Neutral Citation Number: [2022] EWHC 1687 (Ch)

Case No: CR-2022-BRS-000042

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: 4 July 2022

Before :

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

- -

Between :

RUSHBROOKE UK LTD	**Applicant**
- and -	
4 DESIGNS CONCEPT LTD	**Respondent**

- -
- -

Charlie Newington-Bridges (instructed by **Neath Raisbeck Golding Law**) for the **Applicant**
John Churchill (instructed by **Temple Bright LLP**) for the **Respondent**

Application dealt with on paper

- -

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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This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 4 July 2022.

HHJ Paul Matthews :

Introduction

1. On 9 May 2022 I heard the claimant company's application (by notice dated 20 April 2022) for an injunction to restrain presentation of a winding-up petition. On 13 May 2022, I handed down judgment in this matter, giving my reasons for striking out the application. This was on the basis that one of the only two directors of the company, Mr Mark Steventon-Smith, had no authority on his own to make or give instructions to make the application on the company's behalf: see [2022] EWHC 1110 (Ch). I invited written submissions on consequential matters, and received those from both sides on 13 May 2022 (primary submissions) and 16 May 2022 (responsive submissions). As a result of those submissions, on 15 June 2022 I ordered that the applicant should pay the respondent's costs of and incidental to the application, and summarily assessed these in the sum of £7920 (including VAT): [2022] EWHC 1416 (Ch). At the same time I declined to order that Mr Steventon-Smith should be jointly liable with the company to the respondent for those costs.

2. However, a further primary submission from the respondent was that the applicant's solicitors, Neath Raisbeck Golding Law ("NRG"), should show cause why they should not be ordered to be jointly liable with the company (and Mr Steventon-Smith) for the wasted costs of the application of 20 April 2022. The responsive submission of the applicant suggested that the solicitors should file their evidence by the 30 May 2022, and that the respondent should file any evidence in answer by 7 June 2022. I therefore gave directions (albeit with slightly different dates), and duly received such written evidence, from David McAndrew of NRG on 27 May 2022, and on behalf of the respondent on 13 June 2022. Having considered that evidence, I decided that the most appropriate way to deal with the wasted costs issue was to invite written submissions from the parties and from NRG on that issue: the respondent by 4 PM on 17 June 2022, the applicant or NRG by 4 PM on 22 June 2022 and any reply from the respondent by 4 PM on 24 June 2022. I duly received those submissions, and have considered them.

Wasted costs order

The law

3. Originally, there was an inherent jurisdiction in the court to require a solicitor for one party to pay to another party costs which had been wasted by the solicitor's undue delay or misconduct: see *Myers v Ellman* [1940] AC 282, HL. This jurisdiction was given statutory recognition by the Solicitors Act 1957, section 50(2). It was however regulated by the procedural rules only in 1960. The relevant rule later became RSC 1965 Ord 62, rule 8(1), and then in 1986 RSC Ord 62, rule 11. There were periodic amendments to the relevant rule, and a number of cases were decided, among them the important decision in *Ridehalgh v Horsefield* [1994] Ch 205, CA, to which I refer below.

4. Nowadays, however, wasted costs orders are governed by the Senior Courts Act 1981, section 51(6), (7), CPR rule 46.8, and CPR Practice Direction 46, para 5. The first of these provisions reads:

> "(6) In any proceedings mentioned in subsection (1), the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.
>
> (7) In subsection (6), *"wasted costs"* means any costs incurred by a party—
>
> > (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or
> >
> > (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay."

5. CPR rule 46.8 reads:

> "(1) This rule applies where the court is considering whether to make an order under section 51(6) of the Senior Courts Act 1981 (court's power to disallow or (as the case may be) order a legal representative to meet, 'wasted costs').
>
> (2) The court will give the legal representative a reasonable opportunity to make written submissions or, if the legal representative prefers, to attend a hearing before it makes such an order.
>
> (3) When the court makes a wasted costs order, it will –
>
> > (a) specify the amount to be disallowed or paid; or
> >
> > (b) direct a costs judge or a district judge to decide the amount of costs to be disallowed or paid.
>
> (4) The court may direct that notice must be given to the legal representative's client, in such manner as the court may direct –
>
> > (a) of any proceedings under this rule; or
> >
> > (b) of any order made under it against his legal representative."

6. CPR Practice Direction 46, para 5, reads:

> **"5.1** A wasted costs order is an order –
>
> > (a) that the legal representative pay a sum (either specified or to be assessed) in respect of costs to a party; or
> >
> > (b) for costs relating to a specified sum or items of work to be disallowed.
>
> **5.2** Rule 46.8 deals with wasted costs orders against legal representatives. Such orders can be made at any stage in the proceedings up to and including the detailed assessment proceedings. In general, applications for wasted costs are best left until after the end of the trial.

