Neutral Citation Number: [2021] EWCA Civ 1037

Case No: A2/2020/1970

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (QUEEN'S BENCH DIVISION)
Mr Mathew Gullick (Sitting as a Deputy High Court Judge)
[2020] EWHC 2542 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE COULSON
and
LORD JUSTICE DINGEMANS

- -

Between :

Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Ticaret ve Sanayi As	**Appellant**
-and-	
Cengiz Aytacli	**Respondent**

- -
- -

Mr Imran Benson (instructed by **Hudson Morgan Williams Solicitors**) for the **Appellant**
The Respondent Appeared in person

Hearing Date : 29 June 2021

- -

Approved Judgment

LORD JUSTICE COULSON :

1 Introduction

1. For those who believe that most civil litigation does not end up being about the costs that were incurred in pursuing that same litigation in the first place, look away now.

2. The point of law which arises on this appeal concerns the circumstances in which a director and shareholder of an insolvent company may be personally liable for some or all of that company's costs liabilities incurred in unsuccessful litigation, pursuant to s.51 of the Senior Courts Act 1981. The particular question is whether it is enough to show that the director controlled and funded the company's conduct of the litigation or whether, in order for a s.51 order to be made, it is also necessary to show either that he or she benefited (or sought to benefit) personally from that litigation, or acted in bad faith or was responsible for impropriety of some kind.

3. There are, however, other issues going to the central question of whether the judge erred in refusing Goknur's application for a non-party costs order in the sum of £249,605.43 against Mr Aytacli, the director of Organic Village. These involve the nature of the benefit personally obtained or obtainable by Mr Aytacli from the litigation, and broader questions of justice arising out of its tortuous history. These issues fall to be answered, not primarily by reference to principle, but on an analysis of the background facts. That is, therefore, where I start.

2 The Background Facts

4. The appellant ("Goknur") is based in Turkey. It is involved in the manufacturing and wholesale supply of fruit juice. It is a large company with a turnover in the region of £100 million per year.

5. Organic Village is a small family-run wholesale business, which used to have a six figure turnover. Until his resignation as a director in October 2016, which was registered at Companies House on 27 March 2017, Mr Aytacli, the respondent to this appeal, was the managing director of Organic Village. Ms Bilgin, who had been the company secretary, and is Mr Ayatcli's wife, was appointed a director in his place. It does not appear that there were any other directors or shareholders.

6. Organic Village was one of only two UK suppliers of Goknur's fruit juices. They also supplied Goknur juices to other countries. The contract between Goknur and Organic Village stipulated that the fruit juices supplied by Goknur would be "not from concentrate". This meant that the juices would not have been reduced to a concentrated form and then later reconstituted by adding back water.

7. In November 2011, Organic Village believed that Goknur was supplying fruit juice with exogenous water, that is to say water from a source other than the fruit itself, such as ground water or tap water. Organic Village wrote to Goknur rejecting the stock that it had already received and in due course stopped the cheques that they had written in payment for the juices delivered.

8. In February 2012, Goknur issued a claim against Organic Village in the sum of £104,465.17 in respect of the stock that had been delivered to Organic Village but not

paid for. Organic Village defended the claim and, by way of set-off and counterclaim, sought £352,015.04 in respect of the losses they said that they had suffered as a result of Goknur's breach of contract. The counterclaim also alleged misrepresentation and deceit. The bulk of it was made up of a claim for loss of profits, in particular an alleged loss of future profits.

9. The subsequent litigation has proved nothing short of a disaster for both Goknur and Organic Village. Goknur repeatedly failed to comply with orders made by Master Kay QC, who was managing the litigation. They made at least three unsuccessful attempts to appeal interlocutory orders that he had made. On 14 July 2017, Master Kay QC ordered that, unless by 24 July 2017, Goknur complied with a previous adverse costs order, their claim would be struck out. Goknur did not comply with the order, and their claim was struck out in consequence. Goknur was ordered to pay Organic Village's costs of the claim.

10. It appears that there was a three day hearing before Master Kay QC, spread between April, May and June 2018, relating to various issues between the parties as to costs. It is not at all clear how or why this was appropriate, when the merits of Organic Village's counterclaim had yet to be determined: it is perhaps an indication of the bitterness which this litigation engendered, and the concerns of the solicitors at the time, that the parties spent more money arguing about costs rather than resolving the substantive issues between them. At the costs hearing, there was a dispute about the amount of the payment on account of costs to be made by Goknur to Organic Village following the striking out of Goknur's claim. It was said that Organic Village's total costs of defending the claim, as advanced by their then solicitors Hugh-Jones LLP, amounted to £269,196.30.

11. Master Kay QC concluded that this figure was a proper starting point for considering the appropriate quantum of an order for costs on account. He ordered a payment on account at 70% of that figure, namely £153,768.51. That was subsequently reduced by Foskett J to £138,800, because of a certain amount of double counting of sums already paid by Goknur to Organic Village on account of costs. Importantly, Foskett J upheld the Master's view that, in principle, a payment on account of 70% of the costs was appropriate and that the £269,196 figure was the correct starting point for any assessment of Organic Village's costs.

12. The double counting had arisen because Goknur had already been found liable to pay Organic Village's costs of previous interim hearings, and costs orders had been made which required them to make other payments on account to Organic Village. In total, including the amount ordered by Foskett J, Goknur paid £185,300 on account of their costs liabilities to Organic Village. It is to be noted that this money was paid direct to Hugh-Jones, Organic Village's solicitors, pursuant to the terms of their Conditional Fee Agreement ("CFA"). None of it was paid to Organic Village themselves.

