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The consequences of funding – Springing into action to

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Introduction

Standing behind a party to litigation is sometimes a funder who will benefit from any success of that party's action. The funder can sometimes be the person who has ultimate control of the party, and therefore the party's actions in the litigation, such as a director or the majority shareholder of a company.

In the recent case of *Topalsson GmbH* v *Rolls Royce Motor Cars Ltd* [2024] EWHC 297, the High Court was asked to grant an order for disclosure of information relating to the funding of proceedings, in support of a potential non-party costs order against the claimant's director and majority shareholder, and other unknown funders.

The decision re-affirms the test for ordering disclosure in support of a non-party costs order and considers how this test is affected if giving such disclosure would result in a breach of the law of another jurisdiction, either civil or criminal.

Background

The defendant, Rolls Royce Motors Cars ("RRMC"), was the successful party against the claimant, Topalsson GmbH ("Topalsson") in litigation arising out of the development and supply of software for a Rolls Royce car. Topalsson was ordered to pay €5 million in damages plus interest, in addition to 90% of RRMC's costs.

Topalsson failed to pay those amounts because, it said, its insurers had wrongfully failed to indemnify it for the judgment sum. Topalsson brought a claim against those insurers in Germany.

In the meantime, RRMC thought it might have a better chance of recovering the sums due to it if it pursued Topalsson's funders. However, RRMC did not know for sure who was funding the litigation and what the terms of any funding arrangements were. It therefore first applied to the court seeking disclosure from Topalsson on those points.

Non-party costs orders

Under English law, section 51 of the Senior Courts Act 1981 empowers the court to make costs orders against non-parties to proceedings. As a matter of common law, if the court has a power to grant a remedy, it also has the power to make ancillary orders to ensure the remedy is effective. In the context of non-party costs orders, those ancillary orders would include a disclosure order.

When will the court make a non-party costs order? This is at the discretion of the court and turns on the facts of each case. The underlying principles were set out by Mr Justice Blake in *Thomson* v *Berkhamsted Collegiate School* [2009] EWHC 2374, a case about a former pupil, with an undisclosed funder, bringing an action against his school arising out of an alleged failure by the school to prevent him from being bullied.

Blake J. set out the general principles relating to non-party costs orders, the most relevant of which are as follows:

> "*i) The order for payment of costs by a non-party would always be exceptional and any application should be treated with considerable caution.*

> *iii) The mere fact that someone has funded proceedings would generally be insufficient to support an application that they pay the costs of the successful party. Pure funders* […] *will not normally have the discretion exercised against them. That definition of "pure funders" means 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.*
>
> *v) The conduct of the non-party in the course of the litigation and other than as a pure witness of material fact is of relevance and potential weight.*
>
> *vii) In determining these applications the court must exercise its case management powers to ensure that the application does not turn into satellite litigation that results in prolonged, complex and over-extended arguments about costs about costs. For that reason the inherent strength of the application is always a relevant factor.*"

The judge considered these principles, and concluded that for the question of whether disclosure was necessary to support an application for a non-party costs order, the following further principles are relevant:

> "*i) The strength of the application as it now appears unassisted by disclosure;*
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> *ii) The potential value to the fair determination of the application of the documents of which the claimant seeks disclosure and whether they are likely to elucidate considerations highly probative of the exercise of the court's discretion, or threaten to drag the application into a side alley of satellite litigation with diminishing returns for the overall issue;*
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> *iii) Whether on a summary assessment it is obvious that the documents for which disclosure is sought will be the subject of proper legal professional privilege;*
>
> *iv) Whether the likely effect of any order the court might be minded to make will be proportionate and just in all the circumstances.*"

Disclosure application

Turning back to the *Topalsson* case, the presiding judge, Mr Justice Constable, sought to apply these principles. Topalsson argued that the first step in applying the principles is to ask whether the application for a non-party costs order is likely to succeed. Constable J disagreed. It is no part of the test for ordering disclosure in support of a non-party costs order that the application for that non-party costs order is likely to succeed.

Indeed, where the application is overwhelmingly likely to succeed, that might be an indication that disclosure is unnecessary and so would not be ordered. On the other hand, if the non-party costs order application is inherently weak or fanciful, an application for disclosure may be refused. The correct question was therefore to ask whether the applicant can demonstrate that its future application for a non-party costs order is not inherently weak or fanciful. Once that is established, the court will not look further into the merits of that application.

Constable J also pointed out that the very purpose of these disclosure applications was to reveal the identity of the funders and the nature of the funding arrangements. In some circumstances it may be premature to consider the merits of any application for a non-party costs order until that information has been obtained.

On the facts, RRMC already had a target in mind for the non-party costs order, namely Mr Topal. Mr Topal was the founder, CEO and majority shareholder of Topalsson. RRMC suspected that there may be other funders of the litigation, on which it had little to no information.

In those circumstances, Constable J first considered whether any application for costs against Mr Topal would be inherently weak or fanciful, before turning to the question of whether there was any rational basis for the court to conclude that any other non-party funders may exist in respect of which a non-party costs application might properly be made.

