Neutral Citation Number: [2022] EWHC 2696 (Comm)

Case No: CL-2021-000501

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/10/2022

Before :

SIR ANDREW SMITH

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Between :

(1) OCM MARITIME NILE LLC **(2) OCM MARITIME KAMA LLC**	**Claimants**
- and –	
(1) COURAGE SHIPPING CO **(2) AMETHYST VENTURES CO** **(3) ORYX SHIPPING LTD** **(4) ADBUL JALIL MALLAH**	**Defendants**

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Charles Holroyd (instructed by **Reed Smith LLP**) for the **Claimants**
The Defendants were not represented and did not appear

Hearing date: 26 September 2022

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Approved Judgment

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Sir Andrew Smith :

1. On 4 March 2022, I delivered a judgment in these proceedings ([2022] EWHC 452 (Comm)), (the "March judgment"). In this judgment, I adopt the same terms and abbreviations as in the March judgment.

2. OCM Nile and OCM Kama (together, the OCM companies) are special purpose vehicles incorporated in the Marshall Islands and ultimately owned by a Delaware limited liability company called Oaktree Capital Group LLC. On 12 July 2019, an associated company, Oaktree Maritime, made an agreement with Oryx to provide finance for the acquisition of bulk carriers to be chartered to companies controlled by Oryx. Pursuant to that agreement, OCM Nile chartered the bulk carrier "Courage" to CSC by a bareboat charterparty dated 5 November 2019, and OCM Kama chartered the bulk carrier "Amethyst" to AVC by a bareboat charterparty dated 18 February 2021.

3. It is not disputed that before June 2021 Mr Mallah was the legal and beneficial owner of the shares in CSC, AVC and Oryx, and was their sole director. It was contended by the companies that on 23 June 2021 Mr Mallah disposed of his interest in them, resigned as a director of them and ceased to have any "rights in and management authority" over them. In the March judgment, for reasons that I explained and shall not repeat, I rejected that contention: I concluded that Mr Mallah retained his beneficial interest in all the companies, and that he continued to order their affairs.

4. On 10 June 2021 the United States authorities had designated Mr Mallah a "Specially Designated Global Terrorist" ("SDGT"). That was an Event of Default under each of the charterparties. The OCM companies gave notices on 18 June 2021 to terminate them. saying that they would re-possess the vessels at their next ports of call, but CSC and AVC disputed their right to do so. In the event, OCM Kama took possession of the "Amethyst" on or about 1 September 2021 at Sharjah in the United Arab Emirates, but CSC caused the "Courage" to proceed into Syrian waters and she remains there.

5. The OCM companies brought these proceedings against CSC and AVC, and also Oryx. In the March judgment, I concluded that the notices of 18 June 2021 lawfully and effectively terminated the charterparties, and that the OCM companies were entitled to possession of the vessels. I did not determine claims for damages for breach of the charterparties and undertakings given by Oryx in support of them. I ordered that the costs of the action to 4 March 2022 be paid by the defendant companies on the indemnity basis, such costs to be subject to detailed assessment on the conclusion of the remaining issues in the action. I also ordered that the defendant companies should pay £1 million on account of those costs within 14 days.

6. CSC and AVC appealed against my judgment, but the Court of Appeal dismissed the appeal in a judgment of 29 July 2022 ([2022] EWCA Civ 1091).

7. CSC, AVS and Oryx, which has been dissolved, have not made any payment in respect of the costs. By a notice dated 14 June 2022, the OCM companies applied for an order that Mr Mallah be joined as a party to the proceedings for the purpose of costs only, and for other relief, including permission to serve the amended claim form and other documents on Mr Mallah out of the jurisdiction and for a worldwide freezing order ("WFO") against Mr Mallah. On 21 June 2022, I made an order the OCM companies

to join Mr Mallah as a party in the proceedings and for service outside the jurisdiction, and I made a WFO.

8. The return date for the WFO was originally 1 July 2022. On 30 June 2022, AMZ Law came on the record as solicitors for Mr Mallah. They gave notice of an application to adjourn the hearing on 1 July 2022, disputing valid service of the proceedings, and said that Mr Mallah intended to apply to discharge the WFO and to contest disclosure ancillary to it. On 1 July 2022, Calver J permitted service of the amended claim form, the WFO and other documents by alternative means and continued the WFO. On 8 July 2022, Knowles J made an order in support of the WFO that by 29 July 2022 Mr Mallah serve an affidavit disclosing his assets. He has not done so, neither has he applied to discharge the WFO.

