Neutral Citation Number: [2016] EWCA Civ 23

Case No: A3/2014/2344

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
Mr. Justice Cooke
[2014] EWHC 2073 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 January 2016

Before :

LORD JUSTICE MOORE-BICK
Vice-President of the Court of Appeal, Civil Division
LORD JUSTICE LEWISON
and
LORD JUSTICE SIMON

- -

Between :

DEUTSCHE BANK A.G.	**Claimant/ Respondent**
- and -	
(1) SEBASTIAN HOLDINGS INC. **(2) ALEXANDER VIK**	**Defendant/ Appellant**

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- -

Mr. Stephen Cogley Q.C. and Mr. Yash Kulkarni (instructed by **Cooke, Young & Keidan LLP**) for the **appellant**
Mr. David Foxton Q.C., Ms. Sonia Tolaney Q.C. and Mr. James MacDonald (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **respondents**

Hearing dates : 5th, 6th and 7th November 2015

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Approved Judgment

Lord Justice Moore-Bick :

1. This is the judgment of the court on the appeal of Mr. Alexander Vik against the order of Cooke J. joining him to the proceedings as a defendant for the purposes of costs and ordering him to pay the respondent, Deutsche Bank A.G. ("the Bank"), £36,204,891 on account in respect of its costs of the proceedings against Sebastian Holdings Inc. ("Sebastian").

2. The background to the appeal lies in proceedings between the Bank and Sebastian relating to the operation of accounts maintained by Sebastian with the Bank for trading in foreign currencies, shares and financial products. Except to the limited extent identified later in this judgment, it is unnecessary for present purposes to describe the course of dealing on the accounts or the relationship between the parties, other than to say that in January 2009 the Bank began proceedings against Sebastian in this country to recover the sum of approximately US$250 million due principally in respect of amounts owed on the closing out of various trading positions. Sebastian brought a counterclaim against the Bank for approximately US$8 billion in respect of the losses it alleged it had suffered as a result of the Bank's breaches of contract in forcing it to close out certain open positions contrary to its wishes. In November 2013, after a trial lasting 44 days, Cooke J. gave judgment for the Bank on its claim in the sum of US$243,023,089 and dismissed Sebastian's counterclaim. The judge also ordered Sebastian to pay 85% of the Bank's costs, which are said to amount to about £60 million, on the indemnity basis. We shall refer to the proceedings between the Bank and Sebastian as "the main action".

3. The appellant, Mr. Alexander Vik, was at all material times the sole shareholder and sole director of Sebastian, a company incorporated in the Turks and Caicos Islands which he used as a personal investment vehicle. Sebastian, which is now said to have no assets, failed to make any payment in respect of the judgment or the Bank's costs and the Bank therefore applied to join Mr. Vik as a defendant with a view to obtaining an order that he pay the costs of the proceedings himself. The application was made on the basis that Mr. Vik owned and controlled Sebastian, that he had directed the litigation on its behalf, that he had funded the litigation, or had made funds available to enable Sebastian to pursue it, that it had been conducted for his personal benefit and that therefore he was the "real party" to the litigation. After a two-day hearing, at which Mr. Vik was represented by Leading and Junior Counsel, Cooke J. made the order to which we have referred. The order did not expressly state that the sum of £36,204,891 was to be paid on account of the Bank's costs, but it is clear from the opening paragraph of his judgment that that was what the judge intended.

4. The Bank's application was eventually served on Mr. Vik at his residence in Monaco and in due course he sought to have service set aside on the grounds that there were proceedings pending against him by the Bank in New York and Connecticut raising the same or similar issues (lis alibi pendens) and that the courts of this country were not an appropriate forum in which to determine his liability (forum non conveniens). The judge heard the challenge to the jurisdiction on 16th June 2014 and the Bank's application for an order for costs against Mr. Vik on the following day. Since the applications raised similar issues he gave his reasons in the same judgment.

5. The judge dismissed the argument based on lis alibi pendens on the grounds that an application for an order for costs under section 51 does not involve the assertion of a

cause of action or an attempt to enforce legal rights but a request for the court to exercise a statutory discretion in relation to proceedings before it which cannot be exercised by any other court. The proceedings in the United States, on the other hand, involved an attempt by the Bank to enforce rights recognised by the laws of the relevant states. In relation to the question of forum non conveniens Mr. Vik submitted that he was not bound by the findings in the main action and that it was open to him to challenge the entirety of the factual basis on which the Bank's application had been made. He argued that the proceedings in the United States, in particular those pending in New York, provided the most appropriate forum in which to determine those issues following disclosure, oral evidence and cross-examination of witnesses. The Bank said that the judge's findings in the main action gave rise to issue estoppels against Mr. Vik, who was therefore bound by them, and that in any event it would be an abuse of process for him to seek to re-open them.

6. In the light of those arguments the judge felt himself obliged to deal with aspects of the law on issue estoppel, abuse of process, the admissibility of findings made in previous proceedings and witness immunity, which also formed a significant part of the submissions advanced on behalf of Mr. Vik on this appeal. He did so, however, only after he had rejected the need to carry out an investigation of that kind. In paragraph 17 of his judgment he said:

> "17. In my judgment, it is not necessary for me to carry out any investigation of the kind which is suggested by Mr Vik in order to determine the section 51 Non-Party Costs Application. The reason for this is the nature of the relationship between [Sebastian] and Mr Vik to which I refer again later in this judgment. As is plain from my judgment in the action, Mr Vik was the sole shareholder and sole director of [Sebastian]. As is plain from statements made by his solicitors in interlocutory applications prior to trial and from evidence at the trial, Mr Vik controlled the conduct of the litigation on [Sebastian's] behalf. Although Mr Johansson may have had "the day to day running" of the litigation, every decision on the conduct of the proceedings had to be taken by Mr Vik himself. Mr Vik "called the shots". He was [Sebastian's] principal witness of fact, spent many days in the witness box and gave all of [Sebastian's] evidence on the issue of available funds and transfers. He stood to benefit from success in the litigation because of his shareholding and his ability and readiness to move [Sebastian's] funds for such purposes as he saw fit.
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> 18. In these circumstances the authorities compel me to the clear conclusion that Mr Vik is a "privy" of [Sebastian] and that, not only are the findings in my judgment admissible evidence in the section 51 application against Mr Vik, but he is bound by my judgment as a matter of res judicata and by my findings in the judgment by reason of issue estoppel. . . . "

7. Later, having referred to the decision in *Symphony Group Plc v Hodgson* [1994] Q.B. 179, to which we shall return, he said:

> "20. . . . Here, in circumstances where Mr Vik was not only the controlling mind and will behind [Sebastian] (keeping, as it would appear from disclosure, no books of account or corporate records for the company which he directed) but also ran the litigation in England in the sense of making all important decisions when instructing [Sebastian's] lawyers and being [Sebastian's] only witness of contemporaneous fact, giving evidence over several days, it is clear that Mr Vik's connection with [Sebastian] is so close that he could not possibly be said to suffer any injustice as a result of the findings in the judgment against [Sebastian] being admissible against him personally.

