

**IN THE HIGH COURT OF JUSTICE,**

**QUEEN'S BENCH DIVISION,  
Central Office**

**Master EYRE**

*ORDER*

*in*

*R.F.S. v MD7*

*[HQ08X00987]*

UPON hearing Mr. Lazarus of Counsel for the Claimants and Mr. Bennett of Counsel for the Defendants on the 18<sup>th</sup> September and the 6<sup>th</sup> October 2009 AND UPON the Defendant's application for an order making the Third and Fourth Claimants jointly and severally liable for the costs of the action

AND for the reasons set out below

IT IS ORDERED as follows:

- 1 The application is hereby granted.
- 2 The First, Second, Third and Fourth Claimants are to be jointly and severally liable for the Defendants' costs of the action, including the costs of this application, the latter assessed summarily at £32,000 + any V.A.T. that may be due.
- 3 The First, Second, Third and Fourth Claimants must also and by no later than 1:00 p.m. on the 20<sup>th</sup> October 2009 pay the Defendants on account of the costs of the action apart from the costs of this application the sum of £50,000.

AND UPON the Third and Fourth Claimants' application for leave to appeal on the grounds set out in their Counsel's 'Draft Grounds of Appeal,'

IT IS ORDERED as follows, namely that leave is hereby refused, there being for the reasons already given no real prospect of success or other compelling reason for granting leave.

7 October 2009

## REASONS

- 1 The Third Claimant is apparently a formidably-successful businessman, with experience of leasing, though principally of leasing containers and chassis to the transport-industry, and is a multi-millionaire.
- 2 His personal assistant is a Miss. Marijke.
- 3 The First Defendant is an English-registered limited company whose business consists of providing leasing-finance for mobile-telephone wireless-masts, by lending capital sums against the rents received for the masts. The Second Defendant is the managing-director of the First Defendant, and is the majority-shareholder of the its American parent.
- 4 It appears to be common ground that the business is specialised, and that the financing-structures are highly complicated.
- 5 In 2006, the Third Claimant caused a limited company controlled by him -- the Fourth Claimant --to incorporate the Second Claimant.
- 6 Both companies had their registered offices at the Third Claimant's home in the Netherlands.
- 7 In early 2007, 2 individuals called Overman and Ferraro left the employment of the First Defendant's American parent in order to go into the business of providing similar financing-structures on their own account, and the American parent brought an action against them in respect of what it alleged was misuse of its information.
- 8 In April 2007, Overman, Ferraro and a third man called Morrone, who had not been employed by the American parent, but who had experience of that company's financing-structures, persuaded the Third Claimant to invest in that area of business in this country, where there was seen to be an opportunity to deal with Orange.
- 9 Miss. Marijke and Morrone were the directors of the Second Claimant.
- 10 The Third Claimant caused the Second Claimant to incorporate the First Claimant in the United States of America to carry on the business with Orange in this country, with Morrone as its managing-director.
- 11 The Third Claimant was not prepared to permit Overman or Ferraro to be directors or officers of the Claimant companies because of their involvement in the American litigation.
- 12 They therefore acted as consultants via a limited company established by them for the purpose, North Rivers Partners.
- 13 In the autumn of 2007, Orange requested proposals for finance-structures of this kind, and both the First Claimant and the First Defendant responded to the request.

