Neutral Citation Number: [2021] EWHC 352 (Comm)

Case No: CL-2019-000189

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice,
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 19/02/2021

Before :

THE HONOURABLE MR JUSTICE CALVER

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Between :

ACTIVE MEDIA SERVICES INC — **Claimant**

- and –

(1) BURMESTER, DUNCKER & JOLY GMBH & CO KG
(2) AXA VERSICHERUNG AG
(3) EUROPEAN FILM BONDS A/S
(4) DOUBLE DUTCH INTERNATIONAL INC — **Defendants**

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Emily Wood (instructed by **Mischon de Reya**) for the **Claimant**
Edmund Cullen QC and Ted Loveday (instructed by **Clintons**) for the **First and Second Defendants**
The Fourth Defendant appeared through Mr. Ron Moring as a Litigant in Person

Hearing dates: 19 February 2021

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Approved Judgment

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Mr Justice Calver :

Introduction

1. I handed down judgment in this case on 9 February 2021. There remains a dispute between the parties, namely the Claimant ("Active"), the First to Second Defendants ("the Guarantor Defendants") and the Fourth Defendant ("DDI") as to the appropriate order for costs in the light of my judgment. Ms Wood appears for Active. Mr. Cullen QC and Mr. Loveday appear for the Guarantor Defendants. Mr. Ron Moring appears for DDI as a litigant in person.

Legal principles

2. I start with the legal principles.

3. The general rule is of course that costs follow the event (CPR 44.2(2)(a)). The Guarantor Defendants were successful in their defence of the claim and the relevant event is the dismissal of Active's claim against them; as well as their alternative case against DDI (which however, was barely argued).

4. The Court has a discretion under CPR 44.2 to make a different order, taking into account all the circumstances, including:

    (1) the conduct of both parties (CPR 44.2(a)); and

    (2) whether a party has succeeded on part of its case, even if that party has not been wholly successful (CPR 44.2(4)(b)).

5. The conduct of the parties includes, by CPR 44.2(5)(b) and (c) whether it was reasonable for a party to pursue a particular allegation or issue and the manner in which a party has pursued or defended its case or an issue.

6. The willingness of the Court to order a party, even a successful party, to be deprived of his costs of a particular issue on which he has lost, and to pay those of his opponent, is not however dependent on establishing that that party has acted improperly or unreasonably: *Summit Property Ltd v Pitmans* [2001] EWCA Civ 2020. If a party has acted improperly or unreasonably the Court will more readily make such an order. But, even if he has not, the Courts are now much more ready to make separate orders reflecting success on different issues than once they were.

7. The court's willingness to make an issue based costs order was famously summarised by Lord Woolf's in *Phonographic Performance v AEI Rediffusion Music Ltd* [1999] 1 WLR 1507 at 1522-3, where he explained:

> *"The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues… It is now clear that a too robust application of the 'follow the event principle' encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they*

> *take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so."*

8. That is so, even where the points taken by the successful party are honest ones. Indeed, even unreasonableness in taking the point is not a pre-condition to an issue-based costs order: *Capita LTD v RFIB Group Ltd* [2017] EWCA Civ 1032 [41].

9. But what of a case where the unsuccessful points are supported by deliberately untruthful evidence? In that situation, the principles are as summarised by Briggs J in *Bank of Tokyo-Mitsubishi v Baskan [2009] EWHC 1696* at [19]:

> *"(i) There is no general principle that where an otherwise successful party has put forward a dishonest case in relation to an issue in the litigation, the general rule that costs follow the event is thereby wholly displaced…*
>
> *(ii) The court's powers in relation to the putting forward of a dishonest case include (a) disallowance of that party's costs in advancing that case, (b) an order that he pay the other party's costs attributable to proving that dishonesty, and (c) the imposition of an additional penalty which, while it must be proportionate to the gravity of the misconduct, may in an appropriate case extend to a disallowance of the whole of the successful party's costs, or an order that he pay all or part of the unsuccessful party's costs.*
>
> *(iii) In framing an appropriate response to such misconduct, the trial judge must constantly bear in mind the effect of his order upon the process of detailed assessment which will follow, in the absence of agreement, in particular to avoid unintended double jeopardy…*
>
> *(iv) There is no general rule that a losing party who can establish dishonesty must receive all his costs of establishing that dishonesty, however disproportionate they might be…"*

10. The approach adopted by Briggs J was approved by the Court of Appeal in *Hutchinson v Neale* [2012] EWCA Civ 345 at [25] and [28]) where the Court stated that "*[w]hat is required is an evaluation of the nature and degree of the misconduct, its relevance to and effect upon the issues arising in the trial, and its tendency to create an unwarranted increase in the costs of the action to either or both of the parties.*"

Costs between Active and the Guarantor Defendants: submissions

11. Turning to the parties' submissions concerning the costs of the action as between Active and the Guarantor Defendants, Active sensibly and realistically accepts that it should pay the Guarantor Defendants' costs on the indemnity basis by reason of the fact that its conduct, in destroying relevant documents just prior to the commencement of the trial which led to the court's findings in favour of the Guarantor Defendants, takes the case outside the norm and justifies such an order.

