In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
2015: No. 16

BETWEEN:

THE MAJURO INVESTMENT CORPORATION
(a company incorporated in the Marshall Islands)

Plaintiff

-v-

(1) VASILE TIMIS (also known as FRANK TIMIS)
(2) DERMOT COUGHLAN
(3) CRAIG COUGHLAN
(4) EDEN DERVAN (also known as ADEN DERVAN)
(5) GLOBAL IRON ORE, LIMITED (a company incorporated in Cyprus, in Liquidation)
(6) FERRERO LAW FIRM
(7) AFRICAN MINERALS LIMITED (a company incorporated in Bermuda, in Administration)
(8) TONKOLILI IRON ORE (SL) LIMITED (a company incorporated in Sierra Leone)

Defendants

RULING ON COSTS

(in Chambers)

Costs-indemnity costs-third party costs order-disclosure of unidentified litigation funders

Dates of hearing: January 14, February 25, 2016
Date of Ruling: March 10, 2016

Mr Delroy Duncan and Ms Lauren Sadler-Best, Trott & Duncan Limited, for the Plaintiff ("P")
Mr. Alex Potts, Sedgwick Chudleigh Limited, for the 1st Defendant ("D1")
Mr Peter Sanderson, Wakefield Quin Limited, for Mr Mahmood Memarian (aka Michael Memarian)

Introductory

1. On January 15, 2015, P issued a Generally Endorsed Writ of Summons accompanied by a 'Particulars of Claim'. P claimed equitable compensation or damages in the amount of $50.5 million from, *inter alia*, D1. From paragraph 1 of P's pleading, it was clear that P brought the claim as a shareholder of the 7th Defendant ("D7"), a Bermudian company, and its subsidiary the 8th Defendant ("D8"), a Sierra Leonean company, on behalf of D7 and D8. The final paragraph of the pleading averred as follows:

> "*81. No relief is sought against* [D7] *and* [D8]*, who have been joined as Defendants solely for the purposes of their being parties to any order made in respect of this claim.*"

2. On the same date as the Writ was issued, P issued an Ex Parte Summons seeking injunctive relief against the Fifth Defendant and Sixth Defendant ("D5" and D6") and directions for service on the Defendants generally outside of the jurisdiction. This Ex Parte Summons was heard before Hellman J in Chambers on January 20-21, 2015. He granted both the injunctive relief sought against D6, which P's counsel addressed first in oral argument; Hellman J also granted leave to serve out against, *inter alia*, D1.

3. In my Ruling of December 4, 2015 on D1's application to set aside service, I found as follows:

> "*37. P admittedly lacks the standing to pursue a derivative claim on behalf of D7 because after the January 21 Ex Parte Order was made granting leave to serve D1 out of the jurisdiction, D1 (the alleged wrongdoer) ceased to have control of the Company. Further and in any event, P lacks standing to pursue a derivative claim because it is not a registered shareholder of D7 and no sufficient grounds have been made out for*

treating its beneficial interest in its shares in D7 as an adequate basis for pursuing a derivative claim. The January 21, 2015 Order is liable to be set aside on the grounds that P has failed to establish that there is a serious issue to be tried on the merits of its claim against D1.

38. Further and in any event, P has failed to establish a good arguable case that this Court has jurisdiction over D1 within the sole jurisdictional gateway relied upon, Order 11 rule 1(1) (c). This jurisdictional limb of Order 11 rule 1 requires reliance upon a viable adverse claim against the 'anchor defendant'. P has merely joined D7 as a nominal defendant on the explicit basis that its real and substantive interest in the litigation is as a passive plaintiff. This is a novel finding in Bermudian law terms. The fact that this point was not adequately explored at the ex parte stage is regrettable but unsurprising.

39. The Ex Parte January 21, 2015 Order granting leave to serve out is liable to be set aside on this further ground. In these circumstances there is no rational basis for staying the present proceedings to see if the UK Joint Administrators of D7 wish to take them over, rather than dismissing the proceedings altogether. No other potential jurisdictional gateway was posited as a potential alternative ground for suing D1 in Bermuda.

40. Accordingly, subject to hearing counsel on the precise terms of the final Order if required, the claim against D1 is dismissed. Unless either party applies within 21 days by letter to the Registrar to be heard as to costs, the costs of the present application shall be awarded to D1 to be taxed if not agreed."

