Neutral Citation No.: [2022] EWHC 2437 (Ch)

Claim No: BL-2021-BHM-000012

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
BUSINESS LIST (ChD)

Priory Courts
33 Bull Street
Birmingham, B4 6DS

Date: 30 September 2022

HIS HONOUR JUDGE RICHARD WILLIAMS
(Sitting as a High Court Judge)

- -

Between:

VENTURES FOOD LIMITED

Claimant

- and –

LITTLE DESSERT SHOP LIMTED

Defendant

MUHAMMAD KHURAM SHAHZAD AFZAL
and ABDUL NAVEEED AFZAL

Third Parties

- -

Nicholas Pilsbury (instructed by HMA Law Solicitors) for the **Claimant**
Martin Budworth (Direct Access) for the **Third Parties**

Hearing date: 26 July 2022

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JUDGMENT

Introduction

1. This is my judgment following the remote hearing of an application dated 12 May 2022 made on behalf of Little Dessert Shop Limited ("***D***") for an order for costs against Messrs Muhammad Khuram Shahzad Afzal ("***TP1***") and Abdul Naveed Afzal ("***TP2***") (together "***the Third Parties***") pursuant to section 51 of the Senior Courts Act 1981 ("***the 1981 Act***") and Civil Procedure Rules ("***CPR***") r.46.2.

Background

2. Messrs Muazzam Ali and Mohammad Chohan ("***MC***") are the co-directors and co-owners of D, which together with its associated company, Little Dessert Shop (Holdings) Limited, is in the business of franchising Little Dessert Shops.

3. Ventures Food Limited ("***C***") was incorporated on 12 December 2017 as the corporate vehicle through which the franchise of a Little Dessert Shop was to be operated. TP1 was the sole registered director and shareholder of C. TP1 and TP2 are brothers.

4. D, as tenant, entered into a lease dated 17 January 2018 ("***the Lease***") of premises at 1 and 1a Bore Street, Lichfield ("***the Premises***"). Thereafter, the Premises were occupied by C pursuant to a franchise agreement with D, which was terminated in September 2020, although C continued in occupation of the Premises.

5. Proceedings were issued in October 2020 whereby C sought a declaration that D held the Lease on trust for C under an express trust evidenced by an email from MC, on behalf of D, to TP1, on behalf of C, and timed at 11:20 on 15 December 2017 in which it was stated that:

> "The money needs to come from my account as I have just spoken to her even though the lease is being secured on your behalf.
>
> [Account Details]
>
> Please let me know once you have transferred the amount requested so I can pay and it's too late to change the name on the lease but we can always make this change after in to your name."

6. D's Defence stated that C's "version of the e-mail dated 15 December 2017 is disputed and the Claimant is put to strict proof that this e-mail is genuine…The Defendant seeks to rely upon its version of the e-mail which is set out as Appendix C." D's version of the disputed email stated:

> "The money needs to come from my account as I have just spoken to her:
>
> [Account Details]
>
> Please let me know once you have transferred the amount requested."

7. By its Reply, C contended that:

> "7.1 The version of the email relied upon by the Defendant has been altered.

7.2 Given that (i) the Defendant's Mr Chohan was a party to the email, and (ii) the effect of the alteration is to render a document which in its original form is damaging to the Defendant's case less damaging to that case, the obvious inference is that the email was altered by or on behalf of the Defendant and that knowledge of the alteration is to be attributed to the Defendant.

7.3 The Defendant's actions in knowingly putting forward an altered email in support of it's position are dishonest, and amount to an abuse of process, with the consequence that the Defence should be struck out."

8. Unsurprisingly, C and D were each given permission to rely upon expert evidence in the field of computer science "concerning the question of whether the versions of the email dated 15 December 2017 disclosed by the parties are authentic and free of any manipulation". The case management order dated 13 May 2021 further provided that "A joint statement by the experts setting out areas of agreement and disagreement between the experts is to be prepared and filed by 22 October 2021…In the event that the experts are unable to reach agreement concerning their evidence, the experts shall attend trial to give evidence orally."

9. C served the expert report of Mr Joseph Naghdi dated 1 December 2021 in which he concluded that D's version of the disputed email "was modified well after it was sent" and C's version of the email "is a genuine, untampered email. There is no evidence that… the email has been modified in any shape or form."

10. D served the expert report of Mr Abid Rashid dated 3 December 2021 in which he concluded that D's "version of the disputed email is genuine and there is no evidence that I have seen, which suggests, that it has been manipulated or altered in any way since 15 December 2017….I believe that [C's] version of the disputed email has been manipulated".

11. By an application notice dated 10 January 2022, Mr Mark Summerfield, C's solicitor, sought:

    "An Order pursuant to CPR42.3 that Solomon Taylor & Shaw has ceased to act for the Claimant and that the name of Solomon Taylor & Shaw be removed from the Court record, because the Claimant has failed to give instructions for over 4 weeks, to pay fees and disbursements and is no longer responding to telephone calls or emails. The trial is due to begin on March 22nd."

12. By order dated 18 January 2022, Solomon Taylor & Shaw ("***STS***") were removed from the Court record as solicitors for C in the main action.

13. By an application notice dated 28 January 2022, D sought an order inter alia:

    a. Setting aside permission for C to rely upon expert evidence, since Mr Naghdi had repeatedly informed Mr Rashid that he was without instructions and so unable to progress the preparation of the joint statement; and

    b. Granting permission for D to bring a Counterclaim seeking a declaration that C was in occupation of the Premises pursuant to a contractual licence, which had been terminated.

The application was listed for hearing before me at the Pre-Trial Review on 4 February 2022. C failed to attend and was not represented at that hearing.

