OUTER HOUSE, COURT OF SESSION

[2021] CSOH 72

A140/18

OPINION OF LORD CLARK

In the cause

REACTEC LIMITED

Pursuer

against

CUROTEC TEAM LIMITED

Defender

Pursuer: Lake QC, Tariq, Harper Macleod LLP
Defender: no appearance
Rebound Technology Group Holdings Limited; O'Brien QC; Shoosmiths LLP

16 July 2021

Introduction

[1] Following a proof before answer in this intellectual property action, the Lord Ordinary granted an interdict against the defender preventing it from acting in infringement of the pursuer's patent rights and made certain other orders against the defender. The Lord Ordinary also assoilzied the pursuer from the conclusions in the defender's counterclaim, which had sought revocation of the pursuer's patent.

[2] The defender then went into voluntary liquidation. Rebound Technology Group Holdings Limited ("RTGH") is the ultimate parent company of the Rebound group of

companies, which includes the defender. RTGH owns 75% of the shares in V&M Group Limited ("V&M"). V&M owns the entire share capital of the defender. The Rebound group's consolidated financial statements include the defender. The Rebound group had a turnover in excess of £141 million in the financial year ended 31 December 2018. There are common directors between the defender and RTGH, with two of the defender's three directors also being directors of RTGH. Peter Griffith-Jones is a director and also the Group Chief Financial Officer of RTGH. He explains in his affidavit that along with Michael Jones he provided instructions to the defender's solicitors in the litigation. Michael Jones is not a director of RTGH. In his witness statement, Michael Jones describes himself as an inventor, entrepreneur and consultant retained or engaged by the defender, having been a director of the defender until 13 February 2015.

[3] The pursuer enrolled a motion to find (i) RTGH and (ii) Michael Jones liable for the expenses of the action and the counterclaim as *domini litis*. RTGH opposed the motion. The joint liquidators, on behalf of the defender, did not oppose it. The pursuer did not at this stage move for Michael Jones to be found liable, but reserved its position in that regard.

Submissions for the pursuer

[4] The essential features of a *dominus litis* were interest and control. Reference was made to *Mathieson* v *Thomson*, 1853 16 D 19 (at 23-24), *McCuaig* v *McCuaig* 1909 SC 355 (at 357) and *Cairns* v *McGregor* 1931 SC 84 (at 89). The element of control and, in particular, the power to compromise an action, was an important feature of being the *dominus litis*. As the issue of whether a party is considered *dominus litis* arises in the context of expenses, it was relevant also to consider the general principle underlying awards of expenses. The cost of litigation should fall on him who caused it: *Shepherd* v *Elliot* (1896) 23 R 695.

[5] At the time of the proof before answer, the defender was a one-product company. That product, and an earlier product no longer sold by the defender, were found to infringe the pursuer's patent. The defender had, since at the latest 31 December 2018, been dependent on the provision of working capital from Rebound Electronics (UK) Ltd, another company of which RTGH is the ultimate parent. The undertaking from that company was that, for a period of 12 months, it would continue to make funds available and would not seek repayment of funds advanced. The ability of the defender to meet its liabilities as they fell due and, accordingly, to trade was at all relevant times wholly dependent on RTGH. This arrangement was the source of funds that meant that the defender was in a position to defend the action. As at 30 June 2019, the defender had assets of £259,000 and liabilities of £2,335,000. It made no profits. The Rebound group of companies had advanced around £2,200,000 to the defender, secured with a charge created on 4 December 2015, held by RTGH over the assets, property and undertakings of the defender. RTGH has preferential rights of recovery as regards the repayment of loans from the defender. The loans are repayable on demand. Mr Griffith-Jones stated in his affidavit that if the defender was wound up, the Rebound group would lose about £2.2million. RTGH's position as creditor was dependent on the defender's ability to sell its product and become profitable. RTGH accordingly had the direct and dominant interest in the litigation both as ultimate owner of 75% of the shares in the company and as a substantial creditor. The combination of this ownership interest and the secured loans was such that it met the requirement for interest noted in *McCuaig* and *Cairns*.