4. D1's application for costs was listed for hearing on January 14, 2016. Regretfully, for administrative reasons, the hearing was not concluded and was adjourned to a date to be fixed. The resumed hearing was listed for February 25, 2016, a date on which I was again distracted by administrative matters. Coincidentally D6's application for costs was listed for the same date and binders for that application were delivered to my Chambers. I studiously prepared for D6's application, assuming that was the only application before the Court, neglecting to leaf through the file to ascertain what applications were listed for hearing[1].

5. In the event, I heard the conclusion of the submissions on D1's application for costs, reserving judgment primarily to remind myself of the submissions made at the

[1] The only obvious application listed for hearing was in any event D6's costs Summons. The only Notice of Hearing on the file was for April 29, 2016. A review of various emails, one manuscript note and one letter reveals that P's Notice of Motion for Leave to Appeal was listed for April 29, 2016, D1's costs application was listed for February 25, 2016, and D6 requested that its costs Summons be listed for February 25, 2016 to follow D1's application, should time permit.

beginning of the application over five weeks ago. I adjourned D6's application to a date to be fixed[2]. Mr Potts legitimately complained that applications such as these ought to be dealt with summarily. Ordinarily, such applications are dealt with in a more summary manner.

D1's costs application

6. D1's Summons dated June 8, 2015 sought the following final head of relief[3]:

> "*5. Further or alternatively…and without the First Defendant in any way submitting, or intending to submit, to the jurisdiction of the Supreme Court of Bermuda, the Plaintiffs (and such third parties as may have caused, or controlled, or funded the Plaintiff's pursuit of these proceedings) do pay the first Defendant's costs of and occasioned by this Summons and the proceedings, to be taxed if not agreed, with such orders for the provision of security, interim payment on account, and/or summary assessment as may be appropriate.*"

7. D1's entitlement to costs was not in dispute. The controversy centred on whether (a) costs should be awarded on an indemnity basis and (b) Mr Memarian as a funder should be made liable for costs.

Standard of costs

8. Mr Potts relied on a variety of considerations in support of D1's claim for indemnity costs. In essence, he complained that the case was hopeless and was unreasonably conducted, in part because of material non-disclosure at the ex parte hearing. Mr Duncan argued that there was nothing out of the norm in the present case to justify indemnity costs. D1's April 20, 2015 letter, upon which Mr Potts relied, did not in fact spell out the arguments which were successful on the effective hearing of the application to set aside.

9. If matters rested there, I might on balance (and perhaps being overly generous to P) have accepted Mr Duncan's submissions. However D1 complained of a further matter to which there could be no credible response and which in my judgment tips the

[2] However, as I recall, Mr White of Cox Hallett Wilkinson for D6 observed the hearing because of its close connection to his client's corresponding cost application.

[3] A further Summons seeking, *inter alia*, joinder of Mr Memarian and disclosure by Trott & Duncan Ltd of P's funding sources was issued on December 21, 2015. Mr Duncan indicated that his firm's knowledge was limited to its own funder, a firm of London of Solicitors which he identified in Court. P's counsel invited the Court in these circumstances to direct any disclosure order to P rather than his firm, which I indicated I was minded to do.

scales of justice decisively in favour of an indemnity costs award. Mr Potts relied on my finding at paragraph 7 of the December 4 Ruling that "*Mahmood Memarian is the ultimate beneficial owner of P which was incorporated on December 22, 2014 in the Marshall Islands for the specific purpose of commencing the present action*". He invited the Court to infer that P had been deliberately incorporated as a judgment proof special purpose vehicle with a view to avoiding any adverse costs orders. There seemed to me to be a very strong basis for drawing such an inference, if in fact the true position is that the proceedings had been commenced, and the opposition to D1's Summons maintained, in circumstances where no funding was in fact available to meet the costs of D1 (and indeed, D6 as well).

10. On January 20, 2015 when P obtained the injunction against D6 and leave to serve the Writ abroad on D1 and D6, Hellman J was understandably concerned about how much reliance could be placed upon an undertaking in damages given by P alone. Mr Memarian was at the hearing, and positively represented that he would fortify the undertaking given by the company for the purposes of obtaining the injunction. Mr Duncan stated[4]:

> "*My Lord, I—I have instructions that the Plaintiff will give the undertaking and Mr Memarian here will give the fortification.*"

11. That was an express representation that Mr Memarian was willing and able to personally fund any sums that might be payable by P pursuant to the undertaking upon which the Injunction was ultimately granted against D6. It was also an implied and far wider representation that while P might be a company of straw, Mr Memarian was willing to meet its financial obligations in relation to the litigation generally. The question as to whether P had been formed as a means of evading the usual costs consequences of litigation, in circumstances where the Defendants would be unable to apply for security for costs without submitting to the jurisdiction they wished to challenge, is obviously relevant to the basis of taxation. I raised the issue of ability to pay with P's counsel at the end of the January 14, 2016 hearing.