9. The adjourned return date hearing for the WFO came before Foxton J on 1 September 2022. AMZ Law had told Reed Smith, who act for the OCM companies, that they were no longer instructed by him (although they have not formally come off the record), and Mr Mallah did not appear before Foxton J either through representation or in person. Foxton J was satisfied that Mr Mallah had been served with the proceedings and the application for a WFO, and he made an order continuing the WFO. He directed that the claim for a costs order against Mr Mallah be listed for a final hearing.

10. Accordingly, I conducted a hearing on 26 September 2022. The OCM companies were represented by Mr Charles Holroyd. Again, Mr Mallah was not represented and did not appear. The OCM companies submitted that, reflecting my order upon the March judgment against the corporate defendants, Mr Mallah should be ordered to pay the costs of the proceedings to 4 March 2022 assessed on the indemnity basis, and that he should be ordered to pay £1 million on account. They also sought an order for the costs of the claim against Mr Mallah, and a payment on account of those costs.

11. Section 51 of the Senior Courts Act, 1981 makes provision for the Court to order that costs be paid by a "third party" or "non-party", sc. a person not party to the substantive claim (such an order sometimes being referred to as a "section 51 order", or "s.51 order"). It is in the following terms: "(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 … the High Court … shall be in the discretion of the court…. (3) The court shall have power to determine by whom and to what extent the costs are to be paid …". In Aiden Shipping Co Ltd v Interbulk, [1986] AC 965, the House of Lords interpreted this section as conferring a discretionary power which is not limited to ordering that costs be paid only by persons who are party to the proceedings (or the substantive claims in the proceedings).

12. The Civil Procedure Rules provide at rule 46.2(1) that, "Where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must – (a) be added as a party to the proceedings for the purposes of costs only; and (b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further". These requirements are met in this case.

13. In Goknur v Aytacli, [2021] EWCA Civ 1037, Coulson LJ, whilst emphasising that he was not formulating "a sort of mandatory checklist applicable to a company director or

shareholder against whom a s.51 order is sought", provided this guidance (at para 40) about making a costs order against a third party, and in particular against a director or shareholder of an insolvent company:

(i) "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 …";

(ii) "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'…";

(iii) "In the case of an insolvent company involved in litigation which has resulted in a costs liability that the company cannot pay, a director of that company may be made the subject of such an order. Although such instances will necessarily be rare …, s.51 orders may be made to avoid the injustice of an individual director hiding behind a corporate identity, so as to engage in risk-free litigation for his own purposes ...";

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

(v) "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 …";

(vi) "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 …"; and

(vii) Such impropriety or bad faith will need to be of a serious nature … and … would ordinarily have to be causatively linked to the applicant unnecessarily incurring costs in the litigation".

14. Coulson LJ continued (at para 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".

15. The OCM companies submit that this guidance supports their application: that Mr Mallah was the "real party" to the litigation, and that his conduct in relation to it was seriously improper and showed serious bad faith. They rely on my findings and conclusions in the March judgment, acknowledging that generally findings in a judgment are binding only upon the parties to the litigation and the parties' privies, but submitting that that rule does not apply on an application of this kind where the non-party was sufficiently connected with the proceedings to avoid any injustice in departing from the general rule. I accept that submission: it is supported by the decisions of the Court of Appeal in Symphony Group Plc v Hodgson, [1994] QB 179, 192E-G and Deutsche Bank AG v Sebastian Holdings Inc, [2016] EWCA Civ 23 esp at para 22, where Moore-Bick LJ said this:

> "… an application under section 51 does not involve the assertion of a cause of action; it is a request for the court to exercise a statutory discretion in relation to the costs of proceedings before it. Section 51 is now the source of the court's discretion to determine who shall bear the costs of proceedings, whether they are parties to the proceedings or third parties. In principle, therefore, one would expect the procedure in each case to be substantially the same and the order to reflect broadly similar matters, such as the conduct of the proceedings and the nature of the party's or third party's involvement. In our view there is a clear distinction to be drawn between the process by which the court makes an order for costs at the conclusion of a trial, whether that order involves the parties alone or one or more persons who are not parties, and separate proceedings against a third party consequent upon the outcome of the trial. In the former case, the ordinary rules of evidence do not apply, precisely because the person against whom an order for costs is sought has had a sufficiently close connection with the proceedings to justify the court's treating him as if he were a party".

