Neutral Citation Number: [2024] EWHC 2060 (Ch)

Case No: CR-2023-BRS-000062

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

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 5 August 2024

Before :

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

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Between :

(1) PAUL DAVID WOOD	**Applicants**
(2) NEIL FRANK VINNICOMBE	
- and -	
(1) DILIP DESAI	**Respondents**
(2) PARESH SHAH	

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Suzanne Chalmers (instructed by **Thrings LLP**) for the **Applicants**
Joshua Munro (instructed by **Direct Access**) for the **Respondents**

Consequential matters, dealt with on paper

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 11:00 am on 5 August 2024.

HHJ Paul Matthews :

Introduction

1. On 24 July 2024 I handed down my reserved judgment on the application dated 15 June 2023 of the liquidators of Boscolo Ltd ("the company") for directions under section 112 of the Insolvency Act 1986. The context was that the respondents had brought proceedings against the company for professional negligence, but they were currently stayed. The present application concerned a sum of money paid by the company's insurers to the company, amounting to £250,000. The respondents, who had not yet established their professional negligence claim, asserted a proprietary interest in these monies, most of which remain in the company's bank account. I held that they had no such interest, and that the monies were held by the liquidators as part of the general assets of the company.

2. When I handed down judgment, I invited written submissions on consequential matters. I have now received and considered these written submissions. This is my judgment on those consequential matters. The applicants (the liquidators of the company) seek an order that the respondents pay their costs of the application of 15 June 2023, including the costs of the directions hearing on 23 August 2023. They say that costs should follow the event, in accordance with the general rule. The respondents resist this. They also seek permission to appeal on a discrete point, and a stay in the meantime. I will come back to these matters in due course.

Costs

3. I begin with costs. The rules are well known. Under the general law, costs are in the discretion of the court: Senior Courts Act 1981, section 51(1); CPR rule 44.2(1). 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(2)(a). However, the court may make a different order: CPR rule 44.2(2)(b). In deciding whether to make an order, and if so what, the court will have regard to all the circumstances, including "the conduct of all the parties" and any admissible offer to settle the case (not falling under CPR Part 36) which is drawn to the court's attention: CPR rule 44.2(4).

4. The first question is whether the court *should* make a costs order. This was serious, professional litigation, which cost a significant amount of money, concerning the beneficial ownership of the main remaining cash asset of an insolvent company. In my judgment it is right to make a costs order. Next, I need to consider which party, for the purposes of the "general rule" in rule 44.2(2)(a), was the successful party overall. In my judgment, this was the applicants. There was one main issue, and the applicants were successful on it. And so the general rule would indicate that I should make an order in favour of the applicants.

5. But the court *may* make a different order, having regard to all the circumstances. Those circumstances are said to include a letter dated 6 September 2021 (before proceedings were issued) from the company's solicitors to the respondents' then solicitors, marked "Without prejudice save as to costs". The letter offered to settle the negligence claim against the company for £80,000. But that was not written in the present application. Following my judgment on that application, the respondents

submit that I should make no *inter partes* order, but instead should make an order that the costs of the applicants (though not those of the respondents) be paid out of the insolvent estate, I note that, in his witness statement for the applicants, their solicitor Mark Cullingworth said:

> "48. … The Liquidators remain neutral, but in the circumstances, they do not feel able to simply concede the Claimants' claim or remain inactive as they owe duties to all of the Company's creditors … "

This is the backdrop for the present decision.

6. In their submissions, the respondents set out the history of the dispute between the parties. They estimated their claim against the company as worth about £700,000. By July 2021, they had incurred costs of about £80,000. Insurers offered to pay out the limit of indemnity, £250,000. The respondents sought to make insurers pay their incurred costs on top, on the basis of principles set out in the decision in *Travelers Insurance Co Ltd v XYZ* [2019] 1 WLR 6075, SC. The insurers refused, and instead paid the indemnity limit to the company, in order to discharge their obligations under the policy. This has left the respondents in the position that they have a (so far unestablished) claim against an insolvent company in s large sum, and have incurred significant legal costs, yet the insurance monies will now go to the general creditors of the company. It would be unjust, they say, in addition to make them pay the costs of the application.

7. The respondents further remind me that (as stated above) the applicants as liquidators took a neutral stance on this application. They were in effect seeking directions. The respondents say that they too took a neutral stance. Accordingly, this was not hostile litigation, but simply seeking the court's directions as to what to do with the insurance payment in the context of the liquidation. In relation to the costs of such a case, the respondents refer to the decision of Hildyard J in *Lomas v Burlington Loan Management Ltd* [2018] EWHC 924 (Ch), one of the decisions in the litigation concerning Lehman Brothers International (Europe) (in administration).