13. What of Organic Village's counterclaim? That was fought through to a trial. In a reserved judgment handed down on 12 August 2019, [2019] EWHC 2201 (QB), Mr Martin Chamberlain QC (as he then was), sitting as a Deputy High Court Judge ("the trial judge"), upheld Organic Village's counterclaim in relation to breach of contract and misrepresentation. He found that Goknur's fruit juices were not, as promised, free from exogenous water. However, he concluded that there was no causative link between Goknur's default and Organic Village's counterclaim for damages. In

particular, the trial judge found that it was not within the reasonable contemplation of the parties that, if Organic Village ceased purchasing organic "not from concentrate" fruit juices from Goknur by reason of defective supply, Organic Village would be unable to obtain alternative supplies of the same juices on the open market. That meant that their claim for loss of future profits could not succeed in law. In consequence, the judge awarded Organic Village only nominal damages of £2.

14. Inevitably, there was then a debate about who was liable for the costs of the counterclaim. The judge concluded that, in all the circumstances, Organic Village should pay one quarter of Goknur's costs of the counterclaim, such costs to be the subject of detailed assessment if not agreed. By way of a Default Costs Certificate dated 20 April 2020, that 25% liability on the part of Organic Village was quantified at £64,305.43. That sum has not been paid.

15. Throughout these events, it appears that Organic Village were balance sheet insolvent. The evidence suggests that this dated back to 2013-2014 (during the early stages of the litigation). There was a debate, which we do not need to resolve, about whether Organic Village ceased trading at this time. However, despite these difficulties, they pursued the counterclaim against Goknur to the end. Goknur themselves were aware of Organic Village's parlous financial position and had earlier sought security for costs against them, but that application had been refused. There is no information as to what, if any, attempts were made by the solicitors on each side to resolve the litigation at a much earlier stage, particularly in the light of Organic Village's ongoing financial problems. In that connection, I should note that Goknur's current solicitors were only instructed in 2019.

16. There is other evidence about those financial difficulties. In October 2010 Mr Aytacli had given a personal guarantee to the company's bankers of £150,000. On 7 January 2014, Mr Aytacli borrowed £160,000 from a Mr & Mrs Patel. £50,000 odd of that sum was expressed in the loan agreement as being intended to provide working capital for Organic Village, whilst the remainder was to pay off earlier loans. Mr Aytacli gave a charge over the family home as security for this loan. The charge was registered on 11 February 2014.

17. Additionally, there were Organic Village's arrangements with their solicitors, Hugh-Jones. The CFA provided that Organic Village would have to pay half of Hugh-Jones' fees irrespective of the outcome of the litigation. The balance (together with a 90% success fee) was payable in the event of any award of damages being made to Organic Village. The success fee would never have been payable by Goknur in any circumstances.

18. Mr Aytacli and Ms Bilgin both provided personal guarantees in respect of all monies due to Hugh-Jones from Organic Village. As the litigation continued, a second charge was registered against Mr Aytacli's family home on 25 October 2016 in respect of Organic Village's indebtedness to Hugh-Jones. As the judge pointed out at [44] of his judgment on the s.51 application, that was approximately half way through the litigation with Goknur.

19. Following the conclusion of the trial, Hugh-Jones considered that, because of the award of nominal damages of £2, success had been achieved in the litigation for the purposes of the CFA, with the result that Organic Village was liable to pay its charges

in full, including the 90% success fee[1]. Whether they were correct in that assertion is not a matter for this judgment. The outstanding amount, according to Hugh-Jones' draft bill, was £427,998.11 That amount has not been paid and there is a reference in the papers to Hugh-Jones' intention to issue a winding-up petition against Organic Village.

20. Worse was to follow for Organic Village. As noted above, although they (or rather Hugh-Jones on their behalf) had been paid the sum of £185,300 on account of their costs of the claim, those costs had never been the subject of detailed assessment. On 9 March 2020, Goknur made an application for an order under CPR 47.8 that Organic Village be required to commence the necessary detailed assessment of costs. Master McCloud ordered that, unless Organic Village commenced detailed assessment proceedings by 16 March 2020, then its costs would be disallowed and it would be required to pay into court the £185,300 that it had been paid by Goknur on account of its costs. There is some suggestion that, at a later date, Goknur obtained a further order that the sum of £185,300 be paid directly to them, although there is no record of such an order in the papers.

21. Organic Village did not comply with Master McCloud's order. That appears to be because they simply had no money to do so. Although Hugh-Jones were obliged to undertake such a detailed assessment in accordance with the terms of the CFA, they had terminated the CFA due to non-payment of their fees. Organic Village's lack of resources also explains the Default Costs Certificate, noted at paragraph 14 above, which fixed the amount of Goknur's costs of the counterclaim without any input from Organic Village.

22. On 15 May 2020, Goknur made an application for a non-party costs order against Mr Aytacli in the sum of £249,605.43 pursuant to s.51 of the Senior Courts Act 1981. That was made up of the sum of £185,300 (Organic Village's costs of the claim paid on account by Goknur) and the further sum of £64,305.43, being Goknur's costs of the counterclaim in accordance with the judge's 25% allocation.

23. The application was refused by Mr Mathew Gullick, sitting as a deputy judge of the High Court ("the judge"). His admirably thorough judgment is at [2020] EWAC 2542 (QB). Having set out the facts and the law, he concluded that:

    a) Mr Aytacli controlled Organic Village and the conduct of the litigation with Goknur ([43]);

    b) By providing security for Organic Village's indebtedness to its solicitors, Mr Aytacli funded the conduct of the litigation by Organic Village ([44])[2];

[1] I note that, at the end of the hearing before the trial judge, there was much debate about whether there should be an award of nominal damages. Counsel for Organic Village argued for nominal damages; counsel for Goknur resisted it. If Mr Aytacli had known that an award of £2 by way of nominal damages would have such an adverse effect on the costs position with Hugh-Jones, he would doubtless have given different instructions. It does not appear that this potential conflict of interest was raised with him at the time.