8. In our view, it is quite clear from these passages that, although he dealt with many of the arguments raised by Mr. Vik, the basis of his order was the very close connection which he found to have existed between Mr. Vik and the proceedings in the main action, which was sufficient to justify holding him bound by the findings of fact in his judgment.

9. On this appeal Mr. Vik was represented by Mr. Stephen Cogley Q.C. and Mr. Yash Kulkarni, neither of whom had appeared in any of the proceedings below. Mr. Cogley's submissions can be grouped under three broad heads. First, although not couched in quite these terms, he submitted that proceedings of this kind are in substance separate from the main action, to which they are ancillary, and are therefore to be approached in substantially the same way as any independent proceedings between the applicant and a third party. He therefore submitted (as had been submitted below) that the established rules governing the admissibility in evidence of findings made in a previous action, such as the rules relating to issue estoppel, abuse of process and what is generally known as the rule in *Hollington v Hewthorn* (*Hollington and F. Hewthorn & Co Ltd* [1943] K.B. 587), applied in their full rigour to the present proceedings between the Bank and Mr. Vik. He therefore addressed us at length on questions such as whether, for the purposes of the rules relating to issue estoppel, Mr. Vik was to be regarded as being in privity of interest with Sebastian, whether Mr. Vik was precluded by the rules relating to abuse of process derived from *Henderson v Henderson* (1843) 3 Hare 100 (and now authoritatively stated in *Johnson v Gore Wood & Co* [2002] 2 A.C. 1) from challenging findings of fact made by the judge in the main action, and (since Mr. Vik had given evidence at the trial in that action) the principles of witness immunity. It followed from the application of those principles, he submitted, that Mr. Vik was not bound by any of the judge's findings of fact, particularly those relating to Sebastian's counterclaim, all of which were in any event obiter and would not have been binding on Sebastian itself in any subsequent proceedings.

10. Second, Mr. Cogley laid considerable emphasis on the decision in *Symphony Group v Hodgson*, in which this court offered guidance on the way in which courts should approach applications under section 51 of the Supreme Court Act 1981 (now the Senior Courts Act 1981). In particular, he submitted that it was of the utmost

importance that any third party against whom an order of this kind might be sought should be warned of that possibility as soon as it occurred to the eventual applicant and that if he were not, it would almost invariably be unfair to make such an order against him. Mr. Cogley submitted that the Bank's failure in this case to give Mr. Vik any warning of that kind rendered it unjust and contrary to principle to make an order for costs against him. It also involved a breach of his rights under article 6 of the European Convention on Human Rights ("the Convention").

11. Third, he submitted that the judge erred in the exercise of his discretion, both in making Mr. Vik liable for the Bank's costs and in failing to exclude from the order the costs incurred in instructing a firm of forensic accountants to carry out what he described as a reconstruction of records which the Bank itself ought to have maintained in any event.

12. Mr. Foxton Q.C. took issue with all those submissions. He argued that when making an order for costs against a third party the court is exercising a statutory discretion as part and parcel of the proceedings before it. The application for an order for costs against Mr. Vik was therefore to be viewed an integral part of the main action. Mr. Vik was the real party to that action and it was therefore not unjust to hold him bound by findings of fact which he had had an opportunity to contest. It followed, in Mr. Foxton's submission, that none of the evidential rules on which Mr. Cogley relied had any bearing on the case. The absence of any explicit warning that the Bank might seek an order for costs against Mr. Vik was merely one factor among many others that the court could take into account when deciding what order to make, but it was of little weight in this case given the nature and extent of Mr. Vik's involvement in the litigation. Mr. Foxton explained that the unusually high level of costs incurred by the Bank reflected the necessity for it to meet Sebastian's allegation that the Bank had broken its agreement not to allow it to exceed a certain level of exposure on a day-to-day basis calculated by reference to the market. The Bank's systems were not designed to record the market-related daily movement of open positions which therefore had to be calculated from scratch.

The nature of the proceedings

13. It is convenient to begin by considering the nature of the present proceedings, since that question lies at the heart of the appeal. Section 51 of the Senior Courts Act 1981 provides as follows:

> "51.— Costs in civil division of Court of Appeal, High Court and county courts
>
> (1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—
>
> (a) . . .
>
> (b) the High Court;
>
> . . .

shall be in the discretion of the court.

. . .

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

14. In *Aiden Shipping v Interbulk (The 'Vimeira')* [1986] A.C. 965 the House of Lords held that section 51 gives the court jurisdiction to make orders for costs against persons other than parties to the proceedings, subject to any restrictions that might be imposed by rules of court. The decision thus opened the way for orders for costs to be made against third parties when their connection with the proceedings makes it just and equitable to do so. In *Symphony Group Plc v Hodgson* the plaintiff, a manufacturer of kitchen units, employed the defendant on terms under which he agreed not to engage in the manufacture or supply of kitchen furniture for a year after leaving its employment. Having left the plaintiff's employment, the defendant immediately took a job with a competitor, Halvanto Kitchens Ltd. The plaintiff commenced proceedings seeking damages and an injunction. The defendant obtained legal aid and was represented under his legal aid certificate by the solicitors who acted for Halvanto. The trial judge found in favour of the plaintiff and made an order for costs against Halvanto, but this court set aside the order on the grounds that it was unfair to Halvanto, which had taken no part in the proceedings. It held that Halvanto could have been made a party to the proceedings, that it had been disadvantaged by the failure to warn it that an application for costs might be made against it and that its connection with the original proceedings was not close enough to justify admitting the judge's findings of fact as evidence on the application for costs.

15. The case was cited to us principally for the guidance given in the judgment of Balcombe L.J., with whom Staughton and Waite L.JJ. agreed and in view of the importance which Mr. Cogley attached to it at various points in his argument, we think it appropriate to set it out in full. It runs as follows (pages 192H-194D):

"(1) An order for the payment of costs by a non-party will always be exceptional: see per Lord Goff in *Aiden Shipping Co. Ltd v Interbulk Ltd* [1986] A.C. 965, 980F. The judge should treat any application for such an order with considerable caution.

(2) It will be even more exceptional for an order for the payment of costs to be made against a non-party, where the applicant has a cause of action against the non-party and could have joined him as a party to the original proceedings. Joinder as a party to the proceedings gives the person concerned all the protection conferred by the rules, as to e.g. the framing of the issues by pleadings; discovery of documents and the opportunity to pay into court or to make a *Calderbank* offer (*Calderbank v Calderbank* [1976] Fam. 93); and the knowledge of what the issues are before giving evidence.

