

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FINANCIAL SERVICES DIVISION

3
4 CAUSE NO FSD 63 OF 2014 (AJJ)
5

6 The Hon. Justice Andrew J. Jones QC
7 In Chambers, 30th March 2015
8
9

10 IN THE MATTER OF THE COMPANIES LAW (2013 REVISION) (AS
11 REVISED)

12
13 AND

14
15 IN THE MATTER OF VC COMPUTER HOLDINGS LIMITED (IN OFFICIAL
16 LIQUIDATION) ("the Company")
17

18
19 **Appearances:**

20
21 Mr Alan Turner and Ms Charlotte Hoffman of Turners for the Petitioners
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23 Mr Paul Murphy of Stuarts Walker Hersant Humphries for Mertal Overseas SA and
24 Mr Luis Filipe Da Costa De Sousa Azevedo
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REASONS

- 33 1. This is an application by the successful Petitioners' for orders that Luis Filipe Da
34 Costa De Sousa Azevedo ("**Mr. Azevedo**") and Mertal Overseas SA ("**Mertal**")
35 be made jointly and severally liable with the Company for all the costs of the
36 proceedings. Mertal is a special purpose company incorporated in the British
37 Virgin Islands and is the sole shareholder of VC Computer Holdings Limited (the
38 "**Company**", together with Mertal, the "**Respondents**"). Mr. Azevedo is the
39 ultimate beneficial owner of Mertal and the Company and has been the Company's
40 sole director since 7 August 2014.

1 2. The general rule is that the costs incurred by a person who successfully presents a
2 creditor's winding up petition should be paid out of the assets of the company,
3 such costs to be taxed on the indemnity basis unless agreed with the official
4 liquidator. See CWR Order 24, rule 8(1). However, this rule does not exclude the
5 possibility of making an order against Mertal and Mr Azevedo. The Court has
6 jurisdiction to make an order against Mertal because it chose to participate in the
7 proceeding as a party and defended the petition in its capacity as the Company's
8 sole shareholder. The Court also has jurisdiction to make an order against Mr
9 Azevedo. Even though Mr Azevedo did not make himself a party to the
10 proceeding, the Court has jurisdiction to make an order against him personally
11 under section 24(3) of the Judicature Law which provides that the Court shall have
12 full power to determine *by whom* and to what extent the costs of a proceeding shall
13 be paid.
14

15 3. The mere fact that Mr Azevedo is the sole beneficial owner of the Company and
16 has been personally responsible for defending the petition (on behalf of the
17 Company and through Mertal) is not a sufficient reason to make him personally
18 liable for the Petitioners' costs. I agree with the observation of Lloyd LJ in Taylor
19 v. Pace Developments [1991] BCC 406, at page 409
20

21 *"The controlling director of a one-man company is inevitably the person*
22 *who causes the costs to be incurred, in one sense, by causing the company*
23 *to defend the proceedings. But it could not be right that in every such case*
24 *he should be made personally liable for the costs, even if he knows that the*
25 *company will not be able to meet the plaintiff's costs, should the company*
26 *prove unsuccessful. That would be far too great an in-road on the*
27 *principle of limited liability. I do not say that there may not be cases where*
28 *a director may not properly be liable for costs. Thus he might be made*
29 *liable if the company's defence is not bona fide, as, for example, where the*
30 *company has been advised that there is no defence, and the proceedings*
31 *are defended out of spite, or for the sole purpose of causing the plaintiffs to*
32 *incur irrecoverable costs. No doubt there will be other cases. But such*
33 *cases must necessarily be rare. In the great majority of cases the directors*

1 *of an insolvent company which defends proceedings brought against it*
2 *should not be at personal risk of costs.””*

3
4 4. In determining whether a costs order should be made against a non-party, this
5 Court follows the principles set out in the New Zealand Privy Council case of
6 *Dymoocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] 1 WLR 2807, at
7 paragraph 25 -

8
9 *(1) Although costs orders against non-parties are to be regarded as*
10 *"exceptional", exceptional in this context means no more than outside the*
11 *ordinary run of cases where parties pursue or defend claims for their own*
12 *benefit and at their own expense. The ultimate question in any such*
13 *"exceptional" case is whether in all the circumstances it is just to make the*
14 *order. It must be recognised that this is inevitably to some extent a fact-*
15 *specific jurisdiction and that there will often be a number of different*
16 *considerations in play, some militating in favour of an order, some against.*

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18 *(2) Generally speaking the discretion will not be exercised against "pure*
19 *funders", described in paragraph 40 of Hamilton v Al Fayed as "those with*
20 *no personal interest in the litigation, who do not stand to benefit from it,*
21 *are not funding it as a matter of business, and in no way seek to control its*
22 *course". In their case the court's usual approach is to give priority to the*
23 *public interest in the funded party getting access to justice over that of the*
24 *successful unfunded party recovering his costs and so not having to bear*
25 *the expense of vindicating his rights.*

