Neutral Citation Number: [2020] EWHC 667 (Ch)

Case No: HC-2017-000808 and HC-2017-000904

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: 19/03/2020

Before :

HIS HONOUR JUDGE HACON
(Sitting as a Deputy High Court Judge)

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Between :

(1) JOHN ANTHONY POPELY
(2) ANDREW POPELY **Claimants**

- and -

(1) RONALD ALBERT POPELY
(2) COSMOS TRUST LIMITED
(3) CASTERBRIDGE PROPERTIES LIMITED
(4) JOHN HENRY POPELY (for the purposes of costs only) **Defendants**

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Christopher Boardman (instructed by **Charles Russell Speechlys LLP**) for the **First Defendant**
Timothy Harry (instructed by **RadcliffesLeBrasseur**) for the **Second Defendant**
The **Fourth Defendant** appeared in person

Hearing dates: 18 December 2019

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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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HIS HONOUR JUDGE HACON

Judge Hacon:

Introduction

1. On 13 June 2019 I handed down judgment in these joined actions, [2019] EWHC 1507 (Ch). Permission to appeal having been refused, it marks the end of a long dispute conducted in many jurisdictions between John Henry Popely ('John Snr') and his brother Ronald Albert Popely ('Ronald'). By the time of the trial before me Ronald was still a defendant, but John Snr was no longer a party. The claimants were John Snr's sons, John Jnr and Andrew. Ronald was successful. The claimants' claim for fraudulent breach of fiduciary duty was dismissed.

2. Ronald now seeks a third party costs order against John Snr. In an order dated 21 October 2019 I gave Ronald permission to join John Snr as Fourth Defendant solely for the purposes of any costs order that may be made. Ronald also seeks a cost order against the Second Defendant in the proceedings ('Cosmos').

3. Christopher Boardman appeared for Ronald, Timothy Harry for Cosmos. John Snr appeared as a litigant in person.

Background

4. In my earlier judgment I set out the background as follows:

> "[2] The present joined claims began as an action brought by John Snr in August 2001. He alleged that Ronald had defrauded him of assets arising out of a business offering time shares in holiday properties in the Turkish Republic of Northern Cyprus ('Northern Cyprus') and at Hever in Kent.
>
> [3] The Third Defendant ('Casterbridge') is a company registered initially in the British Virgin Islands, later in St Vincent and currently in Nevis. Casterbridge was set up to play a role in the marketing of the timeshare business. The shares in Casterbridge were owned 70% by Ronald and 30% by John Snr. Each of the brothers subsequently assigned their interest to trusts set up for the benefit of their respective families, in the case of Ronald the Mars Trust and in the case of John Snr the Blue Ridge Trust. The trustee for both trusts is St Vincent Trust Service Ltd ('SVTS').
>
> [4] After the first English claim was started in 2001, Ronald challenged the validity of service, so John Snr started a second action in 2003. Ronald then challenged the jurisdiction of the English courts. On 11 November 2003 Evans-Lombe J ruled that there had been valid service and that the English courts had jurisdiction in both actions.
>
> [5] In January 2005 John Snr's son and the Second Defendant in the present proceedings ('Andrew') brought proceedings in St Vincent on behalf of the beneficiaries under the Blue Ridge Trust.

[6] On 25 September 2005 a bankruptcy order was made against John Snr. His causes of action became vested in his trustee for bankruptcy which sold the causes of action to SVTS. SVTS applied to the court to discontinue the proceedings. In response, John Snr's family, the beneficiaries under the Blue Ridge Trust sought to be substituted as claimant in order to pursue the claims on behalf of Casterbridge.

[7] On 6 March 2007 by the Order of Master Moncaster six members of John Snr's family were substituted for John Snr as claimants in the 2001 and 2003 proceedings so far as they concerned the timeshare business in North Cyprus; SVTS and Casterbridge were joined as defendants. The Master also stayed the claims pending the outcome of the proceedings in St Vincent. Towards the end of his judgment Master Moncaster said:

> "Therefore, in this unhappy dispute, in this unhappy family, very little progress I am afraid is being made because although, as I said, I think twice already, that what seems to me to be required is for the substantive issues to be decided between the two brothers or their respective trusts and companies."