14. At the PTR hearing I made the following order:

> "UPON the Pre-Trial Review AND UPON the Defendant's Application dated 28 January 2022
>
> AND UPON hearing Counsel for the Defendant and the Claimant neither attending nor being represented.
>
> AND UPON the Court being satisfied that the Claimant was aware of this PTR and no explanation has been received as to why the Claimant is not in attendance.
>
> AND UPON the Court noting that should the Claimant fail to attend trial, the Claimant is at risk of its claim being struck out and any defence to counterclaim being struck our pursuant to CPR 39.3.
>
> IT IS ORDERED:
>
> 1. The Claimant having failed to give instructions to their expert to prepare a joint statement as required by the Order of DJ Murch dated 13 May 2021, the Claimant does not have permission to adduce expert evidence at trial in the field of forensic computer science.
>
> 2. The Claimant shall, by 4pm on 18 February 2022, notify the Defendant's solicitors as to whether they require the Defendant's expert to attend trial to be cross-examined on his report. In the event that the Claimant fails to so notify the Defendant's solicitors, the Defendant's expert shall not be required to attend trial. If the Claimant requires the Defendant's expert to attend trial, then the Defendant's expert shall attend remotely.
>
> 3. By 4pm on 11 February 2021, the Claimant shall provide to the Defendant's solicitors a copy of the lease which is referred to in paragraph 29(2) of Mr Muhammad Khuram Afzal's statement dated 10 September 2021 and / or paragraph 39 of Naveed Afzal's statement dated 10 September 2021.
>
> 4. The Defendant has permission to file and serve a Counterclaim in the form attached to the witness statement of Mohammed Afzal dated 28 January 2022 by 4pm on 8 February 2022. The Defendant shall pay the relevant fee for the Counterclaim by the same date.
>
> 5. The Claimant may file and serve a Defence to the Counterclaim by 4pm on 15 February 2022, but if the Claimant chooses not to do so, the Claimant shall be deemed to defend the Counterclaim on the basis of the facts and matters pleaded in the Particulars of Claim.
>
> 6. The Order of DJ Murch dated 13 May 2021 is amended as follows:
>
> > 6.1. Paragraph 16 is amended such that, at least 3 weeks before trial, it shall be the Defendant who must serve on the Claimant a trial bundle comprising fully functioning, indexed, paginated and externally identified lever arch files not exceeding 300 pages each.

6.2. Paragraph 17 is amended such that, at least 7 clear days before the date fixed for trial, the Defendant must file the trial bundle with the Court.

7. The Defendant's solicitors shall file and serve an amended trial plan by 4pm on 11 February 2022. The trial plan shall indicate that 8 people will be in attendance at the trial.

8. This Order shall be served by the Court. Upon service by the Court, the Defendant's solicitors shall promptly send a copy of this Order to the email addresses that it holds for Mr Naveed Afzal and Mr Muhammad Khuram Shahzad Afzal. The Defendant's solicitors shall also send a copy of this Order to the Claimant at 1 and 1A Bore Street, Staffordshire, WS13 6SJ.

9. Costs in the Case."

15. By application dated 14 March 2022 and made without notice to D, C sought a stay of the proceedings for a period of 1 month in order to settle the case outside of court. Without a hearing, I dismissed the application by order dated 17 March 2022, which recorded that the reason for doing so was because the "parties have already had ample opportunity to settle the case outside court. The trial is listed for hearing to commence on 22 March 2022."

16. The trial commenced on 22 March 2022 with a time estimate of 4 days. However, again C failed to attend and was not represented such that the trial concluded on the first day. I gave an ex tempore judgment in which I found that:

"[11.] ……. Without the defendant's witness evidence being challenged I have no reason to doubt that the defendant's witnesses were honest witnesses doing their best to assist the court.

[12.] Central to the claimant's case is its version of the disputed email dated 15 December 2017. On balance, I find that version of the email is not genuine and was manipulated. I make that finding for the following primary reasons.

[13.] Firstly, that is the conclusion reached by the defendant's expert, Mr Rashid, who has over thirty years of expertise in the software and technology industry. His expertise spans the design integration and implementation of comprehensive solutions, and design and development of software products. He holds a Bachelor's degree in Computer Science and a Master's degree in Scientific computing. I find that he is a competent and respectable expert. The opinion he expresses is both reasonable and logical. Indeed, I would say that his report overall is an impressive document and the conclusions he reaches, which I accept, are based on comprehensive inspections and investigations. He gives the following detailed reasons for reaching the conclusion that he does:-

"All variations of the Ventures email have one or more issues with the coding of the message Body and/or Attachment.

All variation of the Ventures email contain lines exceeding 78 characters in Plaintext or HTML. Yet all these emails do not fully implement the IETF, RFC, 2822 and 2821 standards regarding long lines in emails. These standards dictate that long lines in excess of 78

characters should be terminated at 75 characters with an equal sign (=) present on the 76th character position, followed by a CRLF (Carriage-Return-Linefeed). The remaining part of the line should be presented on the following line.

Some of these variations of the email contain Plaintext where the user, and not the email system, has manually inserted a new line (CRLF) in the incorrect place.

Test Document [999] provides a baseline of what an email's Plaintext and HTML body should look like if it had originated from LDS' Microsoft 365 email system. Document [999] contains the correct implementation of the RFC 2822 and RFC 2821 standards regarding long lines. No variation of the Ventures email matches both the Plaintext and HTML formatting of Document [999].

The disputed email, as provided by Ventures' solicitors on 10 November 2020 is malformed and corrupt. This corruption cannot originate within the email system.

The image of the email, as provided by Ventures solicitors on 10 November 2020 has been altered from the original source.

The disputed email Document found within the Inbox email folder of karam@centurion.co.uk is located in the wrong position. It should exist surrounded by existing emails dated 14 December 2017 and 19 December 2017. Instead, this email is located between emails dated 18 September 2020 and 4 July 2021.

Seventeen months of emails are missing from the "Sent" email folder of karam@centurion.co.uk. This missing period between 25 July 2016 to 7 January 2018 overlaps with the time-period of the disputed email. From this missing period, we cannot see how the original disputed email received on 17 December 2017 was forwarded or discussed internally.

Twenty-three months of email relating to "Chohan" LDS are missing from the "Inbox" email folder to karam@centurion.co.uk. This missing period between 4 September 2018 to 27 July 2020 could have contributed to a clear history of how the disputed email dated 15 December 2017 was handled internally by Ventures.

There is no logical reason why there would be at least seven variations of the Ventures version of the disputed email, unless these versions have been manipulated.

As the Ventures email has been altered, this has meant that the amended version of that email does not appear in the right chronological in the Ventures email system and does not follow the appropriate email standards as additional wording has been added to the body of the email."

[14.] Secondly, in my judgment, it makes no commercial sense and is inherently unlikely that the defendant would voluntarily undertake fiduciary

obligations to the claimant in what, ultimately, was a commercial context. Mr Ali and Mr Chohan explained in their oral evidence that out of thirty franchised premises, twenty-five of the leases are held directly by the franchisee and five are held directly by the defendant, which then sub-lets those premises to the franchisee. Therefore, rather than holding the lease on trust for the claimant, why would the defendant not have sub-let the premises to the claimant. Indeed, the contemporary documentary evidence shows that in February 2019 the claimant was indeed requesting a sub-lease and thereafter solicitors were instructed, at least by the defendant, to draft that sub-lease, although matters were not progressed. Why would the claimant be requesting a sub-lease if it was beneficially entitled to the lease in any event? As I say, it makes no sense.

[15.] For those reasons, I dismiss the claimant's claim, which leaves the question on what legal basis is the claimant entitled to occupy the premises, if not under an express trust? On balance, I find that the claimant is in occupation pursuant to an express contractual license and for the following primary reasons:-

(i). It is the evidence of the defendant's witnesses, which I accept, that it was always the intention of the parties that the defendant would permit the claimant to occupy the premises for the purpose of the claimant trading pursuant to the franchise agreement; and

(ii). It makes no commercial sense that the defendant would acquire a long lease of the Premises if the claimant's occupation was not linked to the continuation of the franchise agreement. Mr Ali and Mr Chohan explained in their oral evidence the importance to their business model of being able to retain some degree of control over the franchise premises, in order to protect the reputation and integrity of the brand, by allowing the business to continue at those premises if the franchisee was unable to do so for whatever reason. That was why some flagship premises such as those situated in the Bull Ring were leased directly by the defendant and then sub-let to the franchisee. However, even where the premises were leased directly by the franchisee, the standard non-negotiable franchise agreement, a copy of which is included in the hearing bundle, gave the defendant the option upon termination of the franchise agreement to acquire the leasehold interest.

[16.] If I am wrong about there being an express contractual license, I would have decided in the alternative that such a license was implied as being ancillary to the franchise agreement and in circumstances where it is not disputed that at the material times the defendant was the franchisor and had the benefit of the lease of the Premises, whilst the claimant was the franchisee and in need of the Premises. In the absence of any trust or sub-lease then the relationship of licensor and licensee provides the necessary and appropriate legal framework for the claimant's occupation of the premises.

[17.] In conclusion, I dismiss the claimant's claim and grant the relief sought in the defendant's counterclaim."

17. I then made the following order:

"UPON the Trial of the Claimant's Claim and Defendant's Counterclaim

AND UPON the Defendant's application for relief from sanction dated 21 March 2022

AND UPON hearing from Counsel for the Defendant and the Claimant neither appearing nor being represented

IT IS ORDERED:

1. The Defendant is granted relief from sanction in relation to the form of the statement of truth on the Defendant's expert report.

2. The Claim is dismissed.

3. Judgment for the Defendant on the Counterclaim. Accordingly, it is declared that:

3.1. The Claimant occupied the Premises at 1 and 1A Bore Street, Staffordshire WS13 6SJ ("the Premises") by virtue of a contractual licence granted by the Defendant to the Claimant.

3.2. The Claimant's right to occupy the Premises has been terminated by the termination of the Franchise Agreement.

4. The Claimant must vacate the Premises no later than 4pm on 19 April 2022.

5. The Claimant shall pay the Defendant's costs of the Claim and the Counterclaim to be the subject of detailed assessment on the indemnity basis if not agreed.

6. The Claimant shall make an interim payment on account of the Defendant's costs in the sum of £79,380. Such payment to be made by 4pm on 5 April 2022."

18. At a meeting held on 13 April 2022, it was resolved that Mr Barton and Ms Ballinger, who were C's nominees, be appointed liquidators of C by way of a creditors' voluntary liquidation ("***CVL***"). D, as a creditor of C, was represented at that meeting by an Insolvency Practitioner, Gareth Wilcox, who did not object to those appointments.

19. On 12 May 2022, D applied for non-party costs orders against the Third Parties, who by order dated 14 June 2022 were added as parties to these proceedings for the purposes of costs only pursuant to CPR r.46.2 (1) and in order to give them a reasonable opportunity to attend the hearing of D's application.

Legal Framework

20. Section 51 of the 1981 Act provides:

"(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) the civil division of the Court of Appeal;

(b) the High Court;

(ba) the family court; and

(c) the county court,

shall be in the discretion of the court.

(2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings ….

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

21. In ***Aiden Shipping Co Ltd v Interbulk Ltd*** [1986] 1 AC 965, the House of Lords held that there was no basis for implying into section 51 of the 1981 Act a limitation to the effect that a costs order could only be made against a party. Lord Goff said at 975 that:

> "It is, I consider, important to remember that section 51(1) of the Act of 1981 is concerned with the *jurisdiction* of the court to make orders as to costs. Furthermore, it is not to be forgotten that the jurisdiction conferred by the subsection is expressed to be subject to rules of court, as was the power conferred by section 5 of the Act of 1890. It is therefore open to the rule-making authority (now the Supreme Court Rule Committee) to make rules which control the exercise of the court's jurisdiction under section 51(1). In these circumstances, it is not surprising to find the jurisdiction conferred under section 51(1), like its predecessors, to be expressed in wide terms. The subsection simply provides that "the court shall have full power to determine by *whom* **. . .** the costs are to be paid." Such a provision is consistent with a policy under which jurisdiction to exercise the relevant discretionary power is expressed in wide terms, thus ensuring that the court has, so far as possible, freedom of action, leaving it to the rule-making authority to control the exercise of discretion (if it thinks it right to do so) by the making of rules of court, and to the appellate courts to a establish principles upon which the discretionary power may, within the framework of the statute and the applicable rules of court, be exercised. Such a policy appears to me, I must confess, to be entirely sensible. It comes therefore as something of a surprise to discover that it has been suggested that any limitation should be held to be *implied* into the statutory provision which confers the relevant jurisdiction."

22. That power is now enshrined in CPR r.46.2, which establishes a procedural framework for determining such applications, although the rule-making authority did not consider it right to seek to control the exercise of discretion. That said, the appellate courts have sought to establish guideline principles upon which the discretionary power may be exercised. In ***Symphony Group v Hodgson*** [1994] QB 179, Balcombe LJ, in providing general guidance upon the exercise of the discretion to make a non-party costs order, said at pp. 192 - 194:

> "In my judgment the following are material considerations to be taken into account, although I do not suggest that there may not be others which are relevant.
>
> (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. Hewthorn & 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 Ford (a firm) [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 [1993] 3 WLR 830 at 843 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."