[2] At [44], the judge noted that the manner in which the litigation had been funded was relevant to the exercise of his discretion and that this was not a case where the director had provided substantial amounts of cash to enable

c) It was not correct to conclude that proceedings were pursued solely or substantially for Mr Aytacli's own financial benefit ([44]);

d) There was no additional factor, such as bad faith or impropriety, to justify the making of a non-party costs order ([46]);

e) In all the circumstances of the case, it would be an unjust outcome to make Mr Aytacli personally liable for the costs ([48]-[51]).

24. Goknur now seek to appeal the judge's refusal of the s.51 order against Mr Aytacli.

3 The Law

3.1 General Principles

25. S.51(1) of the Senior Courts Act 1981 provides that "the costs of and incidental to all proceedings…shall be in the discretion of the court". S.51(3) gives the court "full power to determine by whom and to what extent the costs are to be paid…". In *Aiden Shipping Co. Limited v Interbulk Limited* [1986] AC965, the House of Lords held that these provisions empowered a court to make an order for costs against a party who was not a party to the litigation. That power is now enshrined in CPR 46.2.

26. The early guidance as to how this power was to be exercised was set out in the judgment of Balcombe LJ in *Symphony Group Plc v Hodgson* [1994] QB179 at 191-194. Amongst other things, he stressed the exceptional nature of the jurisdiction. A relevant observation in relation to the present appeal is at 191G-192A, where Balcombe LJ indicated that one possible type of case in which non-parties might be ordered to pay costs was "a director of an insolvent company who causes the company improperly to prosecute or defend proceedings".

27. The leading case on non-party costs orders is *Dymocks Franchise Systems (NSW) Pty Limited v Todd and others* [2004] UKPC 39, [2004] WLR 2807, a decision of the Privy Council. In the judgment delivered by Lord Brown of Eaton-under-Heywood, he said:

> "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

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it to pay its legal bills. However, he makes no further mention of this point in his judgment and it does not appear to have been taken into account in the exercise of his discretion.

> there will often be a number of different considerations in play, some militating in favour of an order, some against…
>
> 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…"

28. I return to *Dymocks* at paragraphs 34 and 35 below in the specific context of a controlling or funding director or shareholder of an insolvent company.

3.2 The Controlling/Funding Director or Shareholder of an Insolvent Company

29. There have been many authorities dealing with the potential costs liability under s.51 of a director or shareholder of an insolvent company who controls and funds the litigation. Although there are plenty of warnings against the over-citation of authority in a s.51 case (because it is, after all, a matter of broad discretion), in the light of the issues that have arisen on this appeal, I fear that it is necessary to refer to some of the cases, in chronological order, to show the development of the law on this topic. The compensation is that, in my view, an analysis of the caselaw reveals a clear answer to the questions of principle which arise here.

30. In *Taylor v Pace Developments* [1991] BCC 406 at 409, Lloyd LJ baulked at the suggestion that every director who funded and controlled litigation on behalf of an insolvent company was liable to make a non-party costs order. He said:

> "But it could not be right that in every such case he should be made personally liable for the costs, even if he knows that the company will not be able to meet the plaintiff's costs, should the company prove unsuccessful. That would be far too great an inroad on the principle of limited liability. I do not say that there may not be cases where a director may not properly be liable for costs. Thus he might be made liable if the company's best defence is not bona fide, as, for example, where the company has been advised and there is no defence, and the proceedings are defended out of spite, or for the sole purpose of causing the plaintiffs to incur irrecoverable costs. No doubt there will be other cases. But such cases must necessarily be rare. In the great majority of cases the directors of an insolvent company which defends proceedings brought against it should not be a personal risk of costs. "

31. In *Metalloy Supplies Limited v MA(UK)* [1997] 1WLR 1613, Millett LJ said:

> "[An order] may be made in a wide variety of circumstances where the third party is considered to be the real party interested in the outcome of the suit. It may also be made where the third party has been

> responsible for bringing the proceedings and they have been brought in bad faith or for an ulterior purpose or there is some other conduct on his part which makes it just and reasonable to make the order against him. It is not, however, sufficient to render a director liable for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are brought bona fide and for the benefit of the company, the company is the real plaintiff. If in such a case an order for costs could be made against a director in the absence of some impropriety or bad faith on his part, the doctrine of the separate liability of the company would be eroded and the principle that such orders should be exceptional would be nullified."

32. *Gardiner v FX Music Limited* (2000) WL 33116500 (27 March 2000, unreported) is a decision of Geoffrey Vos QC, as he then was, sitting as a deputy judge of the Chancery Division. It is referred to in the commentary to the White Book 2021 at 46.2.3[3]. He reminded himself that:

> "The court must ask whether, in all the circumstances, it is just to exercise the power under s.51 to make the non-party liable for the costs (or part of the costs) of the litigation. Whatever the limits of the court's discretion to order sole or guiding director of an insolvent company to pay the costs of an action brought by or against that company, it is clear that such discretion may be exercised as in circumstances in which: -
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> 1 the director had the management of the litigation on behalf of the company; and
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> 2 the director acted improperly in conducting the litigation.
>
> There may be many categories of relevant impropriety. But such impropriety must be of a serious nature. I have no doubt, however, that sufficient impropriety might be shown if the director:
>
> a) deliberately pursues a concocted claim or defence, knowing it to be false; or
>
> b) swears false evidence in support of such a claim or defence with the intention of misleading the Court".

33. In *Re North West Holdings PLC and Anr* [2001] EWCA Civ 67; (2002) BCC441, Aldous LJ said:

> "34. A crucial question is whether the relevant directors (or director) hold a bona fide belief that (i) the company has an arguable defence, and (ii) it is in the interests of the company for

[3] I consider that the commentary itself is inaccurate. The case is not authority for the proposition outlined there.

