Joining the party

Andrew Hogan looks at the state of the law in relation to non-party costs orders

One of the ever-green topics of the law and practice of costs concerns the circumstances in which the courts of England and Wales will use their powers under section 51 of the Senior Courts Act 1981, to make a costs order against a non-party to proceedings. This area of law is blessed with both an abundance of authorities, and an abundance of judicial statements about the overabundance of authorities – but the caselaw just keeps coming. In this article I shall consider some key points about non-party costs orders.

JURISDICTION

The jurisdiction to make a non-party costs order derives, like all powers to make a costs order, from section 51 of the Senior Courts Act 1981. Further provision is made in rule 46.2 CPR for the joinder of a non-party to proceedings, for the purposes of costs only. Any application for such an order is usually made at the conclusion of a case, and ideally to the trial judge. But there is no reason why an application cannot be made at an earlier stage, or after a case concludes by settlement or discontinuance.

CONCEPTUAL PROBLEMS

In this jurisdiction we do not have 'non-party damages judgments', and one of the key conceptual problems that arises when exercising this power is grappling with the conceptual clash with the concept of limited liability. If a party is a limited company, and loses a case, why should a director or shareholder or liquidator be made to shoulder the costs of the opposing party to litigation? But this is precisely what the jurisdiction permits, allowing the piercing of the corporate veil, and indeed ranging on financial targets with deep pockets, far beyond those immediately proximate to the proceedings, if it is 'just' to do so.

KEY PRINCIPLES: FUNDING BENEFIT CONTROL AND CAUSATION

Modern authority on the criteria that a court will apply when considering whether to make a non-party costs order really begins in 2004, when the Privy Council decided the case of *Dymocks Franchise Systems v Todd* [2004] 1 WLR 2807.

The case has been consistently applied by the appellate courts in England and Wales, and established that although these orders are exceptional, that simply means they are unusual. That although the jurisdiction would not be exercised against pure funders, who were facilitating access to justice, someone who funded and controlled the proceedings or who funded and was to benefit from them, would be viewed as 'a real party' and – subject to the consideration of causation – would be at risk of a non-party costs order.

In *Deutsche Bank v Sebastian Holdings and Vik* [2016] EWCA Civ 23, the Court of Appeal emphasised that there was no formulaic approach: the key consideration was always whether, as a matter of discretion, it was 'just' to make a non-party costs order on the facts of a particular case. In the case of *Travelers Insurance v XYZ* [2019] UKSC 48 the Supreme Court emphasised the importance of causation in relation to conduct and control: if the costs would have been incurred in any event, absent the conduct of the party against whom a non-party costs order was sought, it would rarely be appropriate to make such an order.

Despite the overall consideration being whether it is 'just' to make an order, the courts have looked for ways to anchor this in more readily definable criteria. So the four factors identified above of funding, control, financial benefit and causation, have become lodestones for navigating this area of law and in particular, the different contexts in which such orders may be made.

FUNDERS

Thus building on the approach taken to funding, in recent years, the courts have not been slow to find commercial funders of litigation liable for non-party costs orders; and in the case of *Chapelgate Credit Opportunity Master Fund Ltd v Money and Others* [2020] EWCA Civ 246, the so called 'Arkin cap' which had been believed to limit the liability of such funders to the amount of the monies they had advanced, was declared to be no such thing – and their liability was judged on the conventional basis of causation.

INSURERS

The case of *Travelers Insurance v XYZ* [2019] UKSC 48 was particularly concerned with the liability of insurers, in the context of group litigation where there were both insured and uninsured claims. The so-called Chapman guidelines were approved, and emphasis placed on whether an insurer could be said to be a 'real party', with causation playing a crucial role.

DIRECTORS

The position of directors and their potential liability for costs remains one of the most difficult issues in this area of law. The leading case on insolvent companies (or rather companies that cannot meet awards for costs) remains *Goknur v Aytacli* [2021] EWCA Civ 1037, where it was noted that 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, 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.

In order to assess whether the director was the real party to the litigation, the court may look to see if they 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. Conversely if the proceedings were pursued for the benefit of the company, then usually the company is the real party. 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.

That is not the end of the matter, however. 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. Such impropriety or bad faith will need to be of a serious nature and ordinarily have to be causatively linked to the applicant for the order having incurred costs unnecessarily in consequence.

CREDIT HIRE COMPANIES

In the last 18 months or so, insurance companies have increasingly sought non-party costs orders against credit hire companies, often because the losing claimant has the benefit of qualified one-way costs shifting (QOCS). Such applications have usually failed, however, despite an early partial success in *Select Car Rentals (North West) Limited v Esure Services Limited* [2017] EWHC 1434. Thus, in *Onhire Limited v Smithson* (County Court at Newcastle 20 May 2022 HHJ Freedman), *Shahzad and Royal and Sun Alliance v Fastrack Solutions Limited* (County Court at Leeds 6 April 2023 HHJ Gosnell) and latterly *Da Silva v Rahmoune and Direct Accident Management Limited* (County Court at Central London HHJ Lethem 22 May 2023), all decisions of the Circuit Bench went against the insurers.

EXPERTS

There is increasing interest in the circumstances in which an expert may be found liable for a non-party costs order. What is usually required in such a case is not funding, control or benefit, but a gross breach of a duty owed to the court, which has demonstrably caused a party to incur unnecessary costs. Thus, in the case of *Thimmaya v Lancashire NHS Foundation Trust* [2020] 1 WLUK 437, a non-party costs order was made. Conversely in *Robinson v Liverpool University Hospitals NHS Trust and another* [2023] Costs LR 519, a non-party costs order made at a trial was overturned on appeal.

SOLICITORS

Solicitors are not immune from the potential for a non-party costs order, though the circumstances in which one will be made are rare. Thus, in the case of *Myatt v National Coal Board and another (No 2)* [2007] 1 WLR 1559, a majority of the Court of Appeal made a non-party costs order in the unusual circumstances that, although conditional fee agreements had been found to be unenforceable, appeal had been made

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to the Court of Appeal. In those circumstances, the real interests were the financial ones of the solicitor. But as cases such as *Willers v Joy* and *Nugent exp De Cruz Solicitors* [2019] EWHC 2183 (Ch) indicate, such orders will be few and far between.

CONCLUSIONS

The case of *Prest v Petrodel Resources Limited* [2013] UKSC 34 remains the leading authority on when it is appropriate to pierce the corporate veil: in summary, it is rarely appropriate to do so. Yet non-party costs orders constitute an exception to the concern to protect the principle of limited liability. Lewison LJ observed in *Threlfall v ECD Insight Limited* [2013] EWCA Civ 1444: '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.'

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But such 'reconciliation' of the principles could be viewed as sophistry. In reality the jurisdiction is grounded in pragmatism, the long-held view of the common law that non-parties should not meddle in other people's litigation, and the lack of a realistic alternative: the obvious candidate of requiring security for costs on a universal basis would be far more likely to stifle access to justice, than a settling of accounts afterwards. Although this is an area of law ripe for reconsideration, with the Supreme Court formulating principles to assist the lower courts, the tension between principle and pragmatism is likely to remain.

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