16. I accept the OCM companies' argument that Mr Mallah was so closely connected with the proceedings that it does him no injustice to hold that he is bound by my findings and conclusions in the March judgment. As I have said, I cannot accept the contention that he relinquished his interest in and control over the corporate defendants. In particular, for the reasons that I explained in the March judgment, I reject the contention made by the defendants' solicitor in August 2021 (see para 55 of the March judgment) that from 23 June 2021 Mr Yousef Darbis was their sole director and "was controlling now the companies following the removal of Mr Mallah". In so far as Mr Darbis was involved in the conduct of the litigation or otherwise in managing the affairs of the corporate defendants, he was, as I concluded at para 126 of the March judgment, acting as proxy or nominee for Mr Mallah. In my judgment, therefore, Mr Mallah made all significant decisions about how the corporate defendants should conduct the litigation and how they should deal with the vessels.

17. The OCM companies can properly rely on findings in my March judgment against Mr Mallah. I observe that he has had the opportunity to make submissions as to why he

should not be bound by them, but he has not engaged in the proceedings since he was ordered by Knowles J to disclose his assets.

18. I therefore consider on this basis the claim for costs against Mr Mallah by reference to matters identified as relevant by Coulson LJ. For reasons that I have already given and which I need not elaborate further, I am satisfied that Mr Mallah controlled the defence of the proceedings throughout them.

19. I am also satisfied that Mr Mallah funded the defence of the proceedings. The defendants' costs at first instance were substantial: according to their pre-trial checklist of 7 January 2022, they had incurred £720,000 by way of costs to that date and expected to incur a further £265,000 at trial. It is unrealistic to suppose that the corporate defendants themselves had these funds. The finances of CSC and AVC are not transparent: they are incorporated in the Marshall Islands and have no obligation to file accounts publicly. But they were incorporated as single purpose vehicles to charter the vessels, and the vessels were not generating trading income at the time of the litigation. In submissions to the Court of Appeal in support of an application for a stay of orders, the defendants stated that CSC and AVC "do not trade and neither do they have any other assets or any form of income". In response to the OCM companies' application for security for costs of the appeal, the defendants said that, "It was [Oryx] who was funding the litigation in the High Court up to the point when it could no longer do so". Assuming this to be so, it remains unclear when Oryx ceased to fund the proceedings, but it was dissolved before the end of the trial. In any case, it is improbable that Oryx would have been able to provide the substantial funds for this litigation: before its dissolution, it was a managing entity beneficially owned by Mr Mallah, and as a result of him being designated a SDGT on 10 June 2021, it became subject to sanctions.

20. I infer that the defence of the claims was not funded by the corporate defendants, and that it was funded by their beneficial owner, Mr Mallah. This inference is the stronger in that Mr Mallah has had every opportunity to answer this allegation of the OSC companies and has not done so.

21. The defendants have not been candid about who funded the litigation. Reed Smith asked AMZ Law who funded the High Court proceedings, and received no response. However, documents presented to the Court of Appeal make clear that Mr Mallah himself funded at least the appeal. In response to the application for security for costs, Ms Ashwaq Mizher of AMZ Law said in a witness statement of 7 June 2022 that, because of his designation as a SDGT and the resulting sanctions, Mr Mallah had no income and could not raise finance, and that he had "resorted to borrowing money from friends and associates in order to fund this genuine appeal". Submissions signed by Ms Mizher and dated 7 June 2022 stated that "The persons whom the Appellants' solicitors receive their instructions from have advised that Mr Mallah's designation by the US Government has been catastrophic for him, not only in a personal and reputational sense, but also financially. In particular, his personal resources have become extremely stretched and he has exhausted a great deal of his resources leading him to borrow in order to fund this litigation, in the hope that the situation can be salvaged".

22. The corporate defendants presented evidence to the Court of Appeal that the appeal had been financed by loans from a Mr Mhmat Koroglu. They applied for the Court of

Appeal to reconsider its decision that they should provide security for costs, and in support of the application, filed a witness statement of Mr Koroglu. He described himself as a director and shareholder of Olympus Gemi Yonetim Hizmetleri Dan ("Olympus"), a Turkish company, and said that Olympus was his "most recent venture", incorporated in January 2022. He also said that he had supported the defendant companies with loans "in excess of £100,000 through Olympus in order to assist the funding of their appeal", and specifically that he had, through Olympus, provided them with £37,000 on 9 June 2022, but that he had no further funds to cover the security ordered for the costs of the OCM companies.