- 14 On the 4<sup>th</sup> October 2007, Orange notified the First Claimant that its proposal was the winning proposal.
- 15 On the 7<sup>th</sup> November 2007, the Second Defendant attended a meeting with Orange, at which he at the very least told Orange about the American action against Overman and Ferraro.
- 16 However, according to the Claimants the Second Defendant went a good deal further than that, and told Orange that the First Claimant's activities would infringe rights belonging to the American parent.
- 17 Whatever was said, on the 4<sup>th</sup> December 2007 Orange notified the First Claimant that it would not proceed with the proposal.
- 18 On the 13<sup>th</sup> March 2008, without having thought it necessary to send any letter of claim, the First Claimant -- at that stage the only claimant -- brought this action claiming principally:
  - (1) Damages for slander, malicious falsehood and unlawful interference in its business;
  - (2) An injunction; and
  - (3) A declaration that its use of information relating to the financing-structures did not infringe any rights belonging to the First Defendant or its American parent or associated companies.
- 19 No individual present at the meeting reported to the First Claimant what had been said. Instead, it was content to rely on what it was told had been said by an individual that had not actually been present.
- 20 On the 21<sup>st</sup> April 2008, solicitors for the Claimants informed those acting for the Defendants that the Claimants' loss of the contract with Orange alone was worth in the region of £30m.
- 21 On the 1<sup>st</sup> May 2008, the Defendants served a Defence, denying either that anything wrongful had been said or that the First Claimant could possibly be entitled to the relief claimed.
- 22 On the 10<sup>th</sup> July 2008, the Defendants asked for security for costs in 2 instalments -- £12,500 in the next fortnight, and a further £10,000 at the stage of disclosure.
- 23 On the 25<sup>th</sup> July 2008, the First Claimant:
  - (1) Applied for third-party disclosure by Orange of documents relevant to its decision not to proceed with the proposal, recognising that the result might be to make the action futile.
  - (2) Informed the Defendants that the Second Defendant would guarantee any adverse order for costs made in the action, and suggesting that the Second Defendant be joined as a claimant for that purpose.
- 24 On the 31<sup>st</sup> July 2008, directions were given by consent, including:
  - (1) Leave to join the Second Claimant to the action.

- (2) A general postponement of further directions to enable the Claimants to make effective their application for third-party disclosure.
- 25 Yet no more was ever heard of that application, despite what the Claimants recognised to be its possibly crucial significance.
- 26 On the 8<sup>th</sup> September 2008, the Defendants, who were not convinced by the unsupported assurance as to the Second Claimant's intentions, applied for security for costs, stating that their costs were already more than £72,000, and that they expected to need to incur a further £200,000 to trial.
- 27 It has never been disputed that the First Claimant had at any rate by then no means of meeting any adverse order for costs; and the Fourth Claimant now withdrew from the Second Defendant its only asset of \$3m.
- 28 On the 31<sup>st</sup> October 2008, without warning, without having pursued the application for third-party disclosure, and only a little over 6 months after the letter putting the value of the action at a sum in the region of £30m, the First and Second Claimants discontinued the action.
- 29 On the 20<sup>th</sup> March 2009, the Defendants brought this application for leave to join the Third and Fourth Claimants in order to make them liable for costs, and joinder was ordered by consent.
- 30 Both sides have put in witness-statements, though in the Third Claimant's case without exhibiting a single document.
- 31 There are some disputes of fact, but both Counsel have relied on detailed written arguments, and in the interests of brevity reference is to be made to those detailed written arguments to see how each side has sought to analyse the evidence before the Court.
- 32 However, even after taking account of all of the rival contentions of fact, the clear effect of the evidence is as follows:
  - (1) The 3 corporate Claimants were all ultimately under the sole control of the Third Claimant.
  - (2) The Third Claimant caused the First Claimant to bring the action.
  - (3) The action was of the most speculative kind imaginable, lacking as it did the evidential basis that is indispensable if an action for slander can be considered to have any chance of success whatever.
  - (4) This would have been obvious even to a layman.
  - (5) Any damages recovered in the action would in reality be for the sole benefit of the Third Claimant.
  - (6) The Third Claimant funded the litigation so far as it was funded.
  - (7) The Third Claimant caused the Fourth Claimant to make it impossible for the Defendants to enforce any order in their favour for costs.
  - (8) The Third Claimant then caused the action to be discontinued.

- 33 Counsel for the Claimant contends that the authorities show that the test for determining an application for this kind is the same as it is for summary judgment.
- 34 That is far from clear from the authorities; however, if it is correct, it makes no difference to the result, since the Claimants' contentions have no real prospect of success.

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