(3) Even if the applicant can provide a good reason for not joining the non-party against whom he has a valid cause of action, he should warn the non-party at the earliest opportunity of the possibility that he may seek to apply for costs against him. At the very least this will give the non-party an opportunity to apply to be joined as a party to the action under Ord. 15, r.6(2)(b)(i) or (ii).

Principles (2) and (3) require no further justification on my part; they are an obvious application of the basic principles of natural justice.

(4) An application for payment of costs by a non-party should normally be determined by the trial judge: see *Bahai v Rashidian* [1985] 1 W.L.R.1337.

(5) The fact that the trial judge may in the course of his judgment in the action have expressed views on the conduct of the non-party constitutes neither bias nor the appearance of bias. Bias is the antithesis of the proper exercise of a judicial function: see *Bahai v Rashidian* [1985] 1 W.L.R.1337, 1342H, 1346F.

(6) The procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action. Thus, subject to any relevant statutory exceptions, judicial findings are inadmissible as evidence of the facts upon which they were based in proceedings between one of the parties to the original proceedings and a stranger: see *Hollington v F. Hewthorne & Co. Ltd* [1943] K.B. 587; *Cross on Evidence*, 7th ed. (1990), pp. 100-101. Yet in the summary procedure for the determination of the liability of a solicitor to pay the costs of an action to which he was not a party, the judge's findings of fact may be admissible: see *Brendon v Spiro* [1938] 1 K.B. 176, 192, cited with approval by this court in *Bahai v. Rashidian* [1985] 1 W.L.R. 1337, 1343D, 1345H. This departure from basic principles can only be justified if the connection of the non-party with the original proceedings was so close that he will not suffer any injustice by allowing this exception to the general rule.

(7) Again, the normal rule is that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings. One reason for this immunity is so that witnesses may give their evidence fearlessly: see *Palmer v Durnford* [1992] Q.B. 483, 487. In so far as the evidence of a witness in proceedings may lead to an application for the costs of those proceedings against him

or his company, it introduces yet another exception to a valuable general principle.

(8) The fact that an employee, or even a director or the managing director, of a company gives evidence in an action does not normally mean that the company is taking part in that action, in so far as that is an allegation relied upon by the party who applies for an order for costs against a non-party company: see *Gleeson v J. Wippell & Co. Ltd* [1977] 1 W.L.R. 510, 513.

(9) The judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant. The courts are well aware of the financial difficulties faced by parties who are facing legally aided litigants at first instance, where the opportunity of a claim against the Legal Aid Board under section 18 of the Legal Aid Act 1988 is very limited. Nevertheless the Civil Legal Aid (General) Regulations 1989 (S.I. 1989 No. 339/89, and in particular regulations 67, 69, and 70, lay down conditions designed to ensure that there is no abuse of legal aid by a legally assisted person and these are designed to protect the other party to the litigation as well as the Legal Aid Fund. The court will be very reluctant to infer that solicitors to a legally aided party have failed to discharge their duties under the regulations – see *Orchard v South Eastern Electricity Board* [1987] Q.B. 565 - and in my judgment this principle extends to a reluctance to infer that any maintenance by a non-party has occurred."

16. Staughton L.J. said at page 196:

"Neither Mr. Bramley nor Halvanto had any warning that questions which would tend to make out such a case would be asked. Neither had reason to obtain professional advice on the topic before Mr. Bramley gave evidence. Neither was represented by counsel at the trial, who might, for example, have asked further questions in re-examination. The main purpose of pleadings is to inform one party of the case which the other will seek to make against him. That is an essential feature of justice, and was entirely absent here.

Nevertheless, there are cases, as Balcombe L.J. has shown, where a person may be ordered to pay costs on the basis of evidence given and facts found at a trial to which he was not a party. Before such an order is made, it must be just and fair that the stranger should be bound by that evidence and those findings. In my judgment that is not the case here.

> My second reason is that the deputy judge's findings were reached without the assistance of submissions from counsel representing Halvanto, or of any further evidence that Halvanto might have called."

17. A number of points emerge from that case. First, we think it is clear that all three members of the court assumed that the procedure to be adopted for deciding whether a third party should bear all or part of the costs of the litigation should be summary in nature, in the sense that the judge would make an order based on the evidence given and the facts found at trial, together with his assessment of the behaviour of those involved in the proceedings. Second, in order to justify the adoption of a summary procedure the third party must have had a close connection of some kind with the proceedings. Staughton and Balcombe L.JJ. both emphasised that the court should not make an order for costs against a third party unless it is just and fair that he should be bound by the evidence given at trial and the judge's findings of fact. Whether that is so in any given case will depend on the nature and degree of his connection with the proceedings.

18. Third, we do not think that the court was seeking to do more than provide an indication of the kind of factors that judges should take into account, as appropriate in the particular cases before them, when asked to make an order of this kind. Factors such as failing to join the person concerned as a party to the proceedings or failing to warn him that an application for costs may be made against him may in some cases weigh heavily against adopting a summary procedure, but each case has to be considered on its own merits in order to ascertain whether the third party will suffer an injustice if he is held bound by the evidence and findings at the trial. Decisions made on applications of this kind since *Symphony v Hodgson*, to many of which we were referred, only serve to illustrate the wide range of circumstances in which orders for costs have been sought and made against third parties.

19. In *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39, [2004] 1 W.L.R. 2807 the Privy Council awarded the successful petitioner its costs, but since the respondents were unable to pay them, the petitioner applied for an order that they be paid by a third party, a company associated with one of the respondents which had promoted and funded the appeal substantially for its own benefit. Giving the judgment of their Lordships Lord Brown of Eaton-under-Heywood 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 there will often be a number

> of different considerations in play, some militating in favour of an order, some against. (2) Generally speaking the discretion will not be exercised against "pure funders", described in para 40 of *Hamilton v Al Fayed (No. 2)* [2003] Q.B. 1175, 1194 as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights. (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- see, for example, the judgments of the High Court of Australia in the *Knight* case 174 CLR 178 and Millett LJ's judgment in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 W.L.R. 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in *T G A Chapman Ltd v Christopher* [1998] 1 W.L.R. 12, 22 as "the defendants in all but name"."

20. A little later, summarising the principles to be derived from those and other authorities, he said:

> "29. 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."

21. These principles have been applied in a number of subsequent cases, but it is unnecessary to consider them in detail because they all turn to a greater or lesser degree on their own facts. When an order for costs is sought against a third party, the critical factor in each case is the nature and degree of his connection with the proceedings, since that will ultimately determine whether it is appropriate to adopt a summary procedure of the kind envisaged in the authorities, leading to what

Neuberger L.J. in *Gray v Going Places Leisure Travel Ltd* [2005] EWCA Civ 189 described as "the overall order made by the court at the conclusion of the trial." It is important to note, however, that, contrary to Mr. Cogley's submission, the guidance given in *Symphony v Hodgson* has not been regarded as immutable, but has been developed and modified in subsequent cases to reflect the differing circumstances under which applications for orders of this kind have been made.