23. Further, and more recently, in ***Goknur Gida Maddeleri Enerji Imalat Ithalat Ihracat Ticaret Ve Sanati AS v Aytacli*** [2021] EWCA Civ 1037 Coulson LJ said this in the context of the potential for a director/shareholder being made subject to a non-party costs order:

"**The Controlling/Funding Director or Shareholder of an Insolvent Company**

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

…….

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

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

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

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

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

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

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

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

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

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

24. D does not seek to argue that the Third Parties were seeking to benefit personally from C's pursuit of the litigation. However, D does argue that justice requires that the Third Parties should be subject to non-party costs orders in that they were guilty of serious misconduct by:

a. pursuing a claim based on fabricated documentary evidence; and/or

b. failing to (i) instruct C's expert to prepare a joint statement, (ii) attend the PTR, (iii) notify D that they wished to challenge D's expert evidence at trial, and (iv) attend the trial.

Fabricated documentary evidence

Submissions on behalf of D

25. In ***Deutsche Bank AG v Sebastian Holdings Inc*** [2016] EWCA Civ 23, summarising ***Aiden Shipping***, the Court of Appeal confirmed that the procedure to be adopted for considering a non-party costs order is summary in nature based on the evidence given and the facts found at trial [para 17]:

> "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 LJJ 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."

26. As confirmed by ***Deutsche Bank***, this Court should adopt a summary procedure in assessing whether to make a non-party costs order, based on the evidence at trial and the Court's findings. It is entirely just and fair for the Third Parties to be bound by the evidence given at trial and the factual findings of the Court when:

    a. The Third Parties had an intimate connection with the proceedings. As confirmed by their latest witness statements dated 20 July 2022, both TP1 and TP2 were inherently involved in the pursuit of the claim, with TP2 taking the lead in the daily running of the litigation. They were also the sole factual witnesses for C, including on the issue of whether the disputed email had been manipulated;

    b. D's expert report was found by the Court to be competent, authoritative, and set out in persuasive detail reasons for the conclusion that C's version of the email had been manipulated. The Third Parties were fully aware of this report;

    c. The Court scrutinised Ds' expert evidence and made a considered finding that C's version of the email of 15 December 2017 was not genuine and had been manipulated; and

    d. It is procedurally wrong and improper for the Third Parties (through their witness statements very recently served in response to this application) to attempt to go behind the Court's findings by seeking to re-introduce expert evidence which (i) the Court has already refused permission to be adduced;

(ii) was not made subject to an expert joint statement; (iii) was not cross-examined upon at trial.

27. This is a claim which was brought in bad faith and with impropriety. The central finding of the Court was that C's version of the email was not genuine and had been manipulated. This finding necessarily implicates the Third Parties. The active involvement of the Third Parties in doctoring the email, and their awareness that the email was manipulated, are highlighted by two emails of 4 September 2020 sent by TP1 to TP2 at 11:18 and 11:23 (found at p.70 and 73 of Mr Rashid's report respectively and discussed in paras 92, 102-109, and 110-117 of Mr Rashid's report). Thus:

    a. On 4 September 2020 at 11:18 hrs (p.70 of Mr Rashid's report), TP1 sent an e-mail to TP2 forwarding the disputed e-mail and which had been altered with the addition of the following phrases –

        "even though the lease is being secured on behalf of you."

        ". So I can forward asap and it's too late to change the name on the lease but we can always make this change after in to your name."

    b. Five minutes later, the disputed e-mail at 11:23 was amended again in another e-mail from TP1 to TP2 (p.73 of Mr Rashid's report). This time the wording had been changed to replace the words "on behalf of you" to "on your behalf." In addition, the final paragraph had been changed from two sentences to one such that there was no longer a full-stop before the word 'so'. Furthermore, the phrase 'so I can forward asap' had been changed to: 'so I can pay'.

    It is of note that only two weeks after these email communications between the Third Parties on 4 September 2020, the Claimant's solicitors served a 'Supplementary Letter Before Claim' dated 17 September 2020 referring to the email of 15 December 2017 and alleging that the Lease was held by way of an express trust.

28. Further, given the Court's finding and the evidence contained in D's expert report (including the emails referred to above), it is evident that both TP1 and TP2 gave false evidence in their witness statements for trial which were both signed with a statement of truth. Thus:

    a. TP1 falsely stated that (i) he had received C's (manipulated) version of the email from D on 15 December 2017 (para 20 of his statement dated 10 September 2021), (ii) the first he knew of D's version of the email was when a copy was disclosed as part of the litigation (para 21), and (iii) he "never changed or altered or adapted the text of the emails" (para 22); and

    b. TP2 falsely stated that (i) he had no knowledge of how C's version of the email came to be created (para 27 of his statement dated 10 September 2021) and (ii) that neither his brother nor himself had altered the email (para 29).

29. There is a clear causative link between the Third Parties' impropriety and the expenditure of costs. The claim was fundamentally based on the manipulated email, which resulted in expensive litigation including IT expert evidence. In light of these

factors, it is submitted that it is just and proper for a non-party costs order to be made for the entirety of D's costs of the claim and counterclaim.

Submissions on behalf of the Third Parties

Insolvency as a class remedy

30. This has important policy consequences. At the heart of the statutory insolvency regime is the principle that this is a collective remedy for the whole class of creditors and none is now permitted to steal a march on the others (whether through the front door or the back door). Further, the liquidator (through the strength of the officeholder duties imposed on him by statute) is charged with investigating all avenues for a return to creditors.

31. D is contending that the Third Parties were misfeasant directors (de iure in TP1's case and (it is said) de facto in TP2's case) who breached their fiduciary duty to promote the success of C by causing it to engage in expensive litigation, which was doomed because they were causing the company to engage in it in by fundamental reliance on a key document which they knew to be false. D has on its case (by its application and evidence in support) put all the links in the chain for a compelling summary-remedy claim by the liquidator under s.212 Insolvency Act 1986.

32. Yet despite its vote for the CVL, D seeks to incapacitate the officeholder and thus cheat the other creditors. It seeks to obtain findings on the very same subject matter as would fall under a s.212 claim and it seeks to very substantially deplete any personal resources of the Third Parties before an officeholder has had chance to investigate them, to the obvious detriment of the class of creditors. Because of the coach and horses traverse of the statutory regime, the court cannot sanction D's application.

No permitted back door entry when the front door remains open

33. There is direct and binding authority here. In ***Oriakhel v Vickers*** [2008] EWCA Civ 748 the defendant argued that it was facing a dishonest insurance claim arising out of a road traffic accident. The claim was dismissed as a fraud at trial. The defendant then joined the key witness for the purposes of an application under CPR r.46.2. The application failed. The Court of Appeal said it was fatal that the defendant could have come out and sued the witness (and could still) for his part in a dishonest conspiracy and success on that claim would recover the costs.

34. Likewise D is at liberty to commence a claim against the Third Parties where matters could be tested with the protection of the rigour of disclosure processes. D instead is seeking to bypass all such scrutiny by seeking to tempt the trial court on a summary discretionary procedure where the court does not even have the advantage of seeing the matters tested at trial (because it proceeded in their absence).

35. As the Court of Appeal noted in ***Oriakhel***, from as far back as the seminal guidance of Balcombe LJ in ***Symphony Group***:

> "(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."

36. Here, as in ***Oriakhel***, there was very late warning to the third party of what was being contemplated. This was regarded as pernicious by Jacob LJ giving the lead judgment:

> "[21] When asked why notice was not given directly to Mr Khan and earlier, Mr Laughland said it was so as not to be intimidatory. But indirect notice would be just as intimidatory as direct notice, if not more so because of its insidious nature. And whilst there are cases where the giving of notice is not necessary or can fairly be said to be unjustly intimidatory, in a case where the intention is to allege fair and square that a man is a liar, a perjurer, and a dishonest conspirator and fraudster, there is every reason in fairness to warn him (Balcombe LJ's third proposition)."

The failure to take the primary route (sitting back to later seek to take the secondary, short-cut route instead) was regarded as fatal [31]:

> "(a) ……If he had been made a Defendant to the counterclaim, he would had a full opportunity of taking legal advice, adducing such evidence and documents as might support his defence and indeed considering his own position.
>
> (b) Even now it is conceded, rightly, by Mr Macleod-James for Mr Khan that Groupama are free to sue Mr Khan for his part in the dishonest conspiracy and that if they succeed, the costs of successfully defending the primary claim would be recoverable damages flowing from the conspiracy…
>
> (c) Mr Khan was not given notice of the claim at any time when he could have taken legal advice and, if necessary, deployed further material by way of his "defence" and, if so advised, applying to be joined as a party (see Balcombe LJ's third proposition).

37. Arden LJ added;

> "[40] The judge made some extremely serious findings against Mr Khan. Nothing in this judgment is intended to detract from that point. However, if Mr Khan is to be brought to book for his conduct it must be in accordance with the law."

<u>Analysis and conclusion</u>

38. As submitted on behalf of D, there have been many authorities dealing with applications for non-party costs orders against directors of insolvent companies, but none of those authorities mention the potential for such orders contravening the *pari passu* principle enshrined in the law of insolvency. It was conceded on behalf of the Third Parties that corporate insolvency is not a bar to exercising the discretion to make a non-party costs order against a director, but it was submitted that the distinguishing factor in the present case is that C is in voluntary liquidation by way of a CVL voted for by D, rather than C being in compulsory liquidation. However, I am not persuaded that the liquidation of C is in itself a relevant consideration that weighs in the balance against making a non-party costs order and for the following primary reasons:

a. No claim has been advanced by the liquidator of C against the Third Parties for alleged misfeasance;

b. The present application is a separate claim being made against the Third Parties, not against C, and which, therefore, falls outside the insolvency regime governing the affairs of C; and

c. A CVL is initiated by way of a resolution passed by the members of the company. It is not initiated by the creditors, but once in place operates under the qualified control of the creditors, who are entitled to nominate a person to be the liquidator and set up a liquidation committee. Therefore, it is not correct to say that D chose "to vote" for C's liquidation. Rather, at the creditors' meeting on 13 April 2022, D simply chose not to nominate some other person to act as liquidator instead of the persons nominated by C to act and following the passing of the member's resolution to wind-up C.

39. Nor do I accept that ***Oriakhel*** is binding authority upon me that D is not permitted to pursue non-party costs orders against the Third Parties when D had a cause of action against the Third Parties such that they could and should have been joined as parties to the original proceedings.

40. In ***Dymocks Franchise Systems (NSW) Pty Ltd v Todd*** [2004] UKPC 39 Lord Brown of Eaton-under-Heywood, giving the opinion of the Privy Council, considered the ***Symphony Group*** guidelines and summarised the main principles to be applied in exercise of the court's discretion to make a third party costs order in the following way (at [25] with my emphasis added):

> "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. <u>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</u>."

41. Ultimately, I have a wide discretion to make a non-party costs order. The exercise of that discretion is fact specific and having regard to the particular circumstances of the case, although those circumstances must be outside the ordinary run of cases to justify the making of such an order.

42. The "…..appellate courts have struggled to identify principles applicable across the broad exercise of the jurisdiction to make a costs order against a non-party, save at the very highest level of generality" – Lord Briggs (at [28]) in ***XYZ v Travelers Insurance Co Ltd*** [2019] UKSC 48. However, the appellate courts have made it clear that there must be a sufficiently close connection between the non-party and the main action to justify the court treating them as if they were a party to the main action. In particular, such a close connection is required to justify adopting a

summary costs procedure and to avoid any injustice arising from the trial judge's findings of fact being admissible on the costs application against the non-party.

43. In my judgment the facts in ***Oriakhel*** can be distinguished from the facts in the present case. In ***Oriakhel*** the non-party was involved in the proceedings purely as a witness, who neither funded nor controlled the proceedings. Consequently, Jacob LJ reasoned that [31]:

> "(d) The findings in the primary claim are not admissible against Mr Khan pursuant to Balcombe LJ's sixth point. Where a non-party effectively has controlled the primary litigation (as for instance in ***Globe*** or ***Dymocks***) it is, in the language of estoppel, a "privy" and will be bound by the result. But that is not the case here. One cannot say that Mr Khan had such a close connection or "proximity" (to use Morritt LJ's word in ***Globe***) with the primary claim that he must be bound by the result. He neither funded it nor controlled it – it was not his claim even though, if the findings are correct, he stood to benefit from it. True it is that in the primary judgment Mr Khan was found to be a co-conspirator and a liar but neither of these matters taken separately or together are enough to bind him. Mr Khan must be free to contend that he was not a conspirator and adduce evidence to support his own defence."