12. However, Active also points to the conduct of the Guarantor Defendants themselves. It maintains that what would be unjust and contrary to the overriding objective, would be to reward the Guarantor Defendants with a costs order, still less an order for indemnity costs, in respect of their case that the "original" version of the Film had been completed and delivered within the meaning of the Completion Guarantee by the Delivery Date and that the contractual notices required under the Completion Guarantee had been timeously served. That case, it is said, was supported by dishonest evidence and ought never to have been pursued. Active relies in particular upon the court's finding that the Guarantor Defendants, DDI and LRP cooked up a dishonest plan to pretend that the film had been completed and delivered by the required date in the completion guarantee by back-dating the relevant delivery notice and then pretending contemporaneously and at the trial itself that what happened thereafter was merely the delivery of an enhanced version of the Film.

13. As a result, Ms Wood on behalf of Active submits that the intellectually pure order would be an order that the Guarantor Defendants may not recover their costs relating to their unsuccessful case on the enhanced version of the Film, the false contractual notices and construction of the Completion Guarantee. However, CPR 44.2(7) requires the Court to consider whether it is practicable to make an order that a party must pay a portion of another party's costs instead. That is because establishing with precision which costs are attributable to particular issues in the case may be a difficult and disproportionate exercise, and the trial judge is generally better placed than the costs' judge to assess what a fair end position should look like.

14. Rather, Ms Wood submits, this court should make a broad brush, proportional order. Whilst accepting that Active's conduct was 'worse' than the Guarantor Defendants', the costs order should justly reflect the case overall, which Active submits is reflected in an overall 60% order for indemnity costs in favour of the Guarantor Defendants. Whether the Court considers that amount is comprised wholly of the Guarantor Defendants' disallowed costs, or in part represents a credit towards Active's costs of disproving the Guarantor Defendants' false case, she says ultimately does not matter. But Active does not seek an additional deduction on top of the 40% of the Guarantor Defendants' costs that it says were incurred by reason of the Guarantor Defendants' false case.

15. Mr. Cullen QC for the Guarantor Defendants disagrees. He observes that the general rule that costs follow the event (CPR 44.2(2)(a)) is not displaced merely because the winning party has lost on some points: see Coulson J in *Harlequin Property (SVG) Ltd v Wilkins Kennedy* [2016] 6 Costs L.R. 1201

16. Mr. Cullen points out that as this Court acknowledged at **[**4**]** of its Judgment, the "real issue in this case" has always been Active's knowledge and issues of agency, election and estoppel. That meant the Court inevitably needed to carry out the painstaking trawl through the facts at **[**69**]-[**249**]** of the Judgment.

17. As to the construction of the Completion Guarantee, he says that the parties had mixed success. But the points on which the Guarantor Defendants failed did not materially contribute to the costs of the trial. A 5-day trial would have been needed even if the only issues were election, waiver and acquiescence.

18. Moreover, Mr. Cullen submits that the debate about the backdated notices was irrelevant to Active's cause of action. This was a simple claim for breach of contract, subject to the defences of estoppel, waiver and the like. Active only needed to show that the Film was not completed and delivered. That turned out to be straightforward, especially given the Court's clear approach to the construction of clauses 2.1(a) and 1.10(b). Indeed, Active's positive claim was *inevitably* made out as soon as it satisfied the Court that the Delivery Date could not be extended beyond 28 August 2017.

19. He adds that the findings about backdating reflect equally badly on Active. According to the Judgment, Active fully participated in the backdating—and in the purported acceptance of the Film by DDI—through its agents Mr Moring and Mr Sears.

20. As for Ms Crone's story about an "enhanced Film", this was the version of events which Ms Crone, a former employee of EFB, provided to the First and Second Defendants. It was not in itself a defence but it provided the factual background which gave an explanation for why the individuals acted as they did. It turned out not to be the true explanation: But the point remains that Active did waive its rights. A defendant should not be denied its costs merely because it failed to establish one aspect of the factual background to its defence, especially in a case as factually complex as this one where the Claimant deliberately concealed much of the history.

21. Mr. Cullen submits that the reasonableness of the Guarantor Defendants' conduct of their defence needs to be judged against the backdrop of the litigation as a whole. In short, from the outset, Active put every possible obstacle in the way of the Guarantor Defendants' efforts to obtain the evidence necessary to establish their defence. Active was dishonest throughout, