Neutral Citation Number: [2024] EWHC 3090 (Ch)

Claim No BL-2023-000899

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Wednesday, 27th November 2024

Before:

MASTER MARSH
(sitting in retirement)

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Between:

HIPGNOSIS MUSIC LIMITED	**Claimant**
- and -	
(1) MERCK MERCURIADIS **(2) HIPGNOSIS SONGS FUND LIMITED** **(3) HIPGNOSIS SONG MANAGEMENT LIMITED**	**Defendants**

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EDWARD DAVIES KC (instructed by **Forsters LLP**) appeared for the **Claimant.**

EDMUND CULLEN KC and **EDWARD GRANGER** (instructed by **Payne Hicks Beach LLP**) appeared for the **First Defendant.**

NEIL KITCHENER KC and **PATRICK HARTY** (instructed by **Herbert Smith Freehills LLP**) appeared for the **Second** and **Third Defendants.**

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Approved Judgment

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MASTER MARSH :

1. This is the first case management conference in this claim. Edward Davies KC appears for the claimant, Edmund Cullen and Edward Granger appear for the first defendant and Neil Kitchener KC and Patrick Harty appear for the second and third defendants.

2. This judgment concerns the claimant's application for a split trial to the effect that all issues of liability and causation are to be addressed at a first trial and all issues of quantum at a second trial. The application is opposed.

3. The first defendant says that the first trial should deal with all issues, including claims for loss, other than the taking of an account which should be hived off to a subsequent hearing. The second and third defendants oppose the application altogether.

4. This judgment is provided in the course of a busy case management hearing day and I will provide only a short summary of the claim. The claimant is in liquidation and acts by its liquidators. It is also an assignee of a claim vested in Hipgnosis Copyrights plc (formerly a wholly owned subsidiary). The essence of the claimant's case is that the first defendant procured the diversion of what is said to have been a maturing business opportunity away from the claimant and Copyrights. The claimant was incorporated and steps were taken by the first defendant, acting as director of both companies, to set up a music catalogues business. Initially it was proposed to launch the business with the benefit of a bond issue published on the Gibraltar Stock Exchange but that did not in fact take place. The claimant's case is that the first defendant changed his approach and incorporated the second and third defendants and reached a point at which he planned and affected a diversion of the business opportunity to his new companies.

5. The business of the second and third defendants has been very successful. The second defendant is quoted on the London Stock Exchange following an IPO raising £200 million and is said to have a current market value in the region of £1 billion.

6. The claimant's case is that by virtue of the diversion of the business opportunity the first defendant, as a director of the two companies, was in breach of duties, both under the Companies Act and also by virtue of undertakings given in a Shareholders' Agreement and a Service Agreement. The second and third defendants are said to have dishonestly assisted the first defendant in the diversion exercise.

7. Claims for loss are made by the claimant both on behalf of itself and on behalf of Copyrights. The claimant seeks against the first defendant an account of profits in respect of the benefits he received or, alternatively, compensation for loss and damage suffered by Copyrights, and seeks an account of profits and/or compensation for the loss and damage the claimant has suffered by virtue of breaches of the two agreements I have referred to. As against the second defendant, it claims an account of profits and/or compensation and similar relief is sought against the third defendant.

8. Mr. Davies's case seeking a trial that is split was at one point put on the basis of necessity, by which I understood him to mean that it was simply not possible for there to be a trial of all issues. In his closing submissions, however, his case was adjusted. He then submitted that the trial judge would not be in a position to conduct a focussed

and efficient trial given the number of moving parts that would be required to be dealt with, and there was a risk that there would be a disorderly first trial given difficulties in relation to the way the case was likely to develop.

9. The particular difficulty in this case is that the claim on loss, as opposed to the account of profits, is based on a counterfactual. The court will have to decide what would have happened had the first defendant not been in breach of his duties. Would it have been possible for the claimant and Copyrights to have created a business of value? The way it is pleaded at present is that the claimant would, in that counterfactual situation, have been able to create a business which had either the same, or substantially the same, value as the second defendant currently has.

10. The claimant's case as is stands is not difficult to understand. The claimant is certainly able to put forward, by expert evidence, its case about the value of the counterfactual business and thus its claim for loss. Mr. Davies's concern is that the defendants will run at trial issues which will seek to undermine that case which go beyond the straightforward denial that the counterfactual business would have had the same, or substantially the same, value as the business which in fact was created. Some indication was given by Mr. Kitchener in his submissions that the second and third defendants would wish to test the claimant's case by reference to, for example, whether the bond issue in Gibraltar would have succeeded or would the first defendant have remained a director. Mr. Davies's case is that such variations would make the role of the trial judge either extremely difficult or near to impossible.

11. The case put on the other side is that, albeit it is complex litigation, is not unusual for there to be variables and it is commonplace for a trial judge to be faced with alternative cases which need to be teased out during the course of the trial and findings made on those alternative cases. It is, I think, right to say at this very early stage of the claim it is not easy to see with any precision exactly how the trial will play out. I am not satisfied, however, that at this stage, the court is able to conclude with any degree of certainty that a split trial is either necessary or desirable. In reaching that conclusion, I have in mind the starting point which is reflected in CPR rule 1.4(2)(i), that the court should start on the basis that as many issues as possible are dealt with on the same occasion. Furthermore, it is right to have in mind the default starting point which has been discussed in a number of cases, including *Daimler AG v Walleniusrederierna Aktiebol* [2020] EWHC 525 (Comm) at [32]. I accept the premise that it is out of the norm to split a case into stages and that it is desirable where possible for trial judges to deal with all the issues that arise.

12. The court has only limited information here about the effect of splitting a trial, but it is undoubtedly the case that (1) there would be delay if the trial is split because there would be a long gap between the trial of issues of liability and causation and the trial on quantum, and that gap could easily be a year; (2) it is almost certain that some or all of the witnesses of fact would need to be called in both trials and that is a matter which is highly undesirable where it can be avoided; and (3) it is inevitable that the costs involved in aggregate of having two trials rather than one would be greater. These are factors which militate strongly against directing that a split trial takes place at this stage.

13. An alternative approach was proposed by Mr. Cullen, which is that the court should direct all issues to be tried at the trial, but with the account of profits hived off to a

separate trial. He puts his submission on the basis that this is the orthodox way of proceeding and that the taking of the account after a trial has taken place should be a relatively straightforward process. He accepts that there will be some overlap between the evidence and disclosure for those two trials, but he submits that it would be impossible for the account to be taken at the first trial because the claimant will have to make an election to accept either compensation or an account of profits, and unless and until that election is made, there is no basis for an account of profits being taken. I accept Mr. Cullen's submission that it is certainly conventional for an account of profits to be hived off if for no other reason that the claimant may well decide not to make that election, having obtained the findings of the court at first instance in the first trial about losses. The claimant may well decide that it is satisfied that adequate compensation is obtained without an account of profits being pursued.

14. It seems to me there is good sense in the account of profits generally being hived off to a later trial simply because an election has to be made. However, in this case, I am not satisfied, certainly at this stage, that the account does need to be hived off. It does not strike me as a difficult exercise. The profits that have been obtained by the first defendant and by the companies will not be difficult to establish. It seems to me that it would be highly desirable for the trial to proceed on the basis that what is a relatively simple account is taken, as it were, prior to the election so that the claimant is able to decide, on the basis of the evidence that is produced for the purposes of that trial, which route it wishes to pursue. To have a secondary process in a case of this type does not seem to be an attractive proposition albeit that it is the conventional approach.

15. I am satisfied that the trial of this claim can be dealt with on the basis of all issues being determined by the court, but I have in mind that it is at least possible that as this case matures and disclosure has taken place, witness statements have been exchanged and in particular the accountancy expert evidence has been provided, that it may become apparent that the taking of the account is a far more complicated exercise than I have at this stage concluded and it might be, at that point, the court would be amenable to the account being hived off to a separate occasion. However, I only put that forward as a possibility and it is one which plainly may be proved to be right or wrong.

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