44. In the present case, the Third Parties were not merely witnesses but were closely connected with the main action in that they controlled the litigation and as evidenced by the following:

    a. TP1 was the sole director of C;

    b. TP2 signed on behalf of C the disclosure certificate dated 28 July 2021 and the application for a stay dated 14 March 2022 in his stated capacity as Head of Operations;

    c. In their witness statements served in response to this application the Third Parties confirmed that:

        i. TP2 took responsibility for the day-to-day running of C, but no major decisions were made without discussion with TP1, who had the final say;

        ii. TP2 took the lead in running the main action, although again any major decisions regarding the litigation were discussed with and agreed by TP1; and

        iii. The Third Parties were required at short notice to travel to a remote part of Pakistan for family reasons and where they would be for the majority of December 2021 and January 2022. As they would not be contactable during this time, a Zoom call was arranged with Mr Summerfield prior to their departure overseas with a view to agreeing how matters should be dealt with in the Third Parties' absence. In other words, in the absence of the Third Parties, there was no other person able to give instruction to STS regarding the conduct of the main action.

45. Therefore, in my judgment, joinder as a party to the proceedings was not strictly necessary to give the Third Parties the protections identified by Balcombe LJ in

Symphony Group and conferred by the court rules - such as to the framing of the issues by way of statements of case, disclosure of relevant documents, service of witness evidence addressing those issues and the opportunity to make offers of settlement. That said, and in order to be given the opportunity to take advantage of those protections, it seems to me that the issues to be determined at trial must have been properly identified in advance before it can be said that the Third Parties are to be bound by the result without suffering any injustice.

46. D seeks to argue that the Third Parties are bound by implication and by reference to the contents of Mr Rashid's report, which was found at trial to be an impressive document, that they conspired together to manipulate the disputed email. That is essentially a finding of dishonesty/fraud. It is well established by higher authority that any allegation of dishonesty/fraud must be pleaded clearly, unequivocally and with sufficient particularity so that the person against whom the allegation is made understands the case they are required to meet. That requirement was reflected in Chapter 10 (Statements of case) of the Chancery Guide 2016, which was the version of the guide applicable at the time of the main action and which provided:

> "**SETTING OUT ALLEGATIONS OF FRAUD**
>
> 10.1 ……, a party must set out in any statement of case:
>
> - full particulars of any allegation of fraud, dishonesty, malice or illegality; and
>
> - where any inference of fraud or dishonesty is alleged, the facts on the basis of which the inference is alleged.
>
> 10.2 A party should not set out allegations of fraud or dishonesty unless there is credible material to support the contentions made. Setting out such matters without such material being available may result in the particular allegations being struck out and may result in wasted costs orders being made against the legal advisers responsible."

47. The Defence dated 25 November 2020 does not make any allegation of fraud or dishonesty against the Third Parties. It was submitted on behalf of D that there was no credible material to support such an allegation until the report of Mr Rashid became available, but by then it was too late to seek to amend the Defence. However, the report of Mr Rashid is dated 3 December 2021 some 2 months prior to the PTR hearing and almost 4 months before the trial. Indeed, D made an application on 28 January 2022 for permission to bring the Counterclaim, which application was listed to be heard at the PTR hearing.

48. It is striking that, on 18 January 2022, D's solicitors wrote to C's then solicitors as follows:

> "In paragraph 7.3 of the Reply dated 23 December 2020, your clients made an allegation of dishonesty against our clients concerning the disputed e-mail from 15 December 2017.
>
> As you are aware in *Yuanda (UK) Co Lid v Multiplex Construction Europe Ltd and another* [2020] EWHC 468 (TCC) at [31] and [32] the Court dealt with the specific rules concerning fraud, which must be pleaded. A claim alleging fraud may not be made unless the following matters are satisfied:

(1) There must have been some material fact that '*tilts the balance and justifies an inference of dishonesty'*: *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), [2015] All ER (D) 273 (Oct) at [20]) per Flaux J (as he then was).

(2) The Claimant must have given clear instructions to plead a claim in fraud and there must have been '*reasonably credible material*' to support the allegation: *Medcalf v Mardell* [2002] UKHL 27, [2002] 3 All ER 721, [2003] 1AC 120 (at [22]) per Lord Bingham.

(3) The claimant must be able to plead primary facts ('particulars') from which a claim involving dishonesty may be proven, as the court will not allow a party to prove a claim in fraud other than on the basis of those primary facts: *Three Rivers DC v Bank of England* [2000] 3 All ER 1, [2003] 2 AC 1 (at [55], [160], [186]).

Further in paragraph 32 of *Yuanda (UK)* it made reference to the specific provisions both in the Bar Standards Board Handbook and the Solicitors Regulation Authority Code of Conduct which govern the professional obligations of both barristers and solicitors so far as pleading fraud is concerned. These substantially reproduce the guidance given in *Medcalf.*

We refer to the expert's report of Mr Rashid on behalf of our clients which sets out in detail why your client's version of the e-mail has been fabricated. Your clients expert appeared to have no real answer to the points raised at the Zoom meeting on 17 December between the experts. Since then, he has chosen to disregard his duties as an expert by his failure to agreeing a joint statement pursuant to paragraph 3 of the Order of Judge Murch dated 13 May. Our clients rights are entirely reserved on this point.

Our position is that there was no credible material for the allegation of dishonesty being made against our clients and in breach of the requirements set out above. It is difficult to comprehend why your firm and Counsel could make the serious allegation of dishonesty in accordance with your professional obligations.

If the dishonesty allegation is not withdrawn on or before the Pre- Trial review on 4 February, our clients reserve the right to seek indemnity costs against your clients and/or an application for costs under s51 of the Supreme Court Act 1981 against Naveed and Khuram Afzal of your clients if the Claimant does not meet its obligation to pay any cost orders. We trust that this will not be necessary."

Nowhere in this letter is there any express reference to an allegation being made or a finding being sought that the Third Parties conspired together to fabricate the disputed email.