12. I noted that it would be very surprising if the Court could not take this consideration into account in deciding the basis of taxation. This was because the scheme of the Rules assumed that litigants intended to abide by 'the rules of the game' and that it would amount to a misuse of the Court's processes if, as the evidence then before the Court clearly suggested, P had pursued the present litigation in a manner designed to break 'the rules of the game'. I accordingly afforded P's counsel an opportunity to indicate whether or not P had the means to meet its costs obligations between the end of the hearing and the resumed hearing, which I expected to resume "*hopefully within the next week or so*". I also made it clear that my strong provisional view was that if neither the company nor Mr Memarian had the means to meet the Defendants' costs,

[4] Transcript, page 226, lines 15 to 18.

then I would be bound to find that the proceedings had been prosecuted in an abusive manner.

13. At the resumed hearing of D1's costs application, almost six weeks later, when I raised the same question with Mr Duncan he provided the stunning answer that he had no instructions on P's position. He then indicated that attempts to find funding were in train and invited the Court to postpone awarding indemnity costs until P was given an opportunity to demonstrate its ability to pay. Although I was initially attracted by that course, I have no hesitation (after considering the record as to the basis on which the costs hearing was adjourned on January 14, 2016) in rejecting it.

14. D1 is awarded costs to be taxed if not agreed on the indemnity basis because P obtained and defended the ex parte order in a way which was manifestly abusive in that:

    (a) P's case was unmeritorious;

    (b) P ignored D1's warning in April 2015 that the case was unmeritorious and the Ex Parte Order was liable to be set aside; and

    (c) P was specifically formed to pursue the present litigation and P both obtained and defended the Ex Parte Order in circumstances where it was immune from the costs regime which is a central mechanism of the Rules.

Liability of Mr Memarian as a third party funder

15. It does not lie in Mr Memarian's mouth, in light of his sworn evidence in these proceedings and the representations he made to this Court at the ex parte hearing, to contend that he is not liable to a third party costs order. The high threshold for making such a costs order against a director simply because of his office as such, upon which Mr Sanderson for Mr Memarian relied[5], has no application to the facts of the present case. Nor can it be suggested that a third party costs order can only be made upon proof that the third party in question has actually provided funding. It is sufficient if the Court can properly find that the proceedings were being brought for the benefit of a particular third party and/or that the third party has in practical terms been controlling the proceedings.

16. Mr Memarian commenced the present proceedings on the explicit basis that he was controlling the proceedings and was willing to guarantee payment of any financial

[5] Counsel cited *Taylor-v-Pace Developments Ltd* [1991] BCC 406 at 409; The Times, May 7 1991; *Metalloy Supplies Ltd-v- MA (UK) Ltd* [1997] 1 WLR 1613 at 1618-1619C.

orders which might be made against P which was on the face of it an entirely empty corporate vessel. His Third Affidavit, which denies that he ever funded the litigation without disclosing who did, provides further support for a third party costs order against him. While he also denies intending to benefit financially from the proceedings, he bizarrely all but expressly admits to bringing the proceedings for a collateral purpose. He expressly admits that he had personal animus towards those behind D7 because he suspected them of launching a character assassination campaign against him as well as a physical attack.

17. This evidence merely fortifies the conclusion that the present proceedings have been prosecuted in a manner which constitutes a flagrant abuse of the processes of this Court by a litigant with no legitimate standing to pursue the relevant claim.

18. Mr Potts rightly submitted that the test for ascertaining whether an individual behind a company was amenable to a third party costs order is more fluid than it once was. He relied upon *Petromec Inc-v- Petroleo Brasileiro SA Petrobas* [2006] EWCA Civ 1038, where Longmore LJ (with whom Laws LJ and Ward LJ agreed) opined as follows :