[6] In his affidavit, Mr Griffith-Jones stated that he and Michael Jones gave the instructions to the defender's solicitors in relation to conduct of the litigation. Neither is an officer of the defender. The position was accordingly unlike that in *Eastford Ltd* v *Gillespie* 2011 SC 501, which really concerned a refusal to allow piercing of the corporate veil to find

directors liable. However, Mr Griffith-Jones is a director and Group Chief Financial Officer of RTGH. He provided instructions to the defender's solicitors in that capacity. RTGH's claims that Mr Griffith-Jones was "seconded" to the defender for the purpose of the litigation was itself indicative of RTGH's control of the litigation. He was seconded to the defender with a view to him giving instructions as to conduct of the litigation. Putting their own man in spoke volumes for RTGH taking control. RTGH had the power to compromise the case. In early 2019, the pursuer and the defender held a "round the table discussion" at which potential settlement of the case was discussed. The defender was represented by Mr Griffith-Jones with Michael Jones present for "technical input". No officer of the defender was present at this meeting to discuss settlement of the case. RTGH accordingly had control of the litigation. In the circumstances, RTGH was the *dominus litis*.

[7] Reference was made to *Travelers Insurance Co Ltd* v *XYZ* [2019] UKSC 48, at [95]. It was clear that the defender was not the master of its litigation. Officers of the defender did not direct the litigation. The instructions for the litigation came from Mr Griffith-Jones and Michael Jones. The financial interest in the products and the financial wherewithal to conduct the litigation lay with the party who did assume the role of directing it, namely RTGH.

Submissions for RTGH

[8] The pursuer relied upon interest and control as the key factors in the test, but had failed to identify any basis on which these elements might be met. What was required was not merely interest and control, but the whole interest and control; in effect, a party who has the real interest and control to the exclusion of the nominal litigant. This was apparent in *Mathieson* v *Thomson*, from the requirement that the control should arise through the interest. Other cases, however, made the point more clearly. Reference was made to *dicta* in *Fraser* v

Malloch (1896) 23 R 619 (at 621), approved in *McCuaig* v *McCuaig* (at 357): the question was whether the nominal party to the cause was suing (or defending) for his own behoof or as the agent of another. The third party had to have the true interest, meaning the whole interest for all practical purposes. The passages relied upon had been cited with approval by Lord Reed in the Supreme Court: *Travelers Insurance Co Ltd* v *XY* (at [98]). Reference was also made to *Cairns* v *McGregor* (at 89). Accordingly, it was not sufficient merely to show that the alleged *dominus litis* has an interest of some sort in the outcome of the action. It must be the sort of interest that in effect supplants the interest of the nominal party and confers the right to control the action, for example, where an insurer brings or defends a claim in the name of its insured.

[9] In *Eastford* v *Gillespie*, where two directors of a company instructed the raising of an action in the company's name, the Inner House held that it could not be said that the two directors have the whole interest in the litigation for all practical purposes. It was not relevant that the respondent was a shell company. There were many situations in which companies with little or no assets might initiate court proceedings. Where a company was party to a litigation, it was the company that had the primary interest in that litigation. That primary interest was not displaced merely because of the concurrent interest of its shareholders. The shareholders' interest was merely indirect, derivative and reflective. It was dependent upon the company's primary interest. Therefore, the shareholders' interest cannot be the "whole interest in the litigation for all practical purposes". In *Eastford*, *e*ven if the shareholders' interest had been of the relevant type, 50% of that interest would not have been enough. This was for the simple reason that the *dominus litis* must have "the whole interest". A large percentage was also not enough. As regards the element of control, the pursuer required to show something more than the sort of control that is inherent in any corporate structure.

Companies are legal constructs. As such, they always act under the direction of their directors and shareholders. That is not the sort of control (or interest) which can make a person *dominus litis*. Were it otherwise, the separate legal personality of companies would be undermined.

[10] The pursuer's reliance upon *Shepherd* v *Elliot* was misplaced. The principle in that case was applied in determining which of the parties should bear the expenses of an action. It was not concerned with the exceptional circumstances in which expenses awards may be made against third parties. It provided no basis for lowering the test clearly established in the case law on *dominus litis* status.