49. In conclusion, and in all the circumstances, I am not satisfied that it is just to exercise my discretion and make the Third Parties subject to non-party costs orders on the ground that they conspired together to fabricate the disputed email and for the following primary reasons:

    a. The Third Parties controlled and were closely connected to the main action such that it was not strictly necessary for them to be joined as parties to the proceedings in order to be bound by the result;

b. Nevertheless, in order to be bound by a finding that the Third Parties were dishonest co-conspirators they must have been given the opportunity to consider their personal positions, deny the allegation and put in evidence to support their own defence. They were not given that opportunity, since at no time was that allegation specifically pleaded even when D made an application for permission to bring the Counterclaim and when in possession of Mr Rashid's report;

c. The Third Parties were not even given notice of the possibility that D may apply for costs against them personally because of an allegation/finding that they conspired together to fabricate the disputed email. The thrust of D's solicitor's letter dated 18 January 2022 was that D may apply for a non-party costs order if C did not withdraw its pleaded allegation of dishonesty against D and in the absence of any credible material to support that allegation;

d. It is internally inconsistent for D to seek to criticise C for having pleaded dishonesty against D in the main action in the absence of credible material, but then having come into possession of credible material by way of Mr Rashid's report not to take steps to plead an allegation that the Third Parties conspired together to fabricate the disputed email, if that was the specific finding that D was seeking at trial; and

e. Whilst it is true that I found at trial that C's version of the email was not genuine and had been manipulated, that is not enough on a summary costs procedure to bind the Third Parties by implication to a finding that they conspired together to fabricate the disputed email in circumstances where no such allegation of fraud was ever pleaded in the main action or indeed even put to the Third Parties in correspondence to give them an opportunity to put in evidence in their own defence to such an allegation. The Third Parties' witness statements for trial were prepared before they had been served with the report of Mr Rashid, which for the first time particularised and evidenced the Third Parties having allegedly conspired together on 4 September 2020 to manipulate the disputed email.

Litigation misconduct

Submissions on behalf of D

50. The Third Parties failed to (i) instruct C's expert to prepare a joint statement, (ii) attend the PTR, (iii) notify D that it wished to challenge D's expert evidence at trial, (iv) attend trial. Rather than discontinuing the claim, the Third Parties instead allowed the claim to proceed to trial (with all the associated costs) and took steps to place C in a CVL.

51. The Third Parties' written evidence filed in response to this application (including selective and substantially redacted communications with their solicitor) does not provide any reasonable excuse for these failings. Further, the claim that TP2 gave clear instructions to Mr Summerfield prior to the Third Parties travelling to Pakistan to proceed with the joint statement and yet Mr Summerfield failed to instruct the expert to do so lacks credibility. Indeed, the email of 17 December 2021 from Mr Summerfield to TP2 [at p.24 of the exhibits to TP1's witness statement] contradicts the assertion that Mr Summerfield had been told that the Third Parties were uncontactable in Pakistan as alleged and it is noticeable from the same email that

there appears to have been a discussion between Mr Summerfield and C's expert about what occurred during the expert meeting which preceded the expert subsequently not being given instructions to produce the joint statement. In any event, any such arguments and evidence as are now made by the Third Parties should properly have been presented before the Court at the time when the Court's determinations were made.

Submissions on behalf of the Third Parties

52. In their written evidence the Third Parties have explained that:

    a. Prior to travelling to Pakistan they believed that clear instructions had been given to Mr Summerfield to progress the claim by arranging for the experts to meet and prepare a joint statement. It was only on returning to the UK that they became aware of the order removing STS as solicitors acting for C in the main action;

    b. On returning to the UK on 24 January 2022, the Third Parties also discovered that their maternal uncle had been diagnosed with terminal cancer. When the uncle subsequently died on 11 February 2022 the Third Parties suffered with depression such that they were unable to run C's business including the litigation. It was only by March 2022 that the Third Parties' mental health had improved so that they felt able to deal with the litigation, but by then they had missed the PTR hearing at which it was ordered that C was unable to rely upon expert evidence; and

    c. The Third Parties mistakenly believed that without legal representation they could not attend the trial.

53. This Court cannot reject that evidence, including as to the stated beliefs of the Third Parties, without that evidence being tested by way of cross examination.

54. Finally and come what may, the application against TP2 as brought rests solely on the throwaway assertion that he was a de facto or shadow director. Such laxity is unforgiveable. In ***Gemma Ltd v Davies*** [2008] BCC 812, it was reiterated that in order to show that a person was a de facto director (so as to fix them with liability under section 212 of the Insolvency Act 1986) the following guidance applied:

    a. The applicant must plead and prove that the respondent undertook functions in relation to the company which could properly be discharged only by a director;

    b. Holding out is not a necessary characteristic, though it may be important evidence to support the conclusion;

    c. Holding out is not a sufficient characteristic. What matters is what the person did;

    d. The person must have participated in directing the affairs of the company, and not in some subordinate role;

    e. The person in question must be shown to have assumed the status and functions of a director and to have exercised real influence in the corporate governance; and

f. If it is unclear whether the acts are referable to an assumed directorship or some other capacity then the respondent is entitled to the benefit of the doubt.

By no stretch of the imagination can D's case here be seen to meet these requirements.

Analysis and conclusion

55. At the PTR hearing, I rescinded permission for C to rely upon expert evidence. The order expressly recorded my reason for doing so as being the failure to give instructions to C's expert to prepare the joint statement. That finding was made based upon the evidence then before me, which included:

    a. Emails from C's expert (dated 10 and 11 January 2022) to D's expert confirming that he was unable to progress the joint statement as he was without instructions and despite C being aware of the urgency of the matter; and

    b. C's solicitor's application notice dated 10 January 2022 to come off the court record because inter alia he was without instructions and had been for over 4 weeks.

    No application was made to set aside/appeal that order. The Third Parties cannot in my judgment now seek to go behind that finding by adducing evidence that could and should have been put before the court at the PTR hearing.

56. The Third Parties assert that they did not attend the PTR hearing because neither was in a mental state to do so. However, the Third Parties have not provided any supporting medical evidence such that I cannot be satisfied that the Third Parties had good reason for not attending the PTR hearing.

57. The Third Parties claim that they did not attend the trial because they mistakenly believed that without legal representation they had no standing to appear in court on behalf of C. No explanation is given for the basis of that surprising belief, but in any event that stated belief is wholly inconsistent with the fact that on 14 March 2022 the Third Parties felt able without legal representation to make an application to the Court on behalf of C seeking an order that proceedings be stayed for a period of 1 month for settlement negotiations.