[8] Madame Justice Thom gave judgment in the St Vincent proceedings in 2012. There was an appeal which was compromised on 2 February 2015 on terms which included the substitution of Cosmos Trust Ltd ('Cosmos'), the Second Defendant in the present proceedings, for SVTS as trustee for Blue Ridge Trust.

[9] On 16 August 2016 the present claimants, i.e. John Snr's sons John Jnr and his younger brother Andrew, applied to continue the 2001 and 2003 actions against Ronald in their names. They claimed a cause of action derived from John Snr via Cosmos. Cosmos was substituted for SVTS as a defendant; Casterbridge remained a defendant because the assets of Casterbridge were at stake. Permission to do all of this was given by an Order of Deputy Master Lloyd dated 24 April 2017. 2017 claim numbers were allotted to the consolidated action.

[10] In short, this is a double derivative action. The claimants say that Ronald transferred Casterbridge's assets to the benefit of himself or his family and thereby, both fraudulently and in breach of his fiduciary duty to Casterbridge, deprived the beneficiaries under the Blue Ridge Trust of their entitlement to 30% of those assets."

The law on non-party costs

5. An award of costs against a person who is not a party to the action is made possible by s.51 of the Senior Courts Act 1981, confirmed by the House of Lords in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965.

6. In *Symphony Group Plc v Hodgson* [1994] Q.B. 179, at pp.192-93, Balcombe LJ, with whom Staughton and Waite LJJ agreed, provided guidance as to the exercise of the court's discretion to order the payment of costs by a non-party. The third

guideline was that the party seeking such an order should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him.

7. In *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39; [2004] 1 W.L.R. 2807 Lord Brown of Eaton-under-Heywood, giving the opinion of the Privy Council, considered the *Symphony* guidelines and summarised the main principles to be applied in exercise of the court's discretion to make a third party costs order in the following way (at [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:
>
> > (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.
> >
> > (2) Generally speaking the discretion will not be exercised against 'pure funders', described in paragraph 40 of *Hamilton v Al-Fayed* [[2002] EWCA Civ 665; [2003] QB 1175] 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 *Knight* [*Knight v FP Special Assets Ltd* (1992) 174 CLR 178] and Millett LJ's judgment in *Metalloy Supplies Ltd (In Liquidation) v MA (UK) Ltd* [1997] 1 W.L.R. 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in *TGA Chapman Ltd v Christopher* [1998] 1 W.L.R. 12 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 *Knight*, provided that he is 'a real party in …very important and critical respects' - see *Arundel Chiropractic Centre Pty Ltd v Deputy*

> *Commissioner of Taxation* (2001) 179 ALR 406, referred to in *Kebaro* [*Kebaro Pty Ltd v Saunders* [2003] FCAFC 5] at pp. 32–33, 35 and 37. Some reflection of this concept of 'the real party' is to be found in CPR 25.13(1)(f) which allows a security for costs order to be made where 'the claimant is acting as a nominal claimant.'"

8. In *Deutsche Bank AG v Sebastian Holdings Inc* [2016] EWCA Civ 23; [2016] 4 WLR 17 the Court of Appeal confirmed that the opinion of the Privy Council in *Dymocks* sets out the modern English law. Moore-Bick LJ, giving the judgment of the Court, warned (at [61]) against treating the earlier *Symphony* guidelines, particularly the third guideline on prior warning to the non-party, as laying down requirements that must be satisfied unless the applicant can demonstrate a good reason for failing to do so. He continued (at [62]):

> "The decision of the Privy Council in *Dymocks*, which contains an authoritative statement of the modern law, explains and interprets the *Symphony* guidelines in a way which reflects the variety of circumstances in which the court is likely to be called upon to exercise the discretion. Thus, the Privy Council has explained that 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. Similarly, it has made it clear that the absence of a warning is simply one factor which the court will take into account in an appropriate case when deciding whether, viewed overall, it would be unjust to exercise the discretion in favour of making an order for costs against the third party. We think it important to emphasise that the only immutable principle is that the discretion must be exercised justly. It should also be recognised that, 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."