5.3 The court may make a wasted costs order against a legal representative on its own initiative.

5.4 A party may apply for a wasted costs order –

(a) by filing an application notice in accordance with Part 23; or

(b) by making an application orally in the course of any hearing.

5.5 It is appropriate for the court to make a wasted costs order against a legal representative, only if –

(a) the legal representative has acted improperly, unreasonably or negligently;

(b) the legal representative's conduct has caused a party to incur unnecessary costs, or has meant that costs incurred by a party prior to the improper, unreasonable or negligent act or omission have been wasted;

(c) it is just in all the circumstances to order the legal representative to compensate that party for the whole or part of those costs.

5.6 The court will give directions about the procedure to be followed in each case in order to ensure that the issues are dealt with in a way which is fair and as simple and summary as the circumstances permit.

5.7 As a general rule the court will consider whether to make a wasted costs order in two stages –

(a) at the first stage the court must be satisfied –

(i) that it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and

(ii) the wasted costs proceedings are justified notwithstanding the likely costs involved;

(b) at the second stage, the court will consider, after giving the legal representative an opportunity to make representations in writing or at a hearing, whether it is appropriate to make a wasted costs order in accordance with paragraph 5.5 above.

5.8 The court may proceed to the second stage described in paragraph 5.7 without first adjourning the hearing if it is satisfied that the legal representative has already had a reasonable opportunity to make representations.

5.9 On an application for a wasted costs order under Part 23 the application notice and any evidence in support must identify –

(a) what the legal representative is alleged to have done or failed to do; and

> (b) the costs that the legal representative may be ordered to pay or which are sought against the legal representative."

Breach of warranty of authority

7. In addition to the statutory wasted costs jurisdiction, the court also has an inherent jurisdiction over solicitors (as its officers) to require them summarily to compensate a person who suffers loss as a result of a breach of an implied warranty given by a solicitor that he or she was authorised by the party concerned to act on that party's behalf: see *eg Yonge v Toynbee* [1910] 1 KB 215; *Re Sherlock Holmes International Society Ltd* [2016] 4 WLR 173, [22]; *Zoya Ltd v Ahmed* [2016] 4 WLR 174, [28]-[41]. I refer to this jurisdiction briefly below.

The application for an order

8. The respondent invited me to treat the application made in the written submissions as if it were an application made orally in the course of a hearing, under para 5.4. In *Thames Chambers Solicitors v Miah* [2013] EWHC 1245 (QB), Tugendhat J said:

> "47. In the circumstances of this case, it was not necessary that the Defendant issue a Part 23 application. The case against the Solicitors on whether they had acted improperly, unreasonably and negligently had been made sufficiently clear."

9. In my judgment, the case is sufficiently clear in the present case too. Since the written submissions in the present case replace the oral hearing at which the question of costs would have been discussed, I have not required a Part 23 application. I did not however follow precisely the procedure set out in para 5.7 of the practice direction. The parties were agreed that the solicitors should be invited to file and serve evidence about their role in this application, and I directed that. Subsequently, I sought and received written submissions from the parties, which I have considered.

The conditions for an order

10. A wasted costs order will only be made where the conditions set out in para 5.5 are satisfied. The first of these is that the legal representative's conduct was improper, unreasonable or negligent. Impropriety "covers any significant breach of a substantial duty imposed by a relevant code of professional conduct": *Ridehalgh v Horsefield* [1994] Ch 205, 232 D-E, CA. As for unreasonableness, "the acid test is whether the conduct permits a reasonable explanation": *ibid,* 232 F-G. And negligence simply refers to "failure to act with the competence reasonably to be expected of ordinary members of the profession": *ibid*, 233 B-C.

11. In *Thames Chambers Solicitors v Miah*, to which I referred above, a litigant had issued a claim for a debt of some £23,000. A few days later he was declared bankrupt. Some months later, the litigant instructed solicitors to represent him in the claim thereafter. They accepted those instructions knowing him to be bankrupt, but did not seek or obtain the consent of his trustee in bankruptcy to carry on the proceedings. He was discharged from his bankruptcy in the usual way, on the anniversary of his adjudication. When the solicitors for the defendant to the claim found out about the claimant's bankruptcy, they applied to strike out the claim, and also for wasted costs

against the claimant's solicitors. The claim was struck out, and a wasted costs order was made. In relation to the latter, the solicitors appealed. Tugendhat J dismissed the appeal.