> "*10. In these circumstances it is not necessary to discuss the authorities at any length. I would only observe that, although funding took place in most of the reported cases, it is not, in my view, essential, in the sense of being a jurisdictional pre-requisite to the exercise of the court's discretion. If the evidence is that a respondent (whether director or shareholder or controller of a relevant company) has effectively controlled the proceedings and has sought to derive potential benefit from them, that will be enough to establish the jurisdiction. Whether such jurisdiction should be exercised is, of course, another matter entirely and the extent to which a respondent has, in fact, funded any proceedings may be very relevant to the exercise of discretion. In the present case, however, the judge rightly drew no distinction between the pre- and post-October 2003 proceedings because the reality was that Mr Efromovich was funding them throughout.*
>
> *11. There is a danger that the exercise of the jurisdiction to order a non-party to proceedings to pay the cost of those proceedings becomes over-complicated by reference to authority. On the present appeal Mr Neish mounted an elaborate argument to the effect that proof of funding was necessary and that, to the extent that this court had decided that it was not in Goodwood Recoveries Ltd v Breen [2005] EWCA Civ 414 it was inconsistent with Dymocks Franchise Systems v Todd [2004] UKPC 39, [2004] 1 WLR 2807 and should not be followed. Since the judge decided, rightly, that Mr Efromovich did in fact fund the proceedings, this argument was misplaced and it is tempting to ignore it since any view I express on it will be obiter. But the matter may well arise in other cases and I would therefore wish to record my respectful view that paragraph 59 of the*

judgment of Rix LJ in Goodwood (by which we are, in any event, bound) correctly states the law in the following terms:-

> *'. . . the law has moved a considerable distance in refining the early approach of Lloyd LJ in Taylor v Pace Developments. Where a non-party director can be described as the "real party", seeking his own benefit, controlling and/or funding the litigation, then even where he has acted in good faith or without any impropriety, justice may well demand that he be liable in costs on a fact-sensitive and objective assessment of the circumstances."*

For the avoidance of doubt, it may be necessary to add that this principle is not confined to 'directors'".

19. No need to formally join Mr Memarian for the purposes of making the requisite order arises. In *Phoenix Global Fund Ltd.-v-Citigroup Fund Services (Bermuda) Ltd.*[2007] Bda LR 61, in a passage relied upon by D1's counsel, I found as follows:

"*50… Order 62 rule 1(2) provides as follows:*

> *'party', in relation to a cause or matter, includes a party who is treated as being a party to that cause or matter by virtue of Order 4, rule 10(2) …'*

51. Order 4 rule 10 deals with the consolidation of proceedings, so this definition does nothing to detract from the strength of the conventional assumption that the Rules do not permit the Court to award costs against a third party who participates in no formal way in a proceeding. However, section 1 of the Supreme Court Act 1905 contains a somewhat broader definition of 'party':

> *'party' includes every person served with notice of, or attending, any proceeding, although not named on the record …'*

52. This is hardly the clearest expression of the legislative intention to confer a judicial discretion on the Supreme Court to determine who shall be liable for the costs of an action or application therein. But this provision, read with Order 62, does clearly signify that any person who is directly affected by any proceeding, as signified by their either appearing or having been given an opportunity to appear, may be treated as a party for costs purposes. It is difficult, on the face of these provisions, to infer from this a discretion to order that the entire costs of an action should be paid by a third party who has not appeared, unless (perhaps) at the outset of the proceedings they had been given notice of the possibility of such an application. These statutory

provisions fall far short of the explicit unfettered statutory discretion conferred on the English High Court, firstly in 1890 and latterly in 1981, to determine who should pay the costs of any proceeding…"

Disclosure

20. It follows that P and Mr Memarian should be ordered to disclose forthwith the identity of such other persons (if any) who have been actually funding the present litigation.

Conclusion

21. D1 is awarded the costs of his Summons dated June 8 and December 21, 2015 as against P and Mr Memarian on an indemnity basis, to be taxed if not agreed. P and Mr Memarian shall also disclose forthwith to D1's attorneys the names and addresses of any other third party funders not presently before the Court. I shall hear counsel, if required, on the terms of the final Order and any other matters arising from the present Ruling.

22. Having regard to the overriding objective, I feel obliged to indicate here that it is difficult to see why a similar Order should not summarily be made in favour of D6. The facts and relevant law are not only substantially the same; D6's case for indemnity costs appears even stronger. Order 1A/4 provides:

"*(1) The court must further the overriding objective by actively managing cases.*

(2)Active case management includes—

...

(c)deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others…"

23. Of the Court's own motion I direct that unless P applies within 14 days by letter to the Registrar to be heard as to D6's costs, P shall pay the costs of D6's June 9, 2015 application to set aside the Orders made against D6 in favour of P on January 21, 2016 on an indemnity basis.

Dated this 10th day of March 2016 _____

IAN RC KAWALEY CJ