DON'T LOOK NOW: Non-party costs orders and *Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Ticaret Ve Sanayi AS v Aytacli* [2021] EWCA Civ 1037

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As Lord Justice Coulson warned at the start of his judgment in the recent Court of Appeal decision in *Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Ticaret Ve Sanayi AS v Aytacli* [2021] EWCA Civ 1037:

"For those who believe that most civil litigation does not end up being about the costs that were incurred in pursuing that same litigation in the first place, look away now."

For practitioners involved in litigation, recovering costs can often be a stumbling block in any successful mediation. Similarly, at the conclusion of trial, successful parties can be frustrated by their inability to recover their legal costs from the losing party. The problem is exacerbated in litigation involving insolvent companies. Therefore, the solution many practitioners deploy is to obtain a non-party costs order.

Background to non-party costs orders

The power to award costs against a non-party is derived from section 51 of the Senior Courts Act 1981 which grants the court the power to *"determine by whom and to what extent the costs are to be paid"*.

Following *Aiden Shipping v Interbulk Ltd (The Vimeira) (No 2)* [1986] 1 AC 965, the court has recognised that the costs of litigation can be ordered to be paid by a person who was not a party to those proceedings. However, such orders are exceptional and the courts are urged to be cautious in making such an order. Practitioners are reminded of CPR r. 46.2 as to the procedure to be adopted when considering making a non-party costs order.

The courts have given a series of guidelines suggested as to when a non-party costs order should be made in a range of cases, including *Symphony Group Plc v Hodgson* [1994] QB 179 and *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (Costs)* [2004] UKPC 39.

In summary, non-party costs orders are exceptional and the question is whether in all the circumstances it is just to make the order. In making that assessment, the court will examine a range of factors, in particular, what connection the non-party has to the proceedings and whether the non-party controls or benefits from the proceedings such that they are the *"real party to the litigation"* or if there has been some form of impropriety or bad faith on the part of the non-party.

The *Aytacli* decision

In *Aytacli*, Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Ticaret Ve Sanayi AS (**"Goknur"**) sought a non-party costs order against Mr Aytacli, a director and shareholder of an insolvent company which had been involved in litigation with Goknur.

Mr Aytacli had controlled and funded the company's conduct of litigation with Goknur. Therefore, at first instance, Goknur sought a non-party costs order against Mr Aytacli, which the court refused to grant.

On appeal, the issue that the Court of Appeal was asked to determine was in what circumstances should *"a director and shareholder of an insolvent company […] be personally liable for some or all of that company's costs liabilities incurred in unsuccessful litigation […] The particular question is whether it is enough to show that the director controlled and funded the company's conduct of the litigation or whether, in order for a s.51 order to be made, it is also necessary to show either that he or she benefited (or sought to benefit) personally from that litigation, or acted in bad faith or was responsible for impropriety of some kind".*

After reviewing the authorities (including the cases cited above), Lord Justice Coulson summarised the guidance at paragraph 40 of his judgment and concluded at paragraph 41 as follows:

"[…] 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 [Counsel for the appellant, Goknur] 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"* [emphasis added].

On applying those principles to the present case, the Court of Appeal was satisfied that the director/shareholder had not stood to benefit personally from the litigation. Furthermore, there was no bad faith or impropriety on the director/shareholder's part. As such, the mere fact that the director/shareholder had controlled and funded the company's conduct of litigation was insufficient to justify a non-party costs order.

The Court of Appeal gave further guidance in the course of the judgment which may assist practitioners. In particular:

(1) As to bad faith/impropriety:

   a. The threshold to make a finding that a non-party has acted in bad faith or improperly is high.

   b. The court can look at the merits of the litigation to determine whether there is bad faith or impropriety. On the facts of *Aytacli*, the underlying merits of the claim were sound such that bad faith or impropriety was unlikely.

   c. Furthermore, there must be a causal link between the alleged bad faith or impropriety to the application for a non-party costs order.

(2) Furthermore, the court can look at the over-arching *"interests of justice"* in making or refusing a non-party costs order. The peculiar facts in *Aytacli* were such that the company's impecuniosity resulted in its inability to recover its costs from Goknur by commencing detailed assessment proceedings. But for that impecuniosity, Goknur would have been ordered to pay the company's costs on the merits of the underlying claim. As such, it was deemed *"absurdly unjust"* for a non-party costs order to be made in Goknur's favour.

Therefore, caution should be taken by practitioners when advising on whether to make an application for a non-party costs order. The threshold for making a non-party costs order is high. In the absence of either a personal benefit to the non-party or bad faith/impropriety on the non-party's part which causes an increase in the level of costs incurred by the parties, such an application may struggle to succeed. Indeed, practitioners are reminded to give

their clients adequate costs warnings at the outset of proceedings so as to avoid the need to seek a non-party costs order further down the line.

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