UK Court of Appeal provides guidance on costs orders against third parties

The Court of Appeal handed down one of a number judgments in the case of *Deutsche Bank AG v Sebastian Holdings Inc and another* on 21 January 2016[1]. The decision concerns the appeal of Mr Alexander Vik, sole shareholder and director of Sebastian Holdings Inc ("**Sebastian Holdings**"), against an order joining him as a defendant to the proceedings purely for costs purposes.

Background

In 2009, Deutsche Bank sued Mr Vik's investment vehicle, Sebastian Holdings, for approximately $250 million, due largely on the closing out of various trading positions held in foreign currencies, shares and financial products. In turn, Sebastian Holdings counterclaimed for alleged breaches of contract by the bank in forcing the close-out of some of these positions contrary to Sebastian Holdings' wishes.

Judgment was given by Cooke J in the High Court in favour of the bank in the sum of US$243,023,089, and Sebastian Holdings' counterclaim was dismissed. Cooke J also awarded the bank 85% of its costs (of around £60 million in total) on the indemnity basis; that is, on the assumed basis that the bank's claimed costs were reasonably incurred and reasonable in amount. Sebastian Holdings, which was a Turks and Caicos Islands entity believed to have no assets, failed to make any payment to the bank pursuant to Cooke J's order, whether for the judgment sum or for costs. The bank therefore applied to join Mr Vik as a defendant with the intention of enforcing the costs order against him.

Pursuant to the Court's discretion to determine matters of costs under section 51 Senior Courts Act 1981, Cooke J granted the order, on the basis of various indicators that Mr Vik was in effect the "real party" to the litigation: Mr Vik was sole shareholder and director of Sebastian Holdings, he conducted the litigation on its behalf, he funded the litigation, which was for his own personal benefit, and he had been the principal witness for Sebastian Holdings.

Mr Vik appealed against the order, broadly on the basis that he – having not been a party - was not bound by any findings of fact from the proceedings, and because he had not been warned by the bank that he might be joined as a party, contrary to the judgment in *Symphony Group plc v. Hodgson*[2], which set out the principles governing exercise of the Court's discretion to order that a third party pay the costs of litigation.

Decision of the Court of Appeal

Moore-Bick LJ, giving the judgment on behalf of the Court, considered the case law authorities on third party costs orders; in particular, the guidance provided by the judgment of Balcombe LJ in the *Symphony* case, which was as follows:

1. third party costs orders are exceptional and the courts should adopt a cautious approach;
2. they are even more exceptional where the applicant could have joined the third party to the action;
3. the applicant should warn the third party at the earliest opportunity that he may seek to apply for costs against him;
4. applications for third party payment of costs should normally be determined by the trial judge;
5. the fact that the trial judge may have expressed views on the third party's conduct during the course of his judgment constitutes neither bias nor the appearance of bias;

1 [2016] EWCA Civ 23

2 [1994] QB 179

6. although costs against third parties are usually assessed summarily and therefore judicial findings are generally inadmissible as against a stranger to the proceedings, such findings may be admissible where the proximity of the third party to the proceedings is such that he will not suffer any injustice as a result of such admissibility;
7. to the extent that the evidence of a witness may lead to a costs application against him, the normal rule of witness immunity does not apply;
8. the fact that an employee or director of a company gives evidence does not normally mean that the company itself is a party to those proceedings; and
9. the judge should be alert to the possibility of a third party costs application being motivated by inability to obtain an effective order against a legal-aid-funded litigant.

Moore-Bick LJ held that the *Symphony* guidelines are a non-exhaustive list of the factors courts should consider on such applications, rather than a comprehensive set of rules. As such, the key principle is that the third party must have had a *"close connection"* with the litigation so as to justify the summary assessment of costs against it based on findings arising from the trial. Failure to join that third party, or to warn that party of the possibility of a costs order against it, should be seen as one of a number of factors to be considered in the Court's exercise of its discretion, rather than a precondition to such an order. In the circumstances of this case, Moore-Bick LJ saw no injustice in joining Mr Vik given his proximity to Sebastian Holdings and the proceedings:

- the Court noted that Mr Vik had had ample opportunity to challenge such findings in his capacity as the principal witness for Sebastian Holdings, and given that he had conducted the proceedings as a whole on its behalf;
- the Court also held that the bank's failure to warn Mr Vik that it might apply for a costs order against him directly was of less relevance here, in circumstances where Mr Vik was the "real party" to the litigation, than in cases where the connection between the enforcing party and the third party is more tenuous (such as that between the legal-aid-funded defendant and the solicitors of his employer, as in the *Symphony* case itself). Equally, Moore-Bick LJ saw no sense in the bank's joining Mr Vik for any purpose other than costs.

Conclusion

The Court of Appeal's judgment provides a useful summary of the authorities on third party costs orders and guidance on how judges should approach the question of whether or not to grant such an order. Moore-Bick LJ's judgment clarifies that the *Symphony* guidelines are not rules or conditions in ordering a third party to pay costs of litigation; indeed, the "*only immutable principle*" in relation to exercise of the Court's broad discretion is that the exercise of the discretion is not unjust, which serves to underscore the flexibility reserved for the courts in determining such matters. The guidance also makes clear, in particular, that failure to warn a third party of the possibility of an adverse costs order does not by itself preclude such an order from being granted.

Whilst the *Symphony* guidelines provide examples of the kind of factors for consideration, each case will turn on its own facts; most significantly, the nature and extent of the third party's connection with the main proceedings. The way in which Mr Vik dealt and litigated through his company Sebastian Holdings is not uncommon, and it will be interesting to see whether the guidance provided in this decision leads to an increase in the number of applications to join third parties for costs purposes.

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