9. *XYZ v Travelers Insurance Co Ltd* [2019] UKSC 48; [2019] 1 WLR 6075 concerned a non-party costs order against an insurer which had provided product liability insurance to a defendant. The Supreme Court focussed on earlier insurance cases and did not want to be drawn into a broader reassessment of the law as stated in *Dymocks*. Lord Briggs JSC (with whom Lady Black and Lord Kitchin JJSC agreed) said this:

> "[30] It is not the purpose of this judgment comprehensively to reassess those generally applicable principles. It may be (and I am reluctantly prepared to assume but without deciding) that they really are limited, as the Court of Appeal thought in the present case, to the twin considerations of exceptionality and justice. The same general conclusion is to be found in the *Deutsche Bank* case. That said, I share all Lord Reed DPSC's concerns as to the lack of content, principle or precision in the concept of exceptionality as a useful test. Rather, this is an occasion to consider, in more granular detail, the principles which ought to apply to that distinct part of the broad spectrum of non-parties occupied by liability insurers. While doing so it will be appropriate to make some brief observations about the impact of those general principles in the liability insurance context, and in particular about the role played by the presence or absence of a causative link between the conduct of the non-party

> relied upon and the costs which the applicants incurred which they seek to recover against the non-party under section 51."

10. Thus, even though the Supreme Court apparently had misgivings about the principles set out in *Dymocks* in so far as they relate to the concept of exceptionality, those principles remain good and binding law, subject only to the additional consideration of whether or not there was a causative link between the conduct of the non-party and the costs incurred by the applicant. I understand Lord Briggs to have meant that this applied to all cases of non-party costs orders, not just the insurance cases. Under the heading 'Causation' he said:

> "[65] I have noted above how firmly the Court of Appeal in the *Cormack* case [*Cormack v Excess Insurance Co Ltd* [2002] Lloyd's Rep IR 398] endorsed the requirement for an applicant under section 51 to demonstrate a causative link between the incurring of the costs sought to be recovered from the non-party and some part of the conduct of the non-party alleged to attract the section 51 jurisdiction. That requirement is in my view rightly imposed. Auld LJ regarded it as part of the exceptionality requirement. It could equally be seen as going to the justice, or otherwise, of making the order. If the costs would still have been incurred if the non-party had not conducted itself in the relevant manner, why should it be just to visit the non-party with liability for them?"

11. Lord Briggs went on to consider two bases under which an insurer might become liable to a non-party costs order, namely by becoming the real defendant or by 'intermeddling', an analysis with which Lord Sumption agreed (at [113]). The 'real party' test is to be found in *Dymocks* (see above). To the extent that the analysis on intermeddling as developed in *XYZ* goes further than *Dymocks*, I am not sure that this was intended to apply outside insurance cases.

Costs claim against John Snr

12. The claim for a costs order against John Snr was based on his having been the real claimant in the actions in that he substantially controlled the litigation and stood to benefit from it.

13. The present consolidated action began as contractual claims in which John Snr was the actual claimant. The root cause of the litigation was John Snr's belief that he and Ronald had agreed in the autumn of 1997 to split the ownership of certain assets between them and that in breach of the agreement Ronald arranged for the assets to be retained for his family. Had John Snr not been declared bankrupt in September 2005 I have no doubt that he would have remained the claimant.

14. The reconstitution of John Snr's contract claims into the present derivative claim was approved and enabled by an Order of Master Moncaster dated 18 January 2007. This reconstitution was necessary not only because of John Snr's bankruptcy but also because the contract claims had become time barred. To circumvent that, the present claim was framed as a fraudulent breach of trust, see my judgment at [97]-[98].

15. Ronald's case on costs was that the underlying dispute between John Snr and Ronald never changed, despite John Snr having been forced to retire from the field as a claimant. I agree.