> it to advance that defence. If they do then, (in the absence of special circumstances) to make them pay costs of proceedings in which they are not a party would constitute an unlawful inroad into the principle of limited liability…"

It should be noted that, on the facts of *North West Holdings*, a non-party costs order was made against the director, because the defence to the petitions was not conducted in the *bona fide* belief that it was in the interests of the companies. Instead the director, who had treated the companies' money as his own, defended the petitions to protect his personal reputation and position, without regard to the interests of the companies or its creditors. The appeal against that order was dismissed.

34. As noted above, there was a discussion about the funding/controlling director at [25] of the judgment of Lord Brown in *Dymocks.* The judgment goes on to cite at [26] a High Court case in New Zealand, *Arklow Investments Limited v MacLean* (unreported) 19 May 2000, where Fisher J said that "where a person is a major share-holder and dominant director in a company which brings proceedings, that alone will not justify a third party cost order. Something additional is normally warranted as a matter of discretion". Paragraph [28] of Lord Brown's judgment in *Dymocks* cites the passage from the judgment of Millett J in *Metalloy* to which I have referred at paragraph 31 above[4]. Finally at [29], Lord Brown said:

> "In the light of these authorities their Lordships would hold that, generally speaking, *where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit*, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interests." (My emphasis)

35. These concluding observations on the law were then applied by Lord Brown to the facts of the case in *Dymocks*. When dealing with a submission that there had been no impropriety, Lord Brown said at [33] that this did not avail the appellant because "the authorities established that, whilst any impropriety or pursuit of speculative litigation may of itself support the making of an order against a non-party, its absence does not preclude the making of such an order". That point was picked up by Rix LJ in *Goodwood Recoveries Limited v Breen* [2005] EDCA Civ 414; [2006] 1WLR2723 when he said at [59]:

> "59. In my judgment, it is clear from these passages that 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

[4] For reasons which are obscure, the citation from Millett LJ's judgment misses out the important sentence starting "It may also be made…". As Lewison J noted in *SystemCare*, the same omission can be found in the citation of the same passage in the judgment of Rix LJ in *Goodwood*.

> well demand that he be liable in costs on a fact-sensitive and objective assessment of the circumstances. It may also be noted that in Lord Brown's comments at para 33 of his opinion "the pursuit of speculative litigation" is put into the same category as "impropriety".

36. In *SystemCare (UK) Limited v Service Design Technology Limited* [2011] EWCA Civ 546; [2011] 4 Costs LR 666, Lewison J (as he then was) noted:

> "26. As with Balcombe LJ's classification, these principles are guidance not rules. As Longmore LJ said in *Petromec* (§ 12) Lord Brown's words are emphatically not a statute. The ultimate question is whether it is just to make the order. It is wrong to treat the reported cases as providing a comprehensive check list of factors which must be present in every case before the discretion can be exercised in a particular case. What may be sufficient to justify the exercise of the discretion in one case should not be treated as a necessary factor for the exercise of the discretion in a different case: *Secretary of State for Trade and Industry v Aurum Marketing Ltd* [2000] EWCA Civ 224, [2002] BCC 31 (Mummery LJ)."

In addition, at [31] of his judgment in *SystemCare*, Lewison LJ noted, by reference to the passage in *Metalloy,* that the principle of corporate limited liability "can be outflanked if the director against whom a non-party costs order is sought is guilty of some bad faith or impropriety". That is a reference to the basic principle that, if a director has strayed outside his duty to the company to act in good faith, then he or she may no longer be able to rely on the rules of corporate limited liability.

37. In *Threlfall v ECD Insight Limited and Anr.* [2015] EWCA Civ 144; [2014] 2Costs LO 129, Lewison LJ noted the warning against overburdening cases of this kind with reference to decided cases, and emphasised that "the ultimate question is whether it is just to make what is an exceptional order". On the facts of that case, the Court of Appeal allowed an appeal against the refusal of a s.51 order on the basis that the director, who was also the sole shareholder and entitled to all the economic benefits of the company, had sought to justify resiling from the relevant contract by evidence that was given in bad faith. He caused the company to advance a false defence, which he knew to be false. A non-party costs order was therefore justified.

38. Finally, I should refer to the decision of his HHJ Paul Mathews sitting as a judge of the High Court, in *Housemaker Services Limited and Anr v Cole and Anr.* [2017] EWHC 924 (Ch). That is because this judgment was referred to extensively by the judge below. There, summarising some of the authorities to which I have referred, Judge Mathews said at [15] that "in order to make it just to order a director to pay the costs of unsuccessful company litigation, it is necessary to show something more. This might be, for example, that the claim is not made in good faith, or for the benefit of the company, or it might be that the claim has been improperly conducted by the director."

39. On a first reading, this passage looked as if it was suggesting that bad faith or impropriety is always required for a s.51 order. That is how Mr Benson read it, and it informs the second ground of his appeal. But when we looked at it together during the

hearing, he properly accepted that this was not in fact what HHJ Mathews was saying. HHJ Mathews obviously meant that one of the situations where a s.51 order might be justified was if the claim was ***not*** for the benefit of the company (ie because it was for the benefit of the director personally). HHJ Mathews was therefore including in his "something more" the fact that the litigation had not been pursued for the benefit of the company, ***or*** the existence of bad faith/impropriety.