In determining the position relating to Mr Topal, Constable J considered various authorities dealing with non-party costs orders against company directors. The first of these was the Privy Council case of *Dymocks Franchise Systems (NSW) Pty Ltd* v *Todd* [2004] UKPC 39, in which Lord Brown of Eaton-Under-Heywood said:

> *"(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. 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 …*
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> *…*
>
> *(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.*"

Similarly, in *DNA Productions (Europe) Ltd* v *Manoukian* [2008] EWHC 2627, Evans-Lombe J considered that the "*fundamental contrast*" is between:

> "*… a director who bona fide pursues unsuccessful litigation in the name of the company for the benefit of the company, but where the company cannot pay the order for costs against it, for the benefit of its creditors, and where the director in question is the real litigant in the sense that the court can be satisfied that without his initiative and finance the litigation would not have been pursued by the company, and who stood, albeit with others including creditors, to benefit materially from its success.*"

Finally, in *Goknur Sanati AS* v *Aytacli* [2021], Coulson LJ set out the following guidance:

> "*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 …*
>
> *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' …*

> *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* […]*, 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* […]*. Such an order does not impinge on the principle of limited liability* […]
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> *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* […]*. 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* […]
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> *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* […]
>
> *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* […]
>
> *g) Such impropriety or bad faith will need to be of a serious nature* […] *and* […] *would ordinarily have to be causatively linked to the applicant unnecessarily incurring costs in the litigation.*"

After reviewing the authorities, Constable J noted that while there was no impropriety alleged against Mr Topal, there was nothing inherently weak or fanciful in the submission that Mr Topal had controlled the litigation in a way that set him apart from a normal company director. Mr Topal would, *prima facie,* benefit the most from Topalsson's success in the litigation as its majority shareholder.

The judge also found that there were grounds to consider that the company was a vehicle for Mr Topal's "*personal ambitions*" and to further his personal reputation. In addition, Constable J picked up on something that Topalsson's counsel had said in his submissions in the primary litigation: "*Although it is a corporate claimant, it is very much [Mr Topal's] company and it's very much a dispute in which he has considerable personal interest*".

In relation to other potential funders whom a disclosure order might uncover, it was not fanciful to conclude that such funders might exist. Mr Topal himself had alluded to external funding support. It was perfectly possible for there to be more than one "*real party*" to the litigation.

Constable J therefore concluded that to the extent it had been necessary to assess the inherent strength of any future application for a non-party costs order against both Mr Topal and other funders, RRMC's applications would pass the necessary threshold as neither inherently weak nor fanciful. The judge further held that the disclosure

order sought would provide the court with useful information on which to base the exercise of its discretion in these future applications.

Breach of foreign law

As a last line of defence, Topalsson argued that it had entered into confidentiality agreements with its investors, breach of which (by giving the disclosure sought) would result in civil and criminal sanctions under German law.

Topalsson introduced an expert witness, Mr Monchmeyer, to support this contention. Before turning to the relevant principles, Constable J noted that Mr Monchmeyer did not include his qualifications or a statement of truth in his expert witness statement, and thus his evidence carried little weight.

In circumstances where the English law requirement for the inspection of documents and the provisions of foreign law conflict, the overriding principle was formulated by Gross LJ in *Bank Mellatt* v *HM Treasury* [2019] EWCA Civ 449, as follows:

> "*… where such a tension arises, it is for the Court to balance the conflicting considerations: the constraints of foreign law on the one hand, and the need for the documents in question to ensure a fair disposal of the action in this jurisdiction, on the other.*"

That case concerned an order made by the High Court requiring an Iranian party to produce documents in unredacted form but subject to various confidentiality provisions. That this would constitute a breach of Iranian law was not in dispute. Constable J summarised the guidance given by Gross LJ as follows:

> "*(1) An English court (where matters of disclosure are matters for its procedural law) has jurisdiction, in its discretion, to order disclosure, regardless of the fact that compliance with the order would or might entail a breach of foreign criminal law in the "home" country of the party the subject of the order.*
>
> *(2) An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e. foreign) criminal law, but it is not precluded from doing so.*
>
> *(3) In exercising its discretion, the court should:*
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> *(a) weigh, on the one hand, the real – in the sense of actual - risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings.*
>
> *(b) consider fashioning the order to reduce or minimise the concerns under the foreign law, for example, by imposing confidentiality restrictions in respect of the documents inspected.*"

Applying these principles to the facts of *Topalsson*, Constable J considered that there was little evidence as to the existence of any real risk to Topalsson of criminal or civil proceedings in Germany were it to be required to provide the information sought. In particular, Mr Monchmeyer's evidence only discussed that a violation of German trade secrets legislation "*might"* result in criminal sanctions "*subject to further requirements*" but without explaining what those requirements were.

Similarly, in relation to civil liability, Mr Monchmeyer said only that there was "*at least a certain risk*" of damages for breach of trade secrets legislation, but no evidence on the German legal position was provided in support.

Even taking the evidence at its highest, the information provided was wholly insufficient to prove an actual risk, as opposed to a hypothetical risk, of civil or criminal proceedings being brought against Topalsson if it was required to provide the requested disclosure.

Further, any such risk could be mitigated by the imposition of appropriate confidentiality provisions to ensure the information provided remained confidential to the parties and, in the normal way, the information disclosed could only be used for the purposes of the future non-party costs order application.

Constable J therefore granted the disclosure order sought by RRMC. Looking at the history of the case, the judge could not help but wryly observe that there was a "*depressingly real risk*" that in making an order for disclosure there would likely be satellite litigation around whether Topalsson had properly complied with the order.

Comment

The decision illustrates the court's willingness to order parties to disclose funding information where there is reason to believe the litigation may have been supported by funders against whom a non-party costs application might properly be made. Such information might include the identity of the funders, the terms of the funding, and the nature and extent of the funders' involvement and interest in the litigation.

In considering against whom a non-party costs order might properly be made, the court will consider who is the real party to the litigation. In the case of a director, this will involve determining whether they are acting solely in their capacity as director, or instead seeking to obtain a personal benefit through the litigation.

The decision is also a reminder that the court can order disclosure of information or documents even if compliance would put a party at risk of a breach of civil or criminal law in another jurisdiction. The court will weigh the importance of disclosure against the actual (not theoretical) risk of proceedings being brought in another state.