12. He said:

> "44. In my judgment there was a strong prima facie case as from 16 March 2012 that the Solicitors had acted improperly, unreasonably and negligently. That was the first stage of the proceedings in accordance with para 53.6(1) of the Costs Practice Direction.
>
> 45. Mrs Ramasamy knew that when she accepted instructions from the Claimant he was a bankrupt. Any competent solicitor must know that the assets of a bankrupt vest in a trustee, and that proceedings to enforce a claim can be pursued only with the consent of the trustee. But she herself did not understand the need for that consent, as she made clear in the letter of 5 March 2012.
>
> 46. By 14 December 2012 HHJ Collender QC was clearly entitled to find that they acted improperly, unreasonably and negligently, and that they ought to be subject to a wasted costs order. Given the time during which the proceedings had been conducted by the Solicitors, and the number of applications that had been made, it was clear that the costs in question would be likely to be substantial."

13. The present case is not about a bankruptcy, or needing the consent of the trustee in bankruptcy. But, the respondent says, in the same way that the proceedings need to be properly authorised (because the litigant is a bankrupt), so too a solicitor proposing to act for a limited company must satisfy him- or herself that the company has properly authorised the proceedings. In my substantive judgment (at [29]) I referred to the Solicitors' Code of Conduct, which (at paragraphs 3.1 and 4.1) includes the words:

> "You only act for clients on instructions from the client, or from someone properly authorised to provide instructions on their behalf. … "

There are also professional duties imposed on solicitors in connection with informing their clients of various matters, such as complaints, and information about services and costs: see the Solicitors' Code of Conduct, paragraphs 8.2 to 8.11.

14. In my judgment, there is prima facie evidence of a "significant breach of a substantial duty imposed by a relevant code of professional conduct" by the solicitors in this case. There is also prima facie evidence of unreasonable conduct. In my judgment, it is *prima facie* unreasonable for solicitors instructed by one director, at a time when the only two directors have fallen out and cannot agree on anything, to take instructions on behalf of the company to engage the company in legal proceedings without first satisfying themselves of the director's authority to do so. I also consider that this is *prima facie* evidence of negligence by the solicitors. A reasonably competent solicitor would regard it as fundamental to be clear at the outset on the authority of the person representing the client to instruct the solicitor.

15. As I have said, David McAndrew of NRG produced a witness statement dated 28 May 2022. This explains, by way of background, that the relationship between the two directors and 50% shareholders of the company, Mr Steventon-Smith and Mr Lee

Bryan, had broken down, and that a claim by Mr Steventon Smith against Mr Bryan had already been intimated. Indeed, Mr McAndrew understood from Mr Steventon-Smith that Mr Bryan had "walked away from his duties to the company". In addition, Mr McAndrew said that, on 7 April 2022, he received an email from Mr Steventon-Smith enclosing a copy of an email received from Mr Bryan, attaching a copy of a statutory demand issued by the respondent against the company. Mr Steventon-Smith told Mr McAndrew that because he was not responsible for the day-to-day running of the business he could not confirm that the invoices were genuine, and therefore they were disputed on genuine grounds. Mr McAndrew wrote to the respondent advising it of this and seeking evidence that the invoices were genuine and the work had been completed.

16. Mr McAndrew says it was his "honest and reasonably held belief that NRG Law were properly instructed" and acting on behalf of the company. His statement does not however exhibit any letter of instruction. Nor does he say that legal professional privilege prevents his giving any relevant evidence (*cf Ridehalgh v Horsefield*, at 237B-E). He accepts that the court has now held that Mr Steventon-Smith did not by himself have the authority to give instructions on behalf of the company but nevertheless says that, at the time, he "held the genuine and honest belief that NRG Law was properly instructed to act on behalf of the company". I add here that, in subsequent written submissions, Mr McAndrew confirmed that there was in fact no letter of instruction. Instructions were given orally by Mr Steventon-Smith.

17. Mr McAndrew considered that Mr Steventon Smith had sufficient authority to instruct the solicitors on behalf of the company "because it would not have been possible to pass a board resolution owing to the deadlock between the directors and because of the clear perception that Mr Bryan was doing all he could to bring about the demise of the company". He also relied on what he called "the lack of clear legal authority on the issue", and refers to *Fusion Interactive Communication Solutions Ltd v Venture Investment Placement Ltd* [2005] EWHC 736 (Ch). But there is no evidence in Mr McAndrew's statement that he considered the authorities at the time, rather than later, once the respondent had raised the issue of authority. Nor is there any evidence that he considered the articles of association of the company to see what provision they made for the situation, or consulted any textbooks to see what they said. I infer that he did none of these things.