3.3 Summary as to Directors and Shareholders[5]

40. Without in any way suggesting that these authorities give rise to a sort of mandatory checklist applicable to a company director or shareholder against whom a s.51 order is sought, I consider that the relevant guidance can usefully be summarised in this way:

a) An order against a non-party is exceptional and it will only be made if it is just to do so in all the circumstances of the case (*Gardiner*, *Dymocks*, *Threlfall*).

b) The touchstone is whether, despite not being a party to the litigation, the director can fairly be described as "the real party to the litigation" (*Dymocks*, *Goodwood*, *Threlfall*).

c) In the case of an insolvent company involved in litigation which has resulted in a costs liability that the company cannot pay, a director of that company may be made the subject of such an order. Although such instances will necessarily be rare (*Taylor v Pace*), s.51 orders may be made to avoid the injustice of an individual director hiding behind a corporate identity, so as to engage in risk-free litigation for his own purposes (*North West Holdings*). Such an order does not impinge on the principle of limited liability (*Dymocks*, *Goodwood, Threlfall*).

d) In order to assess whether the director was the real party to the litigation, the court may look to see if the director controlled or funded the company's pursuit or defence of the litigation. But what will probably matter most in such a situation is whether it can be said that the individual director was seeking to benefit personally from the litigation. If the proceedings were pursued for the benefit of the company, then usually the company is the real party (*Metalloy*). But if the company's stance was dictated by the real or perceived benefit to the individual director (whether financial, reputational or otherwise), then it might be said that the director, not the company, was the "real party", and could justly be made the subject of a s.51 order (*North West Holdings*, *Dymocks*, *Goodwood*).

e) In this way, matters such as the control and/or funding of the litigation, and particularly the alleged personal benefit to the director of so doing, are helpful *indicia* as to whether or not a s.51 order would be just. But they remain merely elements of the guidance given by the authorities, not a checklist that needs to be completed in every case (*SystemCare*).

[5] To avoid repetition, I will refer only to a director in paragraphs 40 and 41 below, but that is a shorthand intended to encompass both directors and shareholders.

f) If the litigation was pursued or maintained for the benefit of the company, then common sense dictates that a party seeking a non-party costs order against the director will need to show some other reason why it is just to make such an order. That will commonly be some form of impropriety or bad faith on the part of the director in connection with the litigation (*Symphony*, *Gardiner*, *Goodwood*, *Threlfall*).

g) Such impropriety or bad faith will need to be of a serious nature (*Gardiner*, *Threlfall*) and, I would suggest, would ordinarily have to be causatively linked to the applicant unnecessarily incurring costs in the litigation.

41. Therefore, without being in any way prescriptive, the reality in practice is that, in order to persuade a court to make a non-party costs order against a controlling/funding director, the applicant will usually need to establish, *either* that the director was seeking to benefit personally from the company's pursuit of or stance in the litigation, *or* that he or she was guilty of impropriety or bad faith. Without one or the other in a case involving a director, it will be very difficult to persuade the court that a s.51 order is just. Mr Benson identified no authority in which a s.51 order was made against the director of a company in the absence of either personal benefit or bad faith/impropriety. Conversely, there is no practice or principle that requires *both* individual benefit and bad faith/impropriety on the part of the director in order to justify a non-party costs order. Depending on the facts, as the authorities show, one or the other will often suffice.

4 The Issues

42. It is not in dispute that Mr Aytacli controlled and, at least to the extent recognised by the judge, funded the litigation. There are three remaining issues. First, was the litigation being conducted for Mr Aytacli's own benefit? Secondly, if not, was some bad faith or improper conduct required in order to justify a s.51 order and, if so, did that occur in this case? Thirdly and in any event, would the making of a s.51 order against Mr Aytacli be in the interests of justice? I deal with those three issues below.

5 Issue 1: Was the litigation for Mr Aytacli's own benefit?

43. The judge concluded that the litigation was not conducted for Mr Aytacli's own benefit. He said:

> "45. As to whether the litigation was being conducted by Mr Aytacli for his own benefit, Mr Benson submitted that Mr Aytacli would have benefited from Organic Village being successful in the litigation and recovering substantial damages and costs, because his personal exposure for its various debts – including to its bank and its solicitors – would have been reduced or extinguished had Organic Village recovered from Goknur the substantial damages and legal costs which it was seeking. I have a little more difficulty with this argument than with Mr Benson's argument in relation to funding. Its premise is that because Mr Aytacli had guaranteed Organic Village's debts, then he would have benefited financially from the litigation even if he had never himself seen a penny of any of the money recovered from

> Goknur. If Organic Village had recovered substantial damages and costs then on this premise they would, in the first instance, have been applied to discharge its legal fees and its substantial indebtedness to third parties, such as its bankers. The beneficiary of such a successful conclusion would, in those circumstances, have been Organic Village because its (genuine) indebtedness to its creditors would have been reduced or extinguished by success in the litigation. In my judgment, it is not correct – and ignores the separate and primary liability of the company for its debts – to conclude that, in the circumstances of this case, proceedings were pursued solely or substantially for Mr Aytacli's own financial benefit, rather than for the benefit of Organic Village and its creditors. This case is, in my judgment, precisely the sort of situation referred to by Millett LJ in the passage from his judgment in the *Metalloy Supplies* case, which I have set out above."

44. Mr Benson submitted that in this and the preceding paragraphs, the judge wrongly elevated the elements of control, funding and benefit to the status of conditions precedent. He said that, in this way, the judge lost sight of whether it could be said that Mr Aytacli was a "real party". In addition, Mr Benson submitted that, since Organic Village was insolvent and non-trading, the pursuit of the litigation was plainly for Mr Aytacli's benefit, in order that he could redeem the guarantees and charges on his property registered as a consequence of a) the earlier borrowing from the bank; b) the loan from Mr & Mrs Patel; and c) the funding arrangement with Hugh-Jones. In addition, Mr Benson also suggested that Organic Village pursued the litigation because, if they were successful, there would have been a "substantial surplus" which would have accrued to Mr Aytacli's benefit.

45. As to the point of principle, I have said at paragraph 40(e) above that elements such as control, funding and individual benefit are not set in stone, and that the law does not require that each box always has to be ticked before a non-party costs order can be made. They are simply ways of assessing whether or not such an order would be just. In my view, that is how the judge approached them.