16. John Snr stated in cross-examination that the proceedings in the form pursued at trial were instigated upon his instructions to his sons and that it was he who gave instructions to counsel during the course of the proceedings. John Snr was the only witness who provided evidence on behalf of the claimants and it was largely on his account of events that the claim rested.

17. Counsel's skeleton argument on behalf of the claimants at the trial accurately stated:

> "2. The principal protagonists are John Henry Popely (JHP) now aged 71 and his younger brother, the 1st Defendant, Ronald Popley, now aged 67."

18. A party which stood to benefit from the action was the Blue Ridge Trust, of which John Snr was the settlor and of which his family are the beneficiaries. In cross-examination John Snr characterised the proceedings in this way (emphasis added):

> "The claim *I'm* making is that the Blue Ridge Trust has not received its fair share of the profits of [Casterbridge]."

19. In paragraph 7 of my judgment (see above), I quoted from the judgment of Master Moncaster in which he allowed the substitution of members of John Snr's family in place of John Snr so that the real dispute, which he characterised as the issues between John Snr and Ronald, could be decided. I refer also to paragraph 10 of my judgment (see above).

20. The final paragraph of my judgment included this:

> "[117] I do not doubt that John Snr and his family firmly hold the belief that in the Autumn of 1997 John Snr and Ronald agreed to split the assets of the Longbeach and Hever Resorts and that in breach of the agreement Ronald arranged matters so that he and his family retained all the assets to themselves. The truth or falsity of that belief could not be decided once a claim for breach of contract became time barred. The allegation against Ronald developed into the present double derivative action for fraud and breach of fiduciary duty."

21. Nothing in the application for third party costs has caused me to alter my view that the present action was a continuation by proxy of the proceedings originally brought by John Snr against Ronald. I have no doubt that the costs incurred by Ronald were caused by John Snr having arranged for the continuance of proceedings against Ronald.

22. There was no suggestion that John Snr was warned that there would be an application for a non-party costs order against him. It may well be that John Snr was not aware that it was a point which he could have raised. But had he done so it would have made no difference. John Snr's dogged pursuit of his claim against his brother over many years and in many jurisdictions strongly suggests that such a warning would have had no effect on his conduct of these or any of the other proceedings.

23. It therefore seems to me to be just in the circumstances that John Snr is ordered to be jointly and severally liable for costs of the action which the claimants are required to pay.

Costs claim against Cosmos

24. The costs order sought against Cosmos is different because Cosmos is a party to the proceedings, albeit another defendant. It is necessary to say something more about how Cosmos came to be a party.

25. Following John Snr's bankruptcy in 2005, his trustee in bankruptcy sold his right to the claims against Ronald to St Vincent Trust Services Ltd ('SVTS'). SVTS did not want to continue the claims, so it applied to be joined as claimant with the intention of discontinuing the proceedings. For that reason members of John Snr's family, at John Snr's instigation, applied to be substituted as claimants instead. Their application was heard in January 2007 by Master Moncaster who expressly acknowledged that SVTS did not want to pursue the action because of the risk as to costs. However, the Master took the view that this should not create a barrier to the resolution of the dispute, accepting that the route to such resolution would be to allow the joinder of family members as claimants:

> "[35] … The trustee of course may well wish not to bring the claim in its own name because of the risk as to costs it would face, and it seems strange that the reason for refusing to lend its name, which would be a very proper reason in cases such as this, should make it impossible for the beneficiaries to have the issue decided."

26. In October 2012 Mme Justice Thom in St Vincent removed SVTS as trustee of Blue Ridge Trust and substituted Cosmos. In April 2017 Cosmos was substituted for SVTS in the present action by an Order of Deputy Master Lloyd. Cosmos was neither present nor represented at the hearing before the Deputy Master but like SVTS before it, Cosmos had made it clear that it was not willing to incur the costs of bringing its own action. (This unwillingness on the part of Cosmos was noted on appeal from the Deputy Master's Order in the judgment of David Stone, sitting as a Deputy High Court Judge, [2018] EWHC 276 (Ch) at [107].) The consolidated action therefore continued in the names of John Jnr and Andrew as claimants, with Cosmos joined as a defendant.

