionality plays no part in the assessment process and issues of doubt are to be resolved in favour of the receiving rather than the paying party with the sole test being whether the work for which payment is claimed was reasonably carried out and whether the sums claimed for that work is reasonable in amount.

13. So far as that is concerned, I have perused the hours for which payment is claimed. There is no reason that I have identified for reducing the hours that have been claimed other than possibly in relation to the preparation of the application, line 2 of the work done on documents, where a total of 41 hours has been claimed in respect of the preparation of the application, including supporting evidence, by Mr. Shattock. That is a figure which might strike one as high in the circumstances, particularly when there are additional substantial hours for Mr. Fisher and Mr. Olins as well for for counsel in respect of drafting work. However, I accept the point made by Mr. Mott that this was a case where a significant amount of work had to be done in order to ensure that the application could properly be presented on the assumption that the judge before whom the application came had no familiarity with the *modus operandi* that surrounds these cases. So far as that is concerned, I accept that point as far as it goes because although all these cases are currently being heard by me, when issued in the Commercial Court, if available, that is not generally or publicly known, and in any event depends on me being available.

14. In those circumstances, I accept, particularly having regard to the fact I have ordered costs to be assessed on the indemnity basis, that the figures for which payment is claimed in relation to the preparation of the application are reasonable or at any rate any doubts I might have in relation to that are so vestigial that they ought to be resolved in favour of the receiving party as against the claimant party.

15. The only issue which remains concerns counsel fees. So far as that is concerned, I am satisfied on the similar basis to what I have said previously in relation to the work done on documents that the figures claimed, while at the high end of what is appropriate for work on documents and the like, are acceptable.

16. So far as the hearing is concerned, £15,000 for counsel is in excess of what is reasonable, even having regard to the work that had to be done in relation to the skeleton. It is unreasonable not least because of the familiarity counsel would have

with the issues that arise by reason of the work done on documents, and I reduce that to £10,000.

17. So far as the solicitor charge out rates are concerned, Mr. Mott submits that I should simply adopt the rates for which payment has been claimed on the basis that this is an indemnity costs case. In my judgment that is a too simplistic approach because the issue is not a binary one. The question I have to ask is what is the reasonable sum which ought to be recovered. That might be the guideline rate, it might be the contractual rate or it might be something between the two.

18. Having regard to the fact that this is an indemnity cost case, I am prepared to accept that in principle I should assess the hourly rate to the figure, at any rate, slightly in excess of the guideline rates to reflect the fact that while it might not be proportionate it was certainly reasonable for the applicants to instruct their corporate solicitors to deal with this case. Nonetheless, a sum in excess of £800 an hour is in excess of what is reasonable and must be reduced. What I propose to do is to direct that there should be a composite rate for all Grade A fee earners, both Mr. Shattock and Mr. Fisher, at the rate of £650 an hour. So far as Mr. Olins is concerned, he is a paralegal and is being charged at £257 an hour. The guideline rate for London 1 is £186 per hour. I direct that his hour should be assessed at a rate of £200 an hour.

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