18. I am afraid to say that I consider the first reason given (the impossibility of passing a board resolution) as a *non sequitur*. It does not follow from the fact that there was deadlock between the directors that that *must* mean that either one of them could take action which in the absence of deadlock could not be taken. Nor do I consider that there was a lack of clear legal authority on the issue. In particular, the case of *Mitchell & Hobbs (UK) Ltd v Mill* [1996] 2 BCLC 102, which is a reported case from more than 25 years ago, is very clear authority on the point. The subsequent *Fusion* case does not depart from it as a matter of law, but finds a sufficient reason for reaching an opposite conclusion on the facts of that case, namely a kind of estoppel. *Smith v Butler* [2012] EWCA Civ 314 is a different case, about a managing director, and the special position of such a director. There was no managing director in this case.

19. If Mr McAndrew is seeking to suggest that the wasted costs jurisdiction requires conduct which is vexatious or designed to harass opponents, then I respectfully disagree. It requires conduct which is improper, unreasonable or negligent. Good faith

on its own is not a defence. In my judgment Mr McAndrew provides no evidence to rebut my initial view that there was a significant breach of a substantial duty imposed by a relevant code of professional conduct (at least to be clear about the source of his instructions to act), and therefore his behaviour was improper, and also that it was unreasonable of him in the circumstances to assume that Mr Steventon-Smith had authority on his own on behalf of the company. On the face of it, it seems negligent as well, but I need not decide that.

20. The second requirement for a wasted costs order is that the representative's conduct has caused a party to incur unnecessary costs, or that costs already incurred by a party have been wasted. In the present case it is the former rather than the latter which is at stake. Mr Steventon Smith did not have the authority on behalf of the company to instruct the solicitors to issue the proceedings. Therefore, if the solicitors had satisfied themselves upon this point, the proceedings would not have been issued, and the respondent's costs would not have been incurred.

21. There is nothing in Mr McAndrew's witness statement to rebut my *prima facie* view. Mr McAndrew does appear to say that the respondent would not have suffered any loss if it had provided the evidence requested by him on 12 April 2022. But, apart from the fact that the respondent had *already* provided the relevant information to the other director, Mr Bryan, the relevant information was again provided on 6 May 2022, and yet the application for an injunction still went ahead on 9 May 2022. Given that the respondent's lawyers were only instructed on about 6 May 2022, the relevant costs appear to have been incurred after that date. Causation is therefore established.

22. The third requirement for a wasted costs order is that it is just in all the circumstances to order the legal representative to compensate that party for the whole or part of those costs. On the face of it, in circumstances where the company is or is likely to be insolvent, so that the respondent will not be able to recover its costs (in whole or in part) from the company, it seems to me obviously just that the solicitors who allowed these proceedings to go ahead by failing to satisfy themselves of the director's authority to give instructions should compensate the respondent for the expenditure of the unnecessary costs. It is the more so in circumstances where the respondent in pre-application correspondence *expressly raised* the issue of the authority of Mr Steventon-Smith to instruct solicitors on behalf of the company, but this was simply brushed aside. As before, there is nothing in the witness statement of Mr McAndrew to rebut this view. I quite accept the good faith of NRG. But that does not prevent a wasted costs order from being made, or prevent its being just to make one.

23. At this stage I do not think that I need to consider whether the wasted costs proceedings are justified despite the likely costs involved. But I will say this nevertheless. As summarily assessed by me, the costs involved amount to £6600, plus VAT of £1320, a total of £7920. That is well under the small claims threshold, although of course it does not follow that a claim for a debt of that amount would necessarily be allocated to the small claims track. The degree of difficulty and complexity would first have to be taken into account. But when I also take into account the importance generally of solicitors being clear on the authority of a person giving them instructions on behalf of another person, and the injustice of the respondent being left out of pocket to the tune of several thousand pounds because (as is likely) the company cannot pay these costs, I am quite satisfied that the wasted costs proceedings are justified.

Breach of warranty of authority

24. As I said earlier, there is also another jurisdiction available, relating to the court's jurisdiction over solicitors to order them summarily to compensate persons who have suffered loss because of a breach of the implied warranty that they have their client's authority to bring the proceedings. As William Trower QC (as he then was) said in *Zoya Ltd v Ahmed* [2016] 4 WLR 174, [29], the authorities showed that

> "in all cases, the liability was strict and that it was not necessary to prove that the agent knew or should have known of the want of authority."

Given my conclusion on the wasted costs order, I do not need, strictly speaking, to decide whether, if I had not decided to make such an order, I would have made an order under the breach of warranty jurisdiction. But, without finally deciding, I will indicate that at present I can see no reason why I would not have done so in this case.

Conclusion

25. For the reasons given above, I will make a wasted costs order against NRG in a sum equal to the costs awarded to the respondent on 15 June 2022. I should be grateful to receive an agreed minute of order for approval.