46. Furthermore, from a practical perspective, I consider that the judge was right to focus on the possibility of personal benefit to Mr Aytacli: the authorities demonstrate that this is potentially a very significant matter. Mr Benson accepted that proposition during the hearing. A director who is controlling and funding the litigation to help preserve the company or advance its legitimate interests cannot usually be said to be seeking to gain personally from the litigation. He or she is merely doing what their duties as a director require them to do. Conversely, the director who is looking for a personal windfall from the litigation, or is seeking to preserve his personal position or reputation, knowing that the company has no money to pay the other side's costs if they lose, is vulnerable to an order under s.51, because he or she is "the real party" to the litigation. The question therefore becomes: on the facts, which side of the line was Mr Aytacli?

47. The judge found that Mr Aytacli did not stand to benefit personally from the litigation. On the material available, I consider that that was a conclusion that the judge was quite entitled to reach. There is no basis on which to interfere with the judge's findings of fact on this point, or the exercise of his discretion in consequence.

48. For the avoidance of doubt, however, I should say that, in my view, the judge was right. At least until 2017-2018, when the claim was struck out and its costs consequences were resolved, Mr Aytacli's motive in controlling/funding the litigation was to defend Organic Village from the unjust claim that had been made against it by Goknur. Organic Village's set-off and counterclaim was not a separate frolic of Mr Aytacli's own devising: it was inextricably linked to Organic Village's defence. It arose out of the same facts and matters. So for most of the life of the litigation (between 2012-2017/2018), there can be no dispute that Mr Aytacli was acting for the benefit of Organic Village and not for his personal benefit.

49. After mid-2018, the counterclaim could have been abandoned by Mr Aytacli, but instead it was pursued to trial the following year. So can it be said that at least the costs of that last part of the litigation were incurred pursuing claims intended to benefit Mr Aytacli personally?

50. In my view, that would not be accurate. The counterclaim was pursued to allow Mr Aytacli to pay off the guarantees, loans, charges and other third party liabilities that he had taken on, on behalf of Organic Village, before and during the litigation. He had taken them on in order to keep Organic Village afloat and to pay off earlier loans made to the company and to meet its other liabilities, many related to Goknur's claim. From a personal standpoint, Mr Aytacli would have been better advised neither to provide personal guarantees nor to offer the charge on his property.

51. Perhaps most significantly of all, there was Organic Village's costs liability to Hugh-Jones. In my judgment, one of the motives for the pursuit of the counterclaim was Organic Village's need to pay what was or would be owed to their solicitors. It is untenable to suggest that, in pursuing the litigation towards what he hoped would be victory, so that Hugh-Jones could be paid what they were owed, Mr Aytacli was seeking to benefit personally.

52. In pursuing the counterclaim in order to pay off Organic Village's debts, the highest that it could be put is that Mr Aytacli was trying to get his money back. In that way, his position was very similar to that of a "pure funder". Paragraph [25(2)] of Lord Brown's judgment in *Dymocks* makes plain that someone in that position will not generally be made the subject of a s.51 order.

53. Standing back and looking at the underlying economic reality, Mr Aytacli was not seeking some form of windfall from this litigation; the prospect of £250,000 in his back pocket if he won, with no comeback if he lost. This litigation was defended because, in the light of the claim, Organic Village had no other choice; moreover, they were right to defend the claim on the merits. The counterclaim was maintained in the hope that everything would come right in the end, that the loans and solicitor's bills would be paid off, and that the charges on the family home would be removed. Not even Mr Aytacli at his most optimistic could have envisaged that, if Organic Village won, there would be any sum, let alone a "substantial surplus", left over for his own personal use. No matter how you do the maths, there is no such surplus here.

54. Finally, on the question of benefit, I note that, at one point during the argument, Mr Benson suggested that, even if Organic Village was the "real party" to the litigation, Mr Aytacli was "the real party" too. I do not accept that on the facts, for the reasons I have given. But in my view, the concept of there being two "real parties", one the

company and the other the relevant director or shareholder, introduces a level of complication and granularity which finds no reflection in any of the authorities. It would be well-nigh impossible to apply the concept in practice because, necessarily, a benefit to any small company is also a benefit to the director of and/or shareholder in that company. I also consider that such a concept may distract the court, when faced with an application under s.51, from looking at the matter in the round and deciding whether the director or shareholder in question can properly be termed "the real party".

55. For all these reasons, I consider that the judge was right to conclude that there was no individual benefit to Mr Aytacli in pursuing the litigation.

6 Issue 2: Bad Faith/Impropriety

56. There are really two sub-issues in play here. The first goes to the issue of principle: whether, as a matter of law, something more is required to establish the liability of a funding director, beyond merely the pursuit of an unsuccessful claim or defence. The judge said at [39] that he rejected Mr Benson's submission that the need to show "something more" was not required in the case of a director and shareholder of a company who funds litigation by the company. He referred to some of the authorities noted above and said that Judge Mathews' summary in *Housemaker Services* was accurate.

57. Mr Benson's attack was focussed on his suggestion that the judge had added a requirement to show misconduct to the other matters, such as funding/control and individual benefit. His skeleton argued that "to add on a requirement of misconduct is a gloss which does not serve the fundamental legal principle. It also largely immunises directors/shareholders of small companies inappropriately since it is always hard to prove misconduct".

58. In my view, whilst Mr Benson's submission is correct, its relevance to this case is based on a misapprehension. As I have explained above, it is not usually necessary to show misconduct or bad faith, as well as personal benefit to the individual director. But that is not what HHJ Mathews said in *Housemaker Services*, and it is not what the judge said here. As explained in paragraph 39 above, HHJ Mathews encompassed in his 'something more' the notion of personal benefit *or* misconduct. That is also how the judge understood the passage and applied it. That a party seeking a s.51 order usually needs to establish one or the other is entirely in accordance with the guidance from the authorities summarised in paragraphs 40 and 41 above. In the present case, the judge found (and I agree) that the litigation was not pursued by Organic Village for Mr Aytacli's benefit. So the next question is whether there was bad faith or impropriety on his part.