8. In that case, the question was whether to depart from the general rule that the unsuccessful party pays the costs of the successful, where the substantive decision had concerned "the construction and effect of various standardised pre-administration agreements (and especially two forms of ISDA Master Agreements) on creditors' entitlement to statutory interest". Some unsuccessful parties sought their costs out of the administration estate, on the basis that the issues decided "should properly be characterised as necessarily brought for resolution by the court to enable the Joint Administrators to proceed further with the administration of the estate".

9. Hildyard J said:

> "7. There is … no doubt that, by analogy with developed practice in the context of litigation to resolve contested issues in a deceased's or insolvent's estate, where the proceedings have in effect been sponsored by the estate administrator, and the parties' involvement has in effect been as contributors to a necessary judicial inquiry … the court has been disposed to depart from the general 'costs follow the event' principle and allow costs as an expense in the relevant process of administration.

> […]
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> 9. It is common ground, in these circumstances, that the question is ultimately one of discretion. However, it is plain that the exercise of discretion is to be guided according to the characterisation of the substance of the proceedings; though caution is in any event required, in that (*per* Henderson J, as he then was, in *Kostic v Chaplin & Ors* [2007] EWHC 2909 (Ch)):
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> > ‘ … the courts are increasingly alert to the dangers of encouraging litigation, and discouraging settlement of doubtful claims at an early stage, if costs are allowed out of the estate to the unsuccessful party.’
>
> 10. In [*Pearson & Ors v Lehman Brothers Finance SA & Ors* [2010] EWHC 3044 (Ch], Briggs J added further:
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> > ‘ … although there are features of insolvency litigation which, by analogy with litigation about deceased's estates, may justify a departure from the general rule, the court should nonetheless approach any particular case for a departure with real caution, and litigants ought to expect to have to justify such a departure by reference to the facts about their alleged predicament, rather than merely by recourse to some supposed general principle.’
>
> 11. So the discretion is to be exercised with caution, according to the circumstances and context of the particular case.”

10. I note in passing that, in *Qureshi v Association of Conservative Clubs Ltd* [2019] EWHC 2194 (Ch), Sarah Worthington QC (Hon), sitting as a deputy judge, applied those principles to the facts of the case before her.

11. The circumstances and context of the present case are far removed from those of the Lehman Brothers litigation, where there were a great many parties with interests to protect, and huge sums at stake. They are also different from those in the *Qureshi* case, where the defendant unsuccessfully claimed to be entitled under the rules of the Edgeware Constitutional Club Ltd to the surplus of assets of that club, instead of its members. The litigation was clearly adversarial. Here there was really only one question, which was whether the insurance payment belonged to the company in liquidation as part of its general assets, or was held on trust for the respondents. Given that this payment was otherwise the only realisable asset of the company, determination of that question was fundamental to the liquidation. The liquidators were accordingly quite right to seek directions from the court.

12. The litigation between the respondents as claimants and the company and the insurer as defendants was plainly hostile litigation. But that must not be confused with the present application The applicants in their evidence said they were neutral, and the respondents’ counsel told the court when this application was first before the court that they would not seek their costs *inter partes*, that is, personally from the applicants. (In fact, they have not even sought their costs out of the estate.) On the other hand, the respondents opposed the applicants’ resorting to the insurance payment even for the purpose of funding this application. That was unwise.

13. Nevertheless, in my judgment, this is a clear case for the applicants' costs to come out of the insolvent estate. The question needed to be answered in order for the liquidation to be able to progress. It was raised in a proceeding of a neutral nature (though that cannot be conclusive). The result benefits the liquidation process. If the respondents had won, I have no doubt that the applicants would have asked that their own costs come out of the fund. I think that the liquidation process, rather than the respondents, should pay the applicants' costs, and I will therefore so order.

Permission to appeal

14. Any appeal from my decision of 24 July 2024 requires permission to appeal: CPR rule 52.3(1)(a). Under CPR rule 52.6, in a first appeal (such as this is) the court may not grant permission to appeal unless *either* there is a real prospect of a successful appeal *or* there is some other compelling reason why an appeal should be heard. The phrase 'real prospect' does not require a *probability* of success, but merely means 'not unreal': *Tanfern v Cameron-MacDonald* [2001] 1 WLR 1311, [21], CA; *Re R (A Child)* [2019] EWCA Civ 895, [31]. 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.