22. As the judge noted in paragraph 9 of his judgment, an application under section 51 does not involve the assertion of a cause of action; it is a request for the court to exercise a statutory discretion in relation to the costs of proceedings before it. Section 51 is now the source of the court's discretion to determine who shall bear the costs of proceedings, whether they are parties to the proceedings or third parties. In principle, therefore, one would expect the procedure in each case to be substantially the same and the order to reflect broadly similar matters, such as the conduct of the proceedings and the nature of the party's or third party's involvement. In our view there is a clear distinction to be drawn between the process by which the court makes an order for costs at the conclusion of a trial, whether that order involves the parties alone or one or more persons who are not parties, and separate proceedings against a third party consequent upon the outcome of the trial. In the former case, the ordinary rules of evidence do not apply, precisely because the person against whom an order for costs is sought has had a sufficiently close connection with the proceedings to justify the court's treating him as if he were a party. We therefore turn to consider the nature of Mr. Vik's relationship with Sebastian and his involvement in the main action.

Mr. Vik's involvement in the main action

23. At an early stage in his opening Mr. Foxton Q.C. identified a number of facts which, he submitted, Mr. Vik could not, or had not attempted to, challenge and which were sufficient to establish that he was so closely involved in the litigation that there was no injustice in adopting a summary procedure for dealing with the Bank's application and holding him bound by the findings of fact made by the judge in the main action. They include the facts

(i) that Sebastian was entirely under the control of Mr. Vik, who was its sole director and shareholder;

(ii) that Mr. Vik treated Sebastian as his personal trading vehicle to hold and dispose of funds on his behalf as he thought fit;

(iii) that Mr. Vik ran Sebastian's affairs without troubling with any corporate formalities, such as resolutions, minutes or the filing of company accounts;

(iv) that funds were transferred into and out of its accounts in accordance with his directions given by email or text as and when it suited him;

(v) that between 9th and 22nd October 2008 US$890 million in liquid funds and shares worth US$92 million were transferred out of Sebastian in accordance with Mr. Vik's instructions, and that as a result Sebastian was unable to meet the judgment against it;

(vi) that Mr. Vik controlled Sebastian's conduct of the litigation and was the principal witness called on its behalf;

(vii) that parts of his evidence were false and that the counterclaim was based on documents which had been partly fabricated by him;

(viii) that Mr. Vik and members of his family stood to benefit very substantially if the counterclaim succeeded.

24. The judge's detailed findings concerning Mr. Vik's relationship with Sebastian and his involvement in the proceedings can be found in paragraphs 69-85 of his judgment, but, as we have already pointed out, he had expressed the view at an earlier stage that it was such that there was no injustice in holding Mr. Vik bound by his findings in the main action. It is worth noting, also, that in paragraph 74 he summarised certain of those findings by saying that in his judgment the conduct of extensive parts of Sebastian's defence and counterclaim had been reprehensible, involving impropriety and in a number of respects dishonesty on Mr. Vik's part.

25. As Lord Brown observed in *Dymocks*, whether it is appropriate to exercise the jurisdiction to make an order for costs against a third party depends on the particular facts of the case, but in a case where the court is satisfied that the third party is effectively controlling the litigation, supporting it, whether financially or by giving evidence, and is doing so with a view to obtaining a personal benefit of some kind if it is successful, it will usually be entitled to regard him as the real party to the action. If that is the case, it will normally provide strong grounds for making an order that the third party bear some or all of the other side's costs if the litigation is unsuccessful.

26. In our view, the facts relied on by Mr. Foxton in this case are not seriously open to challenge. Moreover, it is to be remembered that Mr. Vik gave evidence at the trial, in the course of which he was cross-examined at length, not only about Sebastian's relationship with the Bank, but also about its relationship with other companies which he controlled and the transfers of assets of various kinds between them. Mr. Vik therefore had an unrivalled opportunity to deal with all the various criticisms directed both at Sebastian and himself and to describe in full the circumstances that had given rise to Sebastian's dealings with the Bank. It is clear from the judgment in the main action, in which the judge described in some detail the evidence Mr. Vik had given and his assessment of it, that Mr. Vik took full advantage of that opportunity and was able to contest all the issues of fact on which the judge eventually made what can only be described as damning findings.

27. In those circumstances it is difficult to see on what basis it could be said that it was unjust in principle to adopt a summary procedure of the kind envisaged in *Symphony v Hodgson* or for the judge to exercise his discretion on the basis of his findings of fact in the main action. We therefore agree with the judge that the court is not concerned in this case with the scope or application of the rules of evidence which would be applicable if this were an independent claim brought against an unrelated third party. The judge dealt with the arguments relating to issue estoppel (although in our view he need not have done so), but, with all due respect to the detailed submissions made by Mr. Cogley, we do not think that there is anything to be gained by considering the principles of law relating to privity of interest, issue estoppel, abuse of process or the

rule in *Hollington v Hewthorne*, since none of them is relevant to the question we have to decide.

28. Many of the judge's findings criticising Mr. Vik are to be found towards the end of the judgment in the main action. In the first part of his judgment the judge considered in detail the Bank's claim and Sebastian's defences to it, including a claim to be entitled to set off the amounts that were the subject of its counterclaim. In paragraph 1427 he held that Sebastian had no valid claims to set off and that its counterclaims failed, but the judge nonetheless proceeded to set out in paragraphs 1430-1557 some of the conclusions he had reached in relation to them. Mr. Cogley submitted that that section of the judgment was entirely obiter and that nothing it contained was binding on either Sebastian or Mr. Vik for the purpose of the Bank's application. It was therefore to be disregarded altogether. We are unable to accept that. The court's discretion in relation to costs is ancillary to, but separate from, its jurisdiction to determine the substantive issues between the parties. It necessarily follows that for the purposes of exercising its discretion in relation to costs the court will often need to make findings of fact which have no direct bearing on the issues arising in the trial. One obvious example is a finding that one or other party has misconducted itself in some respect or acted unreasonably in the course of the proceedings. Such findings are directly relevant to the exercise of the court's discretion, even though they may be entirely unrelated to the outcome of the trial. In the present case the judge's findings in paragraphs 1430-1557 of the main judgment, although unnecessary for his decision on the counterclaim, are directly relevant to the exercise of his discretion in relation to costs insofar as they include findings about Mr. Vik's relationship with Sebastian and the manner in which he conducted the litigation.

29. However, although for these reasons we do not think that it was wrong in principle for the judge to hold that Mr. Vik was bound by the findings made in the main action, it is necessary to consider certain aspects of the guidance in *Symphony v Hodgson* on which Mr. Cogley particularly relied as supporting his submission that, notwithstanding the matters to which we have referred, the judge was wrong to adopt a summary procedure in this case.