26
27 *(3) Where, however, the non-party not merely funds the proceedings but*
28 *substantially also controls or at any rate is to benefit from them, justice*
29 *will ordinarily require that, if the proceedings fail, he will pay the*
30 *successful party's costs. The non-party in these cases is not so much*
31 *facilitating access to justice by the party funded as himself gaining access*
32 *to justice for his own purposes. He himself is "the real party" to the*
33 *litigation, a concept repeatedly invoked throughout the jurisprudence - see,*
34 *for example, the judgments of the High Court of Australia in Knight and*
35 *Millett LJ's judgment in Metalloy Supplies Ltd (in liquidation) v MA (UK)*
36 *Ltd [1997] 1 WLR 1613. Consistently with this approach, Phillips LJ*
37 *described the non-party underwriters in TGA Chapman Ltd v Christopher*
38 *[1998] 1 WLR 12 as "the defendants in all but name". Nor, indeed, is it*

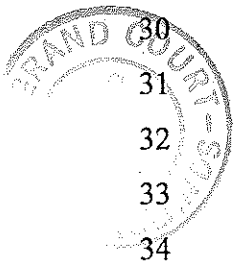
1 *necessary that the non-party be "the only real party" to the litigation in the*
2 *sense explained in Knight, provided that he is "a real party in ... very*
3 *important and critical respects" - see Arundel Chiropractic Centre Pty Ltd*
4 *v Deputy Commissioner of Taxation (2001) 179 ALR 406, referred to in*
5 *Kebaro at pp 32-3, 35 and 37. Some reflection of this concept of "the real*
6 *party" is to be found in CPR 25.13 (1) (f) which allows a security for costs*
7 *order to be made where "the claimant is acting as a nominal claimant".*

8
9 *(4) Perhaps the most difficult cases are those in which non-parties fund*
10 *receivers or liquidators (or, indeed, financially insecure companies*
11 *generally) in litigation designed to advance the funder's own financial*
12 *interests. ...*

13
14 5. It is not necessary for the non-party to be made exclusively liable for the costs. The
15 Court may make an order that the non-party be liable jointly and severally with
16 existing parties (*Merchantbridge & Co Ltd and another v Safron General Partner*
17 *1 Ltd and others* [2011] EWHC 1524 (Comm)).

18
19 6. In *Dymocks*, the Privy Council held (at paragraph 29) that -
20 *In the light of these authorities their Lordships would hold that, generally*
21 *speaking, where a non-party promotes and funds proceedings by an insolvent*
22 *company solely or substantially for his own financial benefit, he should be liable*
23 *for the costs if his claim or defence or appeal fails. As explained in the cases,*
24 *however, that is not to say that orders will invariably be made in such cases,*
25 *particularly, say, where the non-party is himself a director or liquidator who can*
26 *realistically be regarded as acting rather in the interests of the company (and*
27 *more especially its shareholders and creditors) than in his own interests.*

28
29 7. Where, however, a director or shareholder has acted in his own interests and not in
30 the interests of shareholders or creditors, the English courts have shown their
31 willingness to make a non-party order against such a non-party. For example, in
32 *Xhosa Office Rentals Ltd v Multi High Tech PCB Ltd & Ors* [2014] EWHC 1286
33 (QB), the court ordered the sole owner and director of the claimant company to
34 pay the defendant's costs of the claim. Sir David Eady said (at paragraph 12) that –



1 [The non-party] was the claimant in the proceedings in all but name. He funded
2 the claim after the company ran out of funds at an early stage. He effectively
3 determined not only that the claim should, in the first instance, be brought, but
4 also that it should be pursued – not least after the two judges to whom I referred
5 made the remarks they did about the weakness of the merits. He has also been, of
6 course, personally responsible for the manner in which the litigation was
7 conducted. As I have already pointed out, the only evidence relied upon by the
8 claimant company was that of [the non-party]. He alone stood to benefit if the
9 claimant succeeded and so, therefore, it was his interests that undoubtedly
10 underlay the litigation. .
11

12 8. In I-Remit Inc v Far East Express Remittance Ltd [2008] EWHC 939 (Ch),
13 Richards J. noted that where the third parties in question are directors and
14 shareholders of the unsuccessful party, it will necessarily follow that they control
15 the litigation and may well benefit personally, albeit indirectly, if it succeeds and
16 in these circumstances, it is necessary to look closely to see if these factors can
17 properly support a third party costs order. On the facts in *I-Remit*, the absence of
18 substantial business in the company and the absence of other creditors were
19 deemed to demonstrate that the shareholders could have been the principal
20 beneficiaries of successful defence of the claim.
21