[11] On the factual matters relied upon by the pursuer, the suggestion was that the combination of the ownership interest and the secured loans provided the necessary interest. However, no example was cited of any case which would support that conclusion. Even taken as their highest, the matters identified by the pursuers were incapable of meeting the test of *dominus litis* as set out in the authorities. In particular: the interest of a shareholder (and *a fortiori* a creditor) was merely secondary and indirect. Even if the interest of a shareholder was relevant, RTGH has only a 75% interest *qua* ultimate shareholder. That was not "the whole interest for all practical purposes". Even taking the pursuer's position on instructions at face value, it would amount to nothing more than the normal support that a company might expect to receive from its shareholders, and the normal control which shareholders might be expected to influence over a company's affairs. Mr Griffith-Jones could not be equated with RTGH, and Michael Jones was not said to be interested in RTGH at all. Although the pursuer asserts that RTGH had the power to compromise the case on its own, no basis for that was given. The mere possibility of control being exercised by a majority shareholder did not establish *dominus litis* status.

[12] So far as RTGH is aware, there was no case in which even a 100% parent company has been held to be a *dominus litis* on account of its interest and actions as such, let alone a 75% ultimate owner. Nor was there any authority where *dominus litis* status has arisen merely from being a substantial creditor. Such interests are merely secondary, and they do not detract from the primary interest of the defender. In any event, Mr Griffith-Jones did not give instructions "on behalf of" RTGH. He was seconded to the defender to help deal with the litigation because it was considered that he and Michael Jones had the relevant knowledge and skills to do so. That did not amount to an exercise of control by the board of RTGH, of which Mr Griffith-Jones was only one member.

[13] The fact that the pursuer reserved its right to have Michael Jones found to be *dominus litis* as well as RTGH put it in a position very far removed from the approach taken in the authorities.

Decision and reasons

[14] In *Travelers Insurance Company Ltd* v *XYZ,* the appellant challenged the making of a non-party costs order, under English law, made against an insurer. When considering for comparative purposes the law in other jurisdictions, Lord Reed explained (at [95]) that in Scots law the court is prepared to look beyond the person who is formally a party to the action, and to exercise its power to award expenses on the basis that another person is the real party in all but form, who is in reality conducting the suit and interested in its outcome. Lord Reed then set out the relevant *dicta* from the key Scottish authorities on the concept of *dominus litis*. From these, for present purposes, I note that the alleged *dominus litis* must have a direct interest in the subject-matter of the action which, as put by Lord President Dunedin in *McCuaig* v *McCuaig* (at 357) must be:

> "… the true interest in the cause, and by true interest I mean the entire interest, using that term not in the absolute sense, but as denoting the whole interest for all practical purposes."

In *Mathieson* v *Thomson* (at 23) Lord Rutherford explained that the *dominus litis* was "a party with a direct interest in the subject matter of the litigation, and, through that interest, master of the litigation itself, having the control and direction of the suit". Thus, control should arise through having the direct or true interest. As recognised by Lord President Dunedin and also by Lord Rutherford in the passages mentioned, control would require having the power to bring the case to an end, or compromise it. As also explained by Lord Rutherford it is not sufficient that the non-party has some "ultimate consequent benefit". The alleged *dominus litis* must also, of course, have caused the expense for which he is sought to be made liable: *Kerr* v *Employers' Liability Assurance Co Ltd* (1899) 2 F 17 (at 22); *Main* v *Rankin & Sons* 1929 SC 40 (at 43). The former case also established that the requirements of a *dominus litis* might be satisfied by a liability insurer conducting the defence of proceedings in accordance with a policy of insurance.

[15] A clear theme emerges from these authorities and Lord Reed's observations: to meet the test of *dominus litis* the person must have the true interest, being the whole interest in the case for all practical purposes, with complete control, the corresponding result being that the nominal party did not have the true interest for all practical purposes and was not in control. This is reinforced by the question posed in *Fraser* v *Malloch* by Lord Kyllachy (at 621, approved in *McCuaig* v *McCuaig* at 357) as to whether the nominal party to the cause was suing for his own behoof or suing as the agent of another. The requirement of the nominal party not having the true interest and not being in control is emphasised by expressions such as the true interest having to be that of the *dominus litis* and the reference to that person being in effect the principal (although with no required agency relationship).