Warning

30. A recurring theme of Mr. Cogley's submissions was the Bank's failure to warn Mr. Vik that it might seek an order for costs against him. Basing himself on the third of the guidelines in *Symphony v Hodgson*, Mr. Cogley argued that it was essential that a third party be warned that an order for costs might be sought against him if injustice were to be avoided. In the absence of a warning he would be deprived of the opportunity of protecting his interests, for example, by modifying his approach to the proceedings or by applying to be joined as a party in order to contest the evidence and arguments that might affect him. Mr. Cogley repeatedly emphasised that, despite later developments in the law relating to the exercise of the court's jurisdiction in relation to costs, the guidelines to be found in *Symphony v Ho*dgson had not been diluted in any material respect and it was a short step from that to arguing that a warning is an essential pre-requisite of a successful application of this kind. He also submitted that since the Bank had failed to warn Mr. Vik of the risk that he faced, it was incumbent on it to explain why it had not done so, if it wished to persuade the court that he would not suffer injustice as a result of the adoption of a summary procedure. It had not attempted to do so, however, and therefore the lack of a warning made it unjust to

hold Mr. Vik bound by the judge's findings and unjust to make an order for costs against him.

31. It is worth remembering that the *Symphony* guidelines as a whole were formulated in the context of an attempt by the plaintiff to obtain an order for costs against a third party whose connection with the proceedings was fairly tenuous. The second and third guidelines are concerned with ensuring that such a person has a fair opportunity to deal with any allegations that may affect his liability for costs before the judge makes his findings. They are not ostensibly directed to a case such as the present, in which an order for costs is sought against a third party who can properly be regarded as the real party to the litigation. The truth is that Mr. Vik had every opportunity to contest the Bank's factual and legal case and took full advantage of it. We agree with the judge, therefore, that the only advantage that a warning could have given him would have been an opportunity to reconsider his own position in relation to the proceedings.

32. Although Mr. Cogley formally disavowed any suggestion that it is necessary for an applicant to have warned the third party that he is at risk of being ordered to pay the costs if an application of this kind is to be successful, many of his submissions came very close to adopting that position. For example, he submitted that, unless the Bank could provide a good explanation for its failure to warn Mr. Vik of the risk he was exposed to, it could not be heard to say that he would suffer no injustice if he were bound by the findings of fact in the main action. As was made clear in *Dymocks*, however, that is to read too much into the *Symphony* guidelines. The importance of a warning will vary from case to case and may depend on the extent to which it would have affected the course of the proceedings: see per Lord Brown at paragraph 31. If the third party against whom an order for costs is sought is the real party to the litigation, the absence of a warning may be of little consequence. We should make it clear that we do not accept Mr. Cogley's submission that the Bank was under an obligation to explain why it had not warned Mr. Vik of the risk he faced. The fact that he had not been warned was all that was relevant and the judge duly took it into account.

33. In this context our attention was drawn to two cases in particular, *Equitas v Horace Holman & Co. Ltd* [2008] EWHC 2287 (Comm) and *Phillips v Symes (No. 2)* [2004] EWHC 2330 (Ch), [2005] 1 W.L.R. 2043. In *Equitas v Horace Holman* by the time of the hearing the claimant was primarily concerned to obtain an order against the defendant for its costs. The evidence suggested that the sole and managing director, Mr. Powell, was directing the proceedings on behalf of the defendant with a view to vindicating his professional reputation. There was therefore an appreciable risk that the claimant would seek a third party costs order against him and that if, as seemed inevitable, he was called as a witness, that he would be questioned about matters that might have a bearing on such an application. The judge was clearly concerned that Mr. Powell had not been warned before he started to give evidence that a costs order might be made against him and sought to ensure that cross-examination was limited to the substantive issues between the parties. In due course he declined to make an order for costs against Mr. Powell, in part because he was not satisfied that he had been conducting the litigation for his own benefit, but also because he had not been warned before he gave evidence that an order for costs might be sought against him despite the fact that his cross-examination was likely to be particularly relevant to any such

application. In short, the judge was clearly of the view that it would be unfair to make an order against him in the circumstances of that case.

34. In *Phillips v Symes* the court was concerned with an application for an order for costs against an expert witness who was said to have caused significant expense to be incurred by giving evidence in flagrant disregard of his duties to the court. He had not been warned of the risk that an order for costs might be made against him and in paragraph 67 of the judgment Peter Smith J. expressed the view that a warning must be given to a witness that his evidence may lead to an application for costs and that a failure to give him one is a denial of justice. However, he was conscious that to do so could be oppressive and could interfere improperly with the proper conduct of the proceedings. He concluded in paragraph 70 that whether a person should be warned, and if so how, is to be determined on a case by case basis. In that case the expert's duty was clear and no further warning was required. In our view the judge went too far if he intended to say that the absence of a warning will necessarily amount to a denial of justice, and indeed his later comments suggest that he did not. For the reasons we have given we agree that the significance of a failure to warn will vary from case to case. The position of a witness is very different from that of a person who can properly be regarded as the real party to the litigation, which may differ again from that of a solicitor or commercial funder.

35. In the present case the judge expressed himself entirely satisfied that a warning at an earlier stage would have made no difference to the conduct of the proceedings. He accepted that Mr. Vik had probably been unaware of his potential exposure to an order for costs, but held that it did not lie in his mouth to say that his evidence would have been different or that he would have conducted the case in a different way. In our view that judge was entitled to reach that conclusion. He was, of course, uniquely well placed to understand the way in which the litigation had been conducted on behalf of Sebastian and to assess Mr. Vik, both as a litigant and a witness. Mr. Vik's case before the judge was that he could not be identified with Sebastian and was doing no more than conducting the proceedings on behalf of the company in the manner that best served its interests. He now seeks to argue that, if he had been warned that he might be at risk of having an order for costs made against him personally, it would have influenced his approach to the litigation, but it is not open to him, without conceding that Sebastian was little more than a puppet, to say that he would have caused it to act differently in order to protect his own interests. Similarly, Mr. Vik put himself forward as a witness of truth. He cannot now be heard to say that he would have given different evidence if he had known that he might be made personally liable for the Bank's costs. This case is unlike *Equitas v Horace Holman* in that the facts which establish that Mr. Vik was the real party in issue were all relevant to the issues that arose in the action, either on the claim or the counterclaim and he had a full opportunity to deal with them.

36. In the court below the judge drew attention to the fact that there was no evidence from Mr. Vik to support a suggestion that his approach to the proceedings would have been different if he had been warned of the risk to his position. No doubt for that reason Mr. Cogley sought on the appeal to rely on fresh evidence in the form a further statement from Mr. Vik, made since the conclusion of the proceedings below, in which he described for the first time a number of respects in which a warning would have cause him to act in a different way. The most significant of them was the

assertion that it would have been possible for Sebastian to compromise the Bank's claim on terms that did not expose him personally to an order for costs and that if he had been aware of the risk to his personal position he would have ensured that it did so.