23. I reject this evidence. Mr Charles Weller, a partner of Reed Smith, put in evidence an entry from the Turkish Company Gazette which records that the "founder" of Olympus was not Mr Koroglu, but Ms Hourieh Mallah, and that she was the shareholder and the director when it was formed. No change in the shareholding or the directors has been registered, as would be required under Turkish law. The evidence is that Ms Hourieh Mallah is Mr Mallah's wife. Further, the evidence shows that the sum of £37,000 to which Mr Koroglu referred was paid to AMZ Law by a SWIFT transfer from the account not of Olympus but that of "Olympos Shipmanagement SA", which I take to be the Greek company associated with the defendants to which I referred at paragraph 112 of March judgment.

24. I am also satisfied that the litigation was defended for the personal benefit of Mr Mallah. Essentially, the proceedings were about the right to possession of the vessels. Not only were the vessels chartered to companies of which Mr Mallah was the sole beneficial owner. but he regarded them as his own. With regard to the "Amethyst", I refer to paragraph 69 of the March judgment. As for the "Courage", I refer to proceedings brought by Mr Mallah in Syria, in which he alleges that OCM Nile and its parent company are liable for breach of contract. In documents filed with the Court on Mr Mallah's behalf, it is said (according to translations in evidence) that the vessel was bought from "Sun Lanes Co" (presumably, a reference to Sun Lanes Shipping SA, which sold her to OCM Nile), and that Mr Mallah has fulfilled "all of his obligations" by paying the purchase price and other money payable under the contract; that Mr Mallah wishes to exercise the purchase option; and that OCM Nile has failed in its obligations to "transfer ownership of the ship into [Mr Mallah's] name". This, it is said, caused Mr Mallah grave harm.

25. Oryx is a party to the Syrian proceedings, and it has filed a declaratory document with the Court stating that, "Mr Abduljalil has purchased MV Courage …. in the name of [Oryx], provided her ownership will be with Mr Abduljalil Mallah's and his partners after he pays its full price", and that "Considering that Mr Abduljalil Mallah used to be the manager of the Company and that MV Courage was purchased in the name of the Company but for his own account, [Oryx] thus does not object to his overseeing the affairs of MV Courage or transferred her ownership to his or someone else's name as he deems fit".

26. The final limb of the OCM Companies' argument is that there has been impropriety and bad faith on Mr Mallah's part in connection with the litigation. Again, I accept their submission. In particular,

    (i) In paragraph 158 of the March judgment, I list criticisms of the defendants' response to Court orders and compliance with undertakings to the Court. The

corporate defendants repeatedly acted in contempt of court. Mr Mallah was, as I conclude, responsible for them doing so.

(ii) In paragraph 160 of the March judgment, I list misleading and untruthful information given to the Court in the course of interlocutory proceedings. Mr Mallah was, as I conclude, responsible.

(iii) In paragraph 161, I conclude that the case presented at trial that Mr Mallah no longer had any proprietary interest in the defendant companies was advanced in a deliberate attempt to mislead the Court. Again, I conclude that Mr Mallah was responsible.

27. I add only that Mr Mallah is also in breach of the order of Knowles J to disclose his assets and to pay costs.

28. I am satisfied that, in all the circumstances, it is just to make an order against Mr Mallah in respect of the costs of the proceedings to 4 March 2022 reflecting the order for costs against the corporate defendants made after the trial. I am also satisfied that, in view of my conclusion that Mr Mallah has acted improperly and with bad faith in relation to the litigation and my reasons for that conclusion, those costs should be assessed on the indemnity basis, and that Mr Mallah should be ordered to pay US$ 1 million on account towards them.

29. Further, I order that, in accordance with the general rule, Mr Mallah should be ordered to pay the OCM companies' costs of and incidental to the application for a costs order against him; and that those costs too should be assessed on the indemnity basis in view of (i) his continuing refusal to acknowledge his interest in the corporate defendants; (ii) his evasion about the funding of the litigation; (iii) his professed intention to apply to discharge the freezing order against him, which has every appearance of being a delaying tactic, there being no explanation offered for his apparent change of plan; and (iv) his disobedience of the disclosure order of Knowles J, for which he has offered no explanation or apology.

30. I am grateful for the assistance of the representatives of the OCM companies. I invite them to submit a revised draft order in light of this judgment and exchanges during the hearing, together, if they see fit, with a short note of explanation in respect of any further ancillary relief that they seek.