59. The judge concluded that there was neither. At [46] he said:

> "46. Although he did not accept the need for there to be "something more" (as Judge Matthews put it in the *Housemaker Services* case) to justify the making of a non-party costs order, Mr Benson also relied in the alternative on what Mr Chamberlain QC had said in the Trial Judgment at [53], where he rejected part of the evidence given by Mr Aytacli as being "difficult to accept". That was evidence regarding there

> having been 832 emails in existence showing Mr Aytacli's attempts to mitigate certain of Organic Village's claimed losses. Those emails were never disclosed to Goknur and it was alleged at the trial that they had been accidentally destroyed. Mr Chamberlain QC stated that he did not accept Mr Aytacli's evidence about the existence of these emails and found, on the balance of probabilities, that they had not existed. However, on other matters Mr Aytacli's evidence at trial was accepted by the Deputy Judge (see e.g. the Trial Judgment at [31], where the Deputy Judge held that there was no reason to doubt Mr Aytacli's evidence regarding the ownership of, and his access to, the warehouses where the fruit juice was stored). There was no general finding that Mr Aytacli's evidence was untruthful or lacking in credibility and nor did the Deputy Judge uphold the general attack on Mr Aytacli's character and credibility made during the trial by Goknur, which relied on Mr Aytacli's imprisonment for contempt of court in 2003 (see the Trial Judgment at [30]) in support of its allegation that he had, in fact, watered down the fruit juice himself. I do not consider that the Deputy Judge's rejection of Mr Aytacli's evidence regarding the 832 emails amounts to a finding of impropriety or bad faith. It is not, in my judgment, sufficient to justify a non-party costs order being made. There is, additionally, no suggestion in the Trial Judgment that there was any impropriety or bad faith on the part of Organic Village or Mr Aytacli either in the defence of the claim, or in the prosecution of Organic Village's counterclaim. The Damages & Costs Judgment makes a number of findings against both Goknur and Organic Village regarding their conduct of the litigation, but those do not amount to findings of impropriety on the part of Mr Aytacli or, for that matter, Organic Village."

60. Again, I consider that this was a view that the judge was entitled to take on the evidence. To pick out various elements of Mr Aytacli's evidence which were not accepted by the trial judge, particularly when so much of it was, and weave out of those disparate elements a case of bad faith such as to justify a s.51 order, is a frankly hopeless task. As the deputy judge said in *Gardiner v FX Music*, any impropriety must be serious before a non-party costs order can be made. The submissions advanced on behalf of Goknur on this topic do not begin to cross that threshold.

61. In his submissions on appeal, Mr Benson repeated what he had said to the judge about bad faith – in essence, the point about the 832 emails - so on bad faith/impropriety, there was nothing beyond those matters which the judge considered and properly rejected. In those circumstances, this ground of appeal cannot succeed.

62. In addition, I consider that the question of the *bona fide* nature of Mr Aytacli's conduct can be measured in another way, by reference to the merits of the litigation itself. Organic Village stopped paying Goknur's original invoices because they believed Goknur was supplying fruit juice that was not in accordance with the contract. They were right to do that, as the trial judge found. This was not a case where, due to the controlling/funding director's lack of good faith, a wholly unmeritorious position was taken and maintained throughout the litigation. Organic Village's defence and counterclaim for breach of contract was sound. That would

normally have led to substantial damages. Here it did not, but that was on the basis of causation and foreseeability, not the underlying merits of the claim itself.

63. Indeed, if there is a criticism of one side's conduct to be made in this case, those criticisms are better directed at Goknur, who made a claim which ignored their breach of contract; failed to comply with numerous court orders in respect of their claim, thereby inflating the costs bills of both sides; and then, in the full knowledge of Organic Village's financial difficulties, fought liability on the counterclaim through to judgment and lost, winning only on quantum.

64. Finally on this point, there is the question of the causative relevance of the alleged bad faith or impropriety to an application pursuant to s.51. That will always be fact-specific. In some cases, such as *Threlfall*, it was the issue that went to the heart of the litigation and so justified the making of a non-party costs order. But in other cases, bad faith or even impropriety may be of tangential relevance. I would suggest that, where the bad faith or impropriety, even if established, would have had no significant effect on the incurring of costs by the applicant, it is unlikely on its own to justify a s.51 order. Mr Benson properly accepted that he could not say that the point about the emails in the present case had had a significant effect on costs. So in my judgment, that would also be enough to render this issue irrelevant to the making of a non-party costs order against Mr Aytacli.

65. For the reasons set out in Sections 5 and 6 above, I consider that the absence of either personal benefit to Mr Aytacli, or bad faith/impropriety on his part, meant that the judge was right to conclude that it would be unjust to make a s.51 order. But the judge went further, and found a separate and overarching reason for refusing to make the order. Mr Benson criticises that part of the judgment too. For completeness, therefore, I turn to that last issue.

7 Issue 3: The Interests of Justice

66. The judge said at [48] that this overarching reason for not making a s.51 order concerned "both the nature of the costs being sought by Goknur and the circumstances with which they have come to be sought from Mr Aytacli personally."