37. We have reached the conclusion that it would not be appropriate to admit that evidence. In the first place, we do not think it is credible. If there had been any opportunity of settling the Bank's claim (which seems very likely), it was obviously not on terms that appealed sufficiently to Mr. Vik. If, as the judge found, Sebastian was simply his vehicle, he must have concluded that it was in his own interests to press ahead rather than settle on the terms acceptable to the Bank. If, on the other hand, he was conducting the litigation in the best interests of the company, his decision to press ahead would have been uninfluenced by his own position. It is difficult to escape the conclusion that Mr. Vik preferred to fight on in the hope of obtaining a substantial personal benefit and take the chance of losing.

38. Quite apart from that, however, no satisfactory explanation was put forward for the failure to adduce this evidence below. It is clear from the written submissions before Cooke J. that the question of adducing evidence to support an argument that Mr. Vik would have caused Sebastian to act in a different way was present to the minds of those acting on his behalf and that a decision was taken not to do so. It is said that Mr. Vik was labouring under the misapprehension that he was not entitled to refer to negotiations between Sebastian and the Bank, but those acting for him would certainly have known the extent to which it was possible to refer to them and in any event that was only one of several respects in which he said that he would have acted differently. In our view, it is not appropriate to allow Mr. Vik to adduce fresh evidence relating to that issue on appeal.

39. The judge considered that in the circumstances of this case the failure to warn Mr. Vik that he might face an order for costs against him personally was of very little weight at all. We agree.

Joinder

40. In *Symphony v Hodgson* the court laid some emphasis on the protection that a third party might obtain by being made a party to the proceedings. Mr. Cogley submitted that the Bank could have joined Mr. Vik as a defendant to a claim in conspiracy, but chose not to do so and, having failed to warn him that he was at risk in relation to costs, had effectively deprived him of the opportunity of making an application himself to be joined. It was therefore unjust, he submitted, to dispose of the application summarily by holding Mr. Vik bound by all the judge's findings of fact.

41. We do not think there is anything in this argument. In the present case it would have made no sense for the Bank to have attempted to join Mr. Vik as a defendant. Its claim against Sebastian was to recover sums due on the trading accounts; the trading relationship did not give rise to any cause of action against Mr. Vik. Mr. Cogley argued that the Bank could have pursued a claim in conspiracy against both Sebastian and Mr. Vik, presumably on the basis that they had conspired together to harm the Bank by ensuring that Sebastian did not have the funds necessary to satisfy its obligations. However, that would have been a difficult and surprising course for the Bank to have taken and in our view no criticism can be made of it for having failed to

do so, least of all by Mr. Vik, who, of course, vigorously denied that he had caused Sebastian to part with assets otherwise than for proper reasons. As for Mr. Vik, we find it impossible to see on what basis he might have applied to be joined, other, perhaps, than to contest issues of fact which might ultimately affect his personal position, but the truth is that Mr. Vik had every opportunity to contest the Bank's factual and legal case and took full advantage of it. Moreover, he has never suggested that, if he had been made aware of the risk to his own position, he would have applied to be made a party.

Witness immunity

42. Mr. Cogley submitted that to make an order for costs against Mr. Vik in the circumstances of this case would infringe the principle of witness immunity, as foreshadowed in the seventh of the *Symphony* guidelines, and in support of that argument he drew our attention to the decision of this court in *Oriakhel v Vickers* [2008] EWCA Civ 748. The case concerned a claim for damages alleged to have been suffered in a motor accident, but the defendant's insurer had succeeded in proving at trial that the claimant and the defendant had concocted the claim, which was entirely spurious. The claimant had called as a witness a Mr. Khan, who claimed that he owned a garage, knew the defendant and had arranged for the damaged car to be brought in. The judge found that Khan was closely associated with the defendant and had given false evidence, but was not sure that he had been the mastermind behind the claim.

43. After the evidence had been closed the insurers informed Khan that they would apply for an order that he should pay the costs of the action on the grounds that he had been involved in setting up and running the claim. The judge declined to make such an order. He was not satisfied that Khan had funded or controlled the litigation, which he thought was a pre-requisite to making an order of that kind. This court held that to have been wrong and proceeded to exercise the discretion afresh, but it too decided that it should not make an order for costs against him. The leading judgment was given by Jacob L.J. He declined to make an order because he considered that Khan could have been joined as a defendant to an allegation of conspiracy and would then have been better able to protect his position. Also, he did not consider that Khan had had a sufficiently close connection with the proceedings to make it just to hold him bound by the judge's findings of fact. Arden L.J. agreed with Jacob L.J., but added that to make an order for costs against Khan in the circumstances of that case would have infringed the law on witness immunity. Jacob L.J. agreed with those observations and Sir Anthony Clarke M.R. agreed with both judgments.

44. It is clear from paragraph 36 of the judgment in that case that the question whether to make an order for costs against a witness as a result of his evidence would infringe the law relating to witness immunity had not been the subject of argument. In our view Arden L.J.'s observations are obiter and should be treated with caution. They also have to be understood in the context of the case then before the court. Khan had not funded and controlled the litigation for his own benefit and so could not be regarded as the real party to the proceedings. Moreover, it was clearly open to the court to conclude that his involvement in them was not sufficiently close to justify holding him bound by the judge's findings of fact. It is necessary to bear in mind that when making an order for costs the court is exercising a discretion, not giving effect to legal rights and obligations, but having said that, we consider it important for it to respect

the principles underlying witness immunity. In *Symphony v Hodgson* the court in its seventh guideline appears to have recognised that there may be cases in which it will be just to make an order for costs (not necessarily the whole costs of the action) against a witness and we do not think that the possibility should be excluded. The power to make such an order should, however, be exercised with considerable care. To make an order for costs against a witness simply because he has given false evidence might well infringe the principles of witness immunity, but to make such an order on the grounds that he had conspired with others to pursue a claim that was entirely fabricated would not, even if in order to support it he had given false evidence. We do not understand the court to have suggested otherwise; indeed Arden L.J. herself in paragraph 37 appears to have recognised that to be the case.

45. In the present case the judge did not make an order for costs against Mr. Vik merely because his evidence had been false in certain respects; he made the order primarily because he was satisfied that Mr. Vik was the real party to the litigation, a conclusion which depended on his findings about Mr. Vik's relationship with Sebastian, the control he had exercised over the conduct of the litigation and the extent to which he stood to gain personally if it was successful. The fact that he had given false evidence was no more than one aspect of his efforts to influence the outcome of the proceedings to his own advantage.