[16] The defender in the present case is of course a limited liability company and a separate legal entity from its shareholder, V&M, as well as from RTGH, the holder of 75% of the shares in V&M. There is nothing to suggest that the defender did not operate its own business and indeed the material before the court was to the contrary. It was a trading entity, with its own directors, employees, customers, assets and creditors. The basis for the case against the defender was that it had acted unlawfully by infringing patent rights. The result of the action was not immaterial to the defender. There is no evidence of an absence of interest in this litigation on the part of the defender. Indeed it plainly had an interest, as the outcome of the litigation could give rise to substantial financial loss to the defender, and even insolvency. It cannot therefore be made out that RTGH had the whole interest in the case for all practical purposes. It had a different and limited type of interest, as a 75% shareholder in the parent company and as a creditor of the defender. RTGH is described in the debenture and floating charge as security trustee of each group member. It is correct that the result of the case would have consequences for RTGH as well as at least one other group company, but that does not suffice to meet the test. The fact that the defender's financial position was part of the consolidated accounts is simply a feature of the defender being a company in a group and is of no relevance.

[17] In relation to control, as that must arise "through that interest" and RTGH did not have the whole interest for all practical purposes, the required link to alleged control is missing. In any event, there is a factual dispute about precisely what Mr Griffith-Jones was doing, with RTGH expressly asserting that he did not give instructions on behalf of RTGH. There was no evidence that RTGH, by its board or through someone with authority to do so, had given authority to Mr Griffith-Jones to control or run the action on behalf of RTGH. There was also no evidence of the board of directors of the defender having agreed that RTGH

would have control. The reference to Mr Griffith-Jones having been seconded to the defender is of little assistance, given that his secondment could have been to assist the defender in defending the action for its own good, rather than to exercise control on behalf of RTGH. In the absence of evidence of authority to do so on behalf of RTGH, one cannot equate Mr Griffith-Jones with RTGH. A person from a group company, including the ultimate holding company, being made available to deal with a matter on behalf of a subsidiary is not unusual. There was no material showing that RTGH had the power to compromise, even if Mr Griffith-Jones attended a meeting where such discussion took place as the pursuer contended. There was no evidence either way as to whether Mr Griffith-Jones was acting with or without the authority of the defender. The pursuer relied upon Mr Griffith-Jones stating that he was one of two people (the other being Michael Jones) who gave instructions on behalf of the defender. The fact that he was giving instructions does not mean that he was excluding those who have the right of control of the defender (its board). It was not suggested that Michael Jones has an interest in RTGH.

[18] However, even if Mr Griffith-Jones was acting for RTGH, that would simply show the ultimate parent company having an involvement in the litigation. The case law does not support the view that because an entity is the parent company or shareholder or the major creditor of the nominal party that will suffice to make it the *dominus litis*. Actual control, through having the whole interest for all practical purposes, is required. If, as senior counsel for the pursuer appeared to accept and is in my view plainly correct, it is not sufficient to expose a holder of 75% of the shares in the parent company to liability as *dominus litis* simply because it exercises its *de facto* control as shareholder, it would make no difference if one of its directors is seconded to give instructions. It is true that there was financial support from another RTGH subsidiary, but this was a general funding of its activities and not specific

funding for the litigation. The defender was not some man-of-straw used by RTGH as a way of avoiding any liability of its own.

[19] In relation to the relevance of identifying the person who caused or created the expense of the pursuer, if the key components of the test on interest and control are satisfied, that will follow. It is not to be taken as a separate or free-standing criterion (although in any event it would not be met here).

[20] I see some force in the submission for the defender that the inclusion of Michael Jones in the original motion as *dominus litis* indicates that interest and control were also being asserted by the pursuer in respect of a person who, on the information before me, is entirely separate from RTGH. This arguably further undermines the case against RTGH. However, as the motion against Michael Jones was not moved at this stage and the matter can be determined on the other factual circumstances, I have not taken that point into consideration.

Conclusion and disposal

[21] In these circumstances, I am not persuaded that the requirements for satisfying the test of RTGH being the *dominus litis* have been met. RTGH was not the real party in all but form. It did not have the true or whole interest in the case for all practical purposes, nor did it have complete control. It cannot be regarded as, in effect, the principal with the defender being no more than an agent. I shall therefore refuse the pursuer's motion.