22 9. In *I-Remit*, the Learned Judge was also persuaded that the fact of the non-parties'
23 dishonesty and impropriety in the conduct of defending the litigation was a
24 powerful ground for a costs order against them and that without untruthful
25 evidence of one of the non-parties, the defence and counterclaim were not
26 sustainable (however it was held that the considerations justified the making of the
27 order, even without that impropriety) (at paragraph 25).
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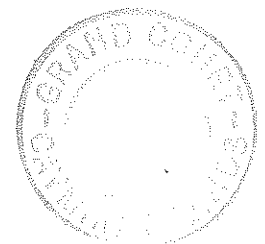
29 10. Whilst there is a significant volume of English case law on circumstances in which
30 a non-party costs order has been made or declined, the English Court of Appeal
31 have warned against extensive reliance on authorities in the exercise of the
32 discretion (see, for example, Petromec Inc v Petroleo Brasileiro SA Petrobras
33 [2006] EWCA Civ 1038 - at paragraphs 11 per LJ Longmore:

1 *There is a danger that the exercise of the jurisdiction to order a non-party to*
2 *proceedings to pay the cost of those proceedings becomes over-complicated by*
3 *reference to authority. Per Longmore LJ at paragraph 11.*
4

5 *I would wish to emphasise my agreement with [Longmore LJ's] statement at*
6 *paragraph 11 that the exercise of this jurisdiction becomes over-complicated by*
7 *reference to authority. Indeed I think it has become overburdened. Section 51*
8 *confers a discretion not confined by specific limitations. While the learning is, with*
9 *respect, important in indicating the kind of considerations upon which the court*
10 *will focus, it must not be treated as a rule-book. Per Laws LJ at paragraph 19.*
11

12 11. Applying these principles to the facts of this case, I have come to the conclusion
13 that there are exceptional circumstances which lead to the conclusion that I should
14 exercise the Court's discretion by making an order for costs against both Meral
15 and Mr Azevedo for the following reasons.

16
17 12. First, Mr Azevedo conducted the defence of the petition in his own interests. Apart
18 from the Company's original lawyers who are creditors in respect of unpaid legal
19 fees, the only parties in interest (or, at least, the only parties whose interest has
20 been disclosed to the Court) are Mr Azevedo and the Petitioners. Mr Azevedo is
21 interested as the Company's sole beneficial owner. Exactly why he considered it to
22 be in his commercial interest to defend this petition notwithstanding that the
23 Company had not carried on any business for about 2 years prior to the
24 presentation of the petition and has no assets (apart from a balance of about \$5,000
25 on a bank account) was never explained to the Court. He did produce two
26 documents dated in April and June 2014 which were intended to establish that the
27 Company was negotiating valuable contracts, but it seemed to me that this was
28 inherently unlikely to be true. This is not a case in which Mr Azevedo, as the
29 Company's sole director, can claim to have been acting in what he considered to
30 be the interests of a body of creditors. He conducted the defence of this petition for
31 his own reasons which he chose not to explain to the Court.



1 13. Second, the defence of this petition was conducted in an improper manner. Three
2 different and inconsistent defences have been put forward. The first was the
3 response by Mr Francisco De Castro Caldas to the statutory demand served in
4 February 2014 which was in part untrue and in part misleading (Judgment
5 paragraph 5). The second line of defence was that put forward in the affidavits of
6 Mr Mikhail Krasnov and Ms Terekova filed in response to the application for the
7 appointment of provisional liquidators. They contended that the Loan Agreements
8 were sham documents which were never intended to be acted upon and performed
9 in accordance with their terms. (Judgment paragraph 6). Finally, Mr Azevedo
10 asserted an entirely different defence based upon the Supply Agent Agreements
11 and Framework Agreement, which had not been mentioned at all in the evidence
12 of Mr Krasnov and Ms Terekova. I concluded (Judgment paragraph 30) that these
13 agreements were not contemporaneous documents and were probably created in
14 August 2014 for the purpose of bolstering the Company defence and attempting to
15 overcome the adverse findings contained in my reasons for making the provisional
16 winding up order.

17
18 14. Third, Mr Azevedo consistently failed to comply with orders for directions which
19 lead to multiple interlocutory applications and caused the trail of the petition to be
20 delayed by three months, thus adding to the Petitioners' costs of the proceedings.

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22 15. For these reasons I have concluded that Mr Azevedo and Mertal should be made
23 jointly and severally liable for the Petitioners' costs of the proceedings, including
24 the costs of this summons, such costs to be taxed on the indemnity basis if not
25 agreed.

26
27 DATED this 17th day of April 2015

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30 
31 **The Hon. Justice Andrew J. Jones QC**
JUDGE OF THE GRAND COURT