Funding

46. The judge found that Mr. Vik had not only directed the litigation but had funded it. He reached that conclusion as a result of his finding that Mr. Vik regarded any assets held by Sebastian as his own and himself as free to dispose of them in whatever way best suited his interests. By deciding to leave funds at the disposal of the company in sufficient amounts to enable it to pay its lawyers, Mr. Vik was in substance choosing to fund the litigation. Although the judge thought that was an artificial way of looking at the matter, he recognised that in *Petromec v Petrobras* [2006] EWCA Civ 1038 this court had accepted that allowing a company to retain funds sufficient to enable it conduct the litigation was tantamount to funding the litigation. In that case the claimant, Petromec, was a single purpose company used as a vehicle for an offshore construction project. It was indirectly owned and controlled by the businessman who ran the project, Mr. German Efromovich. Funds which flowed into Petromec as a result of the loss of the oil rig at the centre of the project were transferred to its parent company, apart from a sum of US$2 million which it retained for its own purposes and used to fund the ensuing litigation with Petrobras. This court held that Mr. Efromovich had funded the litigation to that extent because he, as the person who ultimately controlled the company, had decided to leave the funds in place rather than use them for some other purpose.

47. Mr. Cogley submitted that the judge had been wrong to find that Mr. Vik had funded the litigation and that his exercise of discretion was vitiated by taking that matter into account. We do not agree. In our view, the judge's findings about the relationship between Mr. Vik and Sebastian amply justified his conclusion that Mr. Vik was to be treated as having funded the litigation, but in any event, we agree with the judge that funding of the litigation by the third party is not to be regarded as a pre-requisite of an order for costs against him. It is a factor which may, depending on the circumstances, weigh in favour of making such an order, but no more than that. In the present case it

is better regarded as one aspect of the relationship between Mr. Vik and Sebastian which justified the conclusion that Mr. Vik was the real party to the litigation.

Security for costs

48. Before the judge Mr. Vik argued that the Bank's failure to apply for an order for security for the costs of the counterclaim made it unjust to make an order for costs against him. The submission rested, once again, on the *Symphony* guidelines. The thrust of the argument was that since the Bank could have protected itself by obtaining an order for security, but had chosen not to do so, it would be unjust to enable it to salvage its position after the event at the expense of Mr. Vik.

49. The judge thought that the Bank might have declined to seek security because it was concerned that if the order were not complied with and the counterclaim were stayed, Sebastian would be free to pursue its claim in New York in advance of any judgment in this country. Mr. Cogley criticised the judge's reasoning on the grounds that it rested on speculation and that a failure to provide security would be more likely to lead to the counterclaim's being struck out. However, that would not have involved a judgment on the merits and it is far from clear that Sebastian would have been precluded from pursuing its claim abroad. More important, in our view, is the judge's observation that a failure to apply for security does not preclude a successful application for an order for costs against a third party. We agree. Each case will turn on its own facts and, as Longmore L.J. pointed out in *Petromec v Petrobras*, it is no more unjust to make the backer of an insolvent company liable for costs after the event than to require him to provide security for those costs in advance. In this case the close relationship between Mr. Vik and Sebastian meant that he was not prejudiced by the Bank's failure to make an application for security.

50. Mr. Cogley objected to this kind of analysis on the grounds that it amounts to piercing the corporate veil and treating Sebastian and Mr. Vik as one person. In one sense that might appear at first sight to be true, but it is necessary to bear in mind that on an application of this kind the court is not concerned with legal rights and obligations but with a broad discretion which it will seek to exercise in a manner that will do justice. In *Threlfall v ECD Insight Ltd* [2013] EWCA Civ 1444 Lewison L.J. said:

> "13. If a non-party costs order is made against a company director, it is quite wrong to characterise it as piercing or lifting the corporate veil; or to say that the company and the director are one and the same. As Mr Shaw has demonstrated, the separate personality of a corporation, even a single-member corporation, is deeply embedded in our law. But its purpose is to deal with legal rights and obligations. By contrast, the exercise of discretion to make a non-party costs order leaves rights and obligations where they are. The very fact that the making of such an order is discretionary demonstrates that the question is not one of rights and obligations of a non-party, for no obligations exist unless and until the court exercises its discretion. Moreover the fact that the discretion, if exercised, is exercised against a non-party underlines the

> proposition that the non-party has no substantive liability in respect of the cause of action in question."

51. It is for that reason that, in appropriate circumstances, the court may find that the third party is the real party to the litigation because he is controlling, and perhaps funding, the litigation and conducting it for his own benefit rather than that of the nominal party to the proceedings. Although the court will not ignore the corporate structure, it is entitled when exercising its discretion in relation to costs to have regard to considerations of that kind.

Article 6 of the Convention

52. Article 6 of the Convention is too well known to require citation. Mr. Cogley submitted that the process which led to the order for costs against Mr. Vik in the present case did not meet the requirements of that article because he did not have a fair hearing before an independent and impartial tribunal. The complaint arises out of two particular aspects of the judgment: the judge's decision to make findings about various central aspects of the counterclaim in paragraphs 1430-1557 of his judgment and certain disparaging comments he made in paragraphs 1583-1587 about the nature of the transactions in which the Bank and Sebastian had been engaged.

53. In paragraphs 1430-1557 the judge made a number of findings that were highly critical of Mr. Vik, whom he found to be dishonest in a number of important respects. In paragraphs 1583-1587 he expressed the view in trenchant language that the foreign exchange trading in which the parties had been engaged amounted to nothing more than gaming transactions, which were enforceable only as a result of a change in the law brought about by the Gambling Act 2005 and Part II of the Financial Services and Markets Act 2000. He did not hide his disapproval of gambling as such and questioned whether those responsible for the change in the law had given adequate consideration to its wider social effects. Although he was careful not to accuse the judge of actual bias, Mr. Cogley submitted that, coupled with his determination to hold Mr. Vik bound by the findings of fact made in the main action, there was a real risk that a neutral observer would think that the order for costs was being used as a means of punishing Mr. Vik for dishonest behaviour in relation what he regarded as a morally reprehensible form of business activity. Mr. Cogley also submitted that it was unfair, and therefore a breach of Article 6, for the trial judge to determine an application for costs against a third party in a case where he had been highly critical of that person in the course of his judgment.

54. In our view there is no substance in either of those arguments. The judge had conducted a long trial, in the course of which he had heard a great deal of evidence and had received very substantial submissions from the parties both on the facts and the law. In such a case the parties usually expect the judge to deal with all the main limbs of the argument, even if it is not strictly necessary to do so, out of respect for their arguments. A recognition that the case might take a different turn on appeal may also encourage the judge to cover more of the ground than is necessary for his decision. We do not find it at all surprising, therefore, that in this case the judge dealt with many of the major factual issues raised by Sebastian's counterclaim, even though, as he himself recognised, it was unnecessary for him to do so in order to dispose of it. Moreover, it is necessary to recognise that a judge is entitled to make findings about the parties' conduct in relation to issues that ultimately have no effect on the outcome of the proceedings insofar as they may be relevant to his decision on costs. The way in which Sebastian, through Mr. Vik, had conducted the counterclaim was relevant to the exercise of the court's discretion in relation to costs as

between the parties, if for no other reason, regardless of any application that might be made against Mr. Vik personally. There are no grounds on which the judge can be criticised for making findings in relation to the main factual aspects of the counterclaim.