67. The judge explained that in some detail:

> "49. Prior to the making of Master McCloud's order on Goknur's application of 9 March 2020 and Organic Village's non-compliance with it, the position as regards the costs of the litigation was that Organic Village had an order that its costs of the claim should be paid by Goknur, which in turn had an order that one-quarter of its costs of the counterclaim should be paid by Organic Village. A good deal of analysis had gone into calculating Organic Village's costs of the claim, put at £269,000 odd, for the purpose of the hearings before Master Kay QC in the summer of 2018, to which I have already referred. On appeal, Foskett J upheld the Master's decision to base his calculation of the payment on account on the figures put forward on behalf of Organic Village. Had Organic Village been in a position to proceed with the detailed assessment of the costs of the claim that were due to it, then its bill would - subject, of course, to potential reduction on a standard basis assessment

> - have been for this amount. In my judgment, the costs lawyers employed by Hugh-Jones were correct to state following the conclusion of the trial that, as things then stood, it was highly probable that the overall outcome of the costs proceedings would be a payment from Goknur to Organic Village. In those circumstances, it would in my judgment have been highly unlikely that Goknur would have succeeded with a non-party costs order application against Mr Aytacli; Goknur would, in all likelihood, have been making a substantial overall net payment of costs to Organic Village.
>
> 50. What changed the situation was the application made to Master McCloud and Organic Village's failure to comply with the order that she made by commencing the detailed assessment of the costs of the claim that were due to it. As a result, those costs were assessed at nil and Organic Village was ordered to return the interim payment that it had received. But the reason why Organic Village did not commence the detailed assessment of its own costs was that it was unable to fund the instruction of costs lawyers, in circumstances where its solicitors had ceased to act. Thus although Organic Village's costs of the claim have now been disallowed, the reason for that is its lack of resources to fund the detailed assessment process which Goknur had, by rejecting the idea of negotiating based on anything other than formal Bills of Costs, required it to undertake.
>
> 51. In my judgment, to order Mr Aytacli to pay either or both of the sums now sought by Goknur, because of a situation which has resulted from Organic Village's inability to fund the detailed assessment of its own costs, would be to ignore the reality of this litigation, in which Goknur would (but for Organic Village's impecuniosity and inability to fund the costs of a detailed assessment) have been making a substantial overall net payment of costs to Organic Village. Whilst as between Goknur and Organic Village the position is now governed by the orders that have been made by Master McCloud, I do not consider that I am prevented from taking the wider context into account when determining the separate non-party costs application against Mr Aytacli. To make Mr Aytacli personally liable under a non-party costs order in these circumstances would, in my judgment, result in an unjust outcome for this separate and additional reason."

68. Mr Benson criticised this analysis. He submitted that Organic Village's costs were over-stated and that Goknur had already made extensive payments on account, so that the judge was wrong to think that yet further sums would ever have been due to Organic Village on the costs of the claim. He submitted that, in all likelihood, there would have been a repayment to Goknur. In addition, he submitted that Master McCloud's order meant that Goknur were now entitled to their money back in any event. His more general point was that the history of the £185,300 was irrelevant to the application under s.51.

69. I disagree with those submissions. The £185,300 now sought against Mr Aytacli by way of s.51 had originally been paid to Organic Village by Goknur on account of

costs. The law is that a payment on account of costs must be set at a level which the judge thinks is the minimum that the receiving party will recover on a detailed assessment: see *Mars UK Ltd v Teknowledge Ltd* [1999] 2 Costs LR 44. The level often used as a rule of thumb is 70% of the total, and that was the percentage used by both Master Kay QC and Foskett J here[6]. Organic Village's total costs of defending the claim were £269,196. That figure was also endorsed by Master Kay QC and Foskett J. 70% of that is £188,437.20. That is therefore slightly more than Organic Village were actually paid by Goknur.

70. Accordingly, on the maths, I consider that the sum of £185,300 was the minimum due from Goknur to Organic Village by way of the costs of the claim. The judge was therefore right to find that, all other things being equal, no sums referable to the costs of the claim would have been repayable to Goknur.

71. Organic Village are only liable to pay this sum into court (or even back to Goknur) because, in the event, all other things were not equal; their liability to repay the costs is a simple function of the fact that they no longer have the funds to undertake a detailed assessment of costs. Although Mr Benson baulked at that conclusion, it seems to me to be the only inference to draw from the documents. Whilst it is true that Hugh-Jones were obliged to undertake a detailed assessment of Organic Village's costs in accordance with the terms of the CFA, the fact remains that they did not do so because they terminated the CFA. On their case, they were owed almost half a million pounds by Organic Village in respect of costs and so were entitled to terminate.

72. Merely because Goknur have the resources to pursue this litigation still further, whilst Organic Village do not, cannot change the underlying reality of this case, which is that, in respect of the costs of the claim, Goknur were liable to Organic Village on the merits, not the other way round. That was not an irrelevant consideration. On the contrary, it would make it absurdly unjust now to make a s.51 costs order against Mr Aytacli in respect of the £185,300.

73. Mr Benson submitted that the judge was wrong to conclude that, had there been a detailed assessment of costs, a further sum (over and above the £185,300) would have been due from Goknur to Organic Village by way of the costs of the claim,. For the purposes of the argument, I am prepared to accept that submission. But it does not affect my conclusion that, because the £185,300 was due and payable to Organic Village on the merits, it cannot form part of any s.51 order against Mr Aytacli.

74. As to the other part of the s.51 order sought, namely the £64,305.43 in respect of 25% of Goknur's costs of the counterclaim, I acknowledge that the same argument does not apply. But it would not be just to make a s.51 order in that amount against Mr Aytacli personally because of the judge's conclusions as to benefit (Section 5 above) and the absence of bad faith and impropriety (Section 6 above), both of which I endorse.

8 Disposal

[6] In *Rowe v Ingenious Media Holdings PLC* [2020] EWHC 235 (Ch), Nugee J (as he then was) referred to a band of between 65% and 70%.

75. Accordingly, for the reasons that I have given, if my Lords agree, I would dismiss this appeal.

Lord Justice Dingemans

76. I agree.

Lord Justice Lewison

77. I also agree.