58. I do not accept the submission made on behalf of the Third Parties that I must simply accept without question or scrutiny what the Third Parties have stated in their written evidence served in response to this application simply because that evidence has not been tested by way of cross examination. Ultimately, and as confirmed in ***Deutsche Bank***, "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."

59. In my assessment, having brought the claim in October 2020, the Third Parties had effectively abandoned the proceedings by 13 December 2022 (being 4 weeks prior to C's solicitor's application to come off the court record) and as evidenced by the

fact that the Third Parties failed thereafter without good reason to (i) give instructions to the expert to prepare the joint statement in breach of the case management order, (ii) attend the PTR hearing and (iii) attend the trial. I am reinforced in that view by the fact that the transcript of the first meeting of C's creditors on 13 April 2022 records the following exchanges:

> Gareth Wilcox – "….what drove your decision to abandon the litigation, when you did?"
>
> TP1 – "Basically, no income, we couldn't afford it…."
>
> Gareth Wilcox – "Okay, so in terms of the litigation, you abandoned the litigation because effectively the company trading as a dessert shop couldn't fund the litigation anymore. Fine, had you taken any professional advice at that point and did it differ from any advice as regards the prospects of success that you had previously or was it just literally driven by a lack of funding?"
>
> ……
>
> TP1 – "Obviously [STS] were always saying it was going to be a success and making us believe and at the end we couldn't afford to pay his fees and then just told him that we wanted to finish it off and we didn't want to take it any further."

60. In his written evidence served in response to this application, TP1 sought to distance himself from this part of the transcript by claiming that he could not recall making these comments, and to the extent that he did, they were not accurate. However, it is striking in my judgment that:

    a. TP1 was the appointed convenor/chairperson for the meeting and therefore would likely have had to approve the transcript;

    b. Earlier in his written evidence TP1 stated that –

        > "It is fair to say that, in about December 2021, [C] was in a worrying financial position. The business itself was struggling with little money coming in due to a downturn in profits post-COVID and, moreover, the litigation had cost approximately £130,000 in fees. In December 2021, [C] had a number of invoices outstanding with STS. We had raised queries regarding the time charged…"; and

    c. In their application notice to come off the court record, STS confirmed that "fees and disbursements" were unpaid.

    The weight of the evidence points clearly to the Third Parties abandoning the main action because C had run out of money to continue the litigation.

61. CPR r.1.1 provides that the overriding objective is to deal with cases justly and at proportionate cost, which includes so far as is practicable (i) saving expense, (ii) ensuring the case is dealt with expeditiously and fairly, (iii) allotting an appropriate share of the court's resources and ensuring compliance with court orders. CPR r.1.3 provides that the parties are required to help the court to further the overriding objective. The Third Parties by their own admissions controlled the litigation on

behalf of C. Having chosen to initiate the proceedings, the Third Parties then chose, without formally discontinuing, to disengage at a critical stage of the proceedings as the trial date fast approached. Such conduct was wholly contrary to the overriding objective and no doubt directly caused D needlessly to spend significant time and money in preparing for and attending both the PTR and the trial of a case that the Third Parties initiated but no longer had any intention of contesting. Indeed, the court allocated 4 days in total to the trial, most of which time was not needed and ultimately lost as a result of the Third Parties' decision not to participate.

62. TP2 seeks to argue that he cannot and should not be made the subject of a non-party costs order, since he was not a director of C and conducted the litigation on behalf of C solely in his capacity as an employee. However, I accept the submission made on behalf of D that non-party costs orders are not limited to directors of insolvent companies. Indeed, in ***Goknur***, Coulson LJ's guidance was given expressly in the context of a controlling/funding director or shareholder of an insolvent company.

63. In the judgment I gave at trial I found (at [9]) that the Third Parties "are brothers and co-owners of [C], with [TP1] being the sole director of [C]." I made that finding based upon the written evidence of the Third Parties served for the trial, which made repeated and extensive references to C being the corporate vehicle through which they operated their joint venture. I do not propose to quote each and every reference, but by way of examples:

    a. In his first witness statement dated 10 September 2021, TP1 stated that "[7]….In about January 2017, Naveed and I really started to get thinking about whether we could run our own branch of a Little Dessert Shop as part of the family business…… [23] I didn't want personal risk exposure for our Little Dessert Shop project, and nor did my brother. I mean, who on earth uses personal names for business purposes? That's exactly the response we had received from our accountants and financial advisors at the time. So on 12th December 2017, we incorporated [C] as our corporate vehicle for the project."

    b. In his first witness statement dated 10 September 2021, TP2 stated that "[4]…….[C] was the corporate vehicle through which my brother and I pursued a franchise to operate a shop at [the Premises]…… [23] Towards the end of 2017, my brother and I started thinking about how we would structure our new franchise business…… I thought it made sense to use a new company, for obvious reasons. I did not want personal (financial) exposure in the new business, and so a corporate vehicle was essential….. I thought it would be administratively easier to use a new corporate entity. My brother agreed."

    That finding has not been appealed.

64. In my judgment, it is fair and just to make the Third Parties subject to non-party costs orders in relation to the costs incurred by D in the main action for the period from 13 December 2021 up to and including the trial and having regard to all the circumstances of the case including in particular:

    a. The Third Parties controlled C;

    b. In exercising that control, the Third Parties chose to initiate and pursue the main action against D;

c. As a result of their close connection to the main action, the Third Parties were given the opportunity, which they took, to frame the issues by way of statements of case, to disclose relevant documents, and to serve both lay and expert evidence;

d. The Third Parties, however, then chose in the run up to the trial to abandon the litigation without giving any proper notice of that decision to the Court or to D thereby causing both the Court and D needlessly to spend considerable time and resources on completing a litigation process initiated by the Third Parties including having to deal with the PTR and the trial;

e. At trial, and based upon the Third Parties' own written evidence, I found that the Third Parties co-owned C. As a result of their close connection to the main action, the Third Parties are bound by that finding for the purposes of this application; and

f. Whilst particular caution should be exercised before making a director/owner of a company liable for costs in relation to the activities of the company, the Third Parties were guilty of serious litigation misconduct in the exercise of their control of the litigation, which was exceptional and well outside the ordinary run of cases, such that they should not be able to avoid personal liability for their actions/omissions by seeking to hide behind the corporate identity of C.

Overall conclusion

65. The Third Parties shall jointly and severally pay D's costs of the main action for the period from 13 December 2021 up to and including the trial.