55. Nor do we think that the judge can be criticised for his observations on the nature of the transactions involved in this case. Provided they do not venture into the political arena, judges are entitled to express their views about matters that come before them and the state of the law relating to them. Sometimes their remarks are heeded and sometimes not. As we read the judge's remarks, he did not set out to criticise Mr. Vik any more than the Bank for indulging in a form of business of which he clearly disapproved. Both were in his view equally culpable. Whether the judge was or was not wise to express his views as he did, it cannot be said that he gave any grounds for thinking that he was minded to punish Mr. Vik for having been involved in business of that kind.

56. The suggestion that the judge ought not to have determined the Bank's application for costs against Mr. Vik because he had made adverse findings against him in the main action is, again, one that we cannot accept. Although in *Symphony v Hodgson* Balcombe L.J. said that an application for payment of costs by a third party should "normally" be determined by the trial judge, we find it difficult to imagine a case in which that would not be appropriate. It is necessary for these purposes to assume that the judge has conducted the trial impartially and that, if he has made findings critical of the third party, those findings were justified. Making findings of fact is part of the judicial function and to have made findings critical of one party or another does not disable the judge from dealing with consequential matters impartially, even when they turn on facts in respect of which he has already made findings. That is a commonplace in cases in which the court has to exercise its discretion in relation to costs as between the parties to the proceedings. There is no reason, therefore, why the same should not hold good in relation to an application for costs against a third party, provided, of course, that it is not unjust to hold him bound by the findings in the main action. Accordingly, although we would not wish to exclude altogether the possibility that there may be cases in which an application of that kind should be decided by someone other than the trial judge, such cases are likely to be rare.

57. Since the right to a fair trial is an essential ingredient of the common law, it is not surprising that Mr. Cogley accepted that the arguments based on Article 6 added little, if anything, to his other points. For the reasons we have given we do not think that there was any unfairness to Mr. Vik in this case. The judge was right to regard Mr. Vik as the real party to the main action. He had a full opportunity, through Sebastian, on whose behalf he gave evidence, to contest all the issues of fact in the action. As a witness he had an opportunity to give a full and honest account of all those aspects of Sebastian's affairs which he had been concerned with or with which he was familiar. It is difficult to see in what respect Mr. Vik did not have a fair opportunity to contest all the matters on which the Bank relied in support of its application. There is nothing in the veiled suggestion that the judge did not conduct the proceedings fairly or that Mr. Vik's Article 6 rights were infringed.

Quantum

58. Mr. Cogley submitted that even if the judge had been entitled to make an order for costs against Mr. Vik, he ought to have excluded from the Bank's costs the very considerable amount (about £23 million) which represented the fees of the forensic

accountants who were instructed to calculate the position of Sebastian on a daily mark-to-market basis throughout the period of trading. Those were records which, it was said, the Bank should have maintained in the ordinary course of business; Mr. Vik could not fairly be held responsible for the costs of creating records that ought to have existed in any event. Mr. Foxton, however, said that the Bank did not ordinarily keep records of that kind, because it was unnecessary to concern itself with a client's fluctuating exposure; what mattered was the value of a position when it was closed out. It became necessary to construct a history of Sebastian's trading only because it alleged in its defence that the Bank had been in breach of an agreement to ensure that in the course of its trading Sebastian's exposure did not exceed certain daily limits based on market valuations and that transactions outside those limits were unauthorised.

59. As a starting point it is necessary to bear in mind that the judge awarded the Bank only 85% of its costs (albeit on the indemnity basis) in order to reflect the issues on which it had been unsuccessful and that, although he ordered a detailed assessment of those costs, he did not exclude the costs incurred in respect of the forensic accountants. The question on the Bank's application was whether Mr. Vik should also be made liable for the costs which Sebastian had been ordered to pay. If the basis for the order against Mr. Vik had been simply that by his improper conduct he had caused the Bank to incur unnecessary costs, it would have been open to him to argue that he had not in fact caused the Bank to incur those costs and should therefore not be made liable for them. A similar argument would have been open to Sebastian, of course. In fact, however, it does not appear that Sebastian sought to take that point and in any event the judge did not exclude from the Bank's recoverable costs the fees of the forensic accountants. More importantly for present purposes, the basis of the judge's order for costs against Mr. Vik was not that he had caused the Bank to incur the experts' fees but that he was the real party to the litigation. There is no reason in principle, therefore, why he should not be required to pay the whole of the costs for which Sebastian is liable. The Bank accepts that any arguments available to Sebastian on the detailed assessment will also be available to Mr. Vik and, if successful, will operate to reduce the amount of his ultimate liability. In our view there is no reason why the judge should have excluded the experts' fees from the costs for which he ordered that Mr. Vik should be liable.

Conclusion

60. For these reasons we dismiss both Mr. Vik's application for permission to adduce fresh evidence and his appeal against Cooke J.'s order.

Postscript

61. It will be apparent from what we have said that Mr. Cogley sought to place great emphasis on the *Symphony* guidelines to the point of treating them, in particular the third guideline, as laying down requirements that must be satisfied unless the applicant can demonstrate a good reason for failing to do so. In our view that is not the correct approach. When considering those guidelines it is important to bear in mind that they were formulated not very long after the decision in *Aiden Shipping v Interbulk*, at a time when applications for costs against third parties were relatively uncommon, and that they were intended merely to provide guidance, not to lay down rules. Since then there have been many more applications for orders for costs against

third parties under a wide variety of circumstances, as a result of which it has come to be recognised more clearly than perhaps it was at that time that each case turns on its own facts.

62. As all three members of the court observed in *Petromec v Petrobras*, the exercise of the discretion is in danger of becoming over-complicated by authority. The decision of the Privy Council in *Dymocks*, which contains an authoritative statement of the modern law, explains and interprets the *Symphony* guidelines in a way which reflects the variety of circumstances in which the court is likely to be called upon to exercise the discretion. Thus, the Privy Council has explained that an order of this kind is "exceptional" only in the sense that it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. Similarly, it has made it clear that the absence of a warning is simply one factor which the court will take into account in an appropriate case when deciding whether, viewed overall, it would be unjust to exercise the discretion in favour of making an order for costs against the third party. We think it important to emphasise that the only immutable principle is that the discretion must be exercised justly. It should also be recognised that, since the decision involves an exercise of discretion, limited assistance is likely to be gained from the citation of other decisions at first instance in which judges have or have not granted an order of this kind.