27. In the present application on costs Cosmos filed evidence and was represented at the hearing. A witness statement from its director, Stanley John QC, a director of Cosmos, was provided. Mr John gave three reasons why Cosmos should not be made liable for costs. The first was that trust assets, i.e. those held by the beneficiary Blue Ridge Trust, could not meet any costs order. The second was that Cosmos had had no wish to take part in the substantive proceedings and had taken no part. The third was that Cosmos had not financially supported the litigation to date.

28. There was a conflict of evidence as to the assets of Blue Ridge Trust which I will not resolve because it seems to me to be beside the point.

29. Cosmos had to be joined as a defendant to these proceedings if they were to continue. That was because John Jnr's and Andrew's double derivative action was based on

their being beneficiaries under the Blue Ridge Trust, of which Cosmos was the trustee. The relevant rule is summarised in *Lewin on Trusts*, 19th ed., at 43-012, drawing together the judgments of the Supreme Court in *Roberts v Gill & Co* [2010] UKSC 22; [2011] 1 AC 240:

> "Where a beneficiary brings a derivative action in his own name, then the trustees must be joined as defendants. The need for joinder of the trustees is not merely a procedural matter, nor merely to ensure that the trustees are bound by the judgment or to avoid multiplicity of actions. The need for joinder has a substantive basis since the beneficiary has no personal right to sue and is suing on behalf of the estate, or more accurately the trustee."

30. My attention was drawn to the Settlement Agreement of February 2015 by which the proceedings in St Vincent were brought to an end. The agreement included a contractual term that Cosmos would apply to be joined as a party to the English proceedings. I do not see that this makes a difference. Cosmos would have known that it was bound to be joined as a defendant in the English proceedings were the English court to permit those proceedings to continue as a double derivative action. Its contractual agreement to this happening was not inconsistent with its stance that it neither wanted the English proceedings to continue nor, if they did, would it take any active part in them so as to avoid any costs liability.

31. Mr Boardman's principal argument was that Cosmos was a losing party at trial and was therefore jointly responsible for the costs of the winning party, i.e. Ronald. Mr Boardman relied on this observation by Lewison LJ in *Travelers Insurance Company Limited v XYZ* [2018] EWCA Civ 1099; [2018] 3 Costs L.O. 401:

> "[33] … I agree … that the principle of reciprocity is important. It is that principle which underlies Lord Brown's statement that if a person funds and stands to benefit from proceedings, justice requires that if they fail he should pay the successful party's costs. That is the test that this court applied in [*Legg v Sterte Garage Ltd* [2016] EWCA Civ 97; [2016] Lloyd's Rep IR 390]. This is no more than a reflection (or perhaps a modest extension) of the long-standing principle that he who takes a benefit must also accept the burden."

32. I do not see that this assists Ronald's case. Cosmos neither funded the proceedings nor stood to benefit if the claimants had been successful. The former was not in dispute. As to benefit, given the prayer for relief, the direct beneficiary had the actions succeeded would have been Casterbridge. Assets, alleged to have been taken from Casterbridge, would have been returned. Cosmos owns shares in Casterbridge, but upon trust on the terms of the Blue Ridge Trust. Cosmos itself did not stand to benefit. The real beneficiaries would have been John Snr's family, being the beneficiaries under the Blue Ridge Trust. Their benefit was John Snr's ultimate goal.

33. The question of whether Cosmos should be made jointly liable for the costs of the action is a matter of discretion. Cosmos was clear and consistent throughout that it wanted no active part of these proceedings so as to avoid any risk as to costs. It took no active part. That position was wholly understandable in a trustee. In my view there are no good grounds for an exercise of the discretion to make Cosmos liable for the costs of these proceedings.

Conclusion

34. John Snr is jointly liable with the claimants for the costs of the action. Cosmos is not.