15. The respondents seek permission to appeal on "a discrete point". The point is that

> "it was an implied term in the contract that if [the company] received insurance monies discretely in relation to a claim against [the company] by the Respondents, it would hold those discrete monies on behalf of the Respondents, and pay those monies to the Respondents."

I proceed on the basis that the reference to "the contract" is to the contract between the respondents and the company.

16. The respondents say that, without such an implied term, the respondents could make a claim against the company, its insurers could accept the claim and pay insurance monies to the company and yet the respondents would make no recovery because of the company's insolvency. They say that "the officious bystander would balk at such an interpretation of the contract, and it is necessary to imply the term to give the contract business efficacy." The applicants (the liquidators) say that the decision that I made was correct for the reasons given, and that an appeal would have no real prospect of success.

17. What I said on the implied term point in my substantive judgment was this:

> "43. Nor do I consider that it is necessary to imply a term to that effect, either because it is so obvious that it goes without saying, or in order to give business efficacy to the contract. The fact that there is no case cited where such an argument has been successful strongly supports the view that it is not obvious. And the insurance makes business sense without the need to give clients specific interests in it. It is obviously beneficial *in itself* to a professional person to have indemnity insurance, because it means that claims can be dealt with by others (at no cost to the insured), leaving the professional free to get on with other client work, secure also in the knowledge that the insurer will pay any compensation that may be found due. Ordinary cashflow will remain unimpaired."

18. The test is one of *necessity*, and not one of reasonableness, or even fairness. I see no prospect of the Court of Appeal's taking the view that, without such an implied term as the respondents urge, the contract would lack all business efficacy. As I said in my judgment, the contract works perfectly well without it. The term is not *necessary*. Nor do I see any other compelling reason for an appeal. In these circumstances, I must refuse permission to appeal.

Application for a stay

19. The respondents also ask for "an order not allowing the Applicants access to the insurance monies pending resolution of any appeal." In effect this is an application for a stay pending the appeal. As to that, CPR rule 52.16 relevantly provides:

> "Unless—
>
> (a) the appeal court or the lower court orders otherwise; or
>
> […]
>
> an appeal shall not operate as a stay of any order or decision of the lower court."

20. In *Department of the Environment, Food and Rural Affairs v Downs* [2009] EWCA Civ 257, Sullivan LJ said:

> "8. … A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.
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> 9. It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal."

21. The respondents say that, without a stay, "the Applicants might exhaust the fund rendering any appeal otiose, which would be unjust." The applicants reply that it would be wrong to prevent them from accessing the fund in circumstances where there is no real prospect of success on appeal, and the court has held that (if the respondents had succeeded) the applicants should have their costs on the indemnity basis out of the fund before accounting for the balance: see the substantive judgment at [58].

22. I cannot see that the respondents will suffer any irremediable harm if I refuse a stay. There is no suggestion that, if the applicants used the money to pay costs, and the Court of Appeal held that the money had been held on trust and should not have been so used, the applicants would be unable to pay the equivalent sum back into the estate. Accordingly, I refuse a stay of my order.

Costs of the application for a stay in claim BL-2021-001786

23. On 19 May 2023, Master McQuail reserved the costs of the first respondent's application dated 12 April 2023 to stay the proceedings in claim BL-2021-001786 to the hearing of the then intended application under section 112 of the 1986 Act. I am told that she gave no reasons for this order. The section 112 application was issued in the Business and Property Courts in Bristol and is the one now dealt with by me. Pursuant to that order, the applicants accordingly seek their costs of the application to stay claim 001786 to be paid by the respondents.

24. This raises a number of problems. The main one is that claim BL-2021-001786 is pending in London (in the in the Business and Property Courts of England and Wales) whereas I am sitting in the Business and Property Courts in Bristol. Claim BL-2021-001786 has never been transferred to Bristol. The master's order almost certainly contemplated that the application under section 112 would be issued in London. But that did not happen.

25. In *Zanussi v Anglo Venezuelan Real Estate and Agricultural Development Ltd*, *The Times*,18 April 1996, the Court of Appeal held that that the court did not have power to make a costs order in respect of the costs of proceedings other than those with which the court was engaged, unless those costs could be regarded as 'incidental' to those proceedings. I dealt with issues arising from this authority in a case called *Batt v Boswell* [2022] EWHC 649 (Ch), [155]-[170]. In the circumstances, I think that the parties will need to consider both these decisions before deciding what to do. For the present, therefore, I simply make no order in relation to these costs.

Order

26. I should be grateful for a minute of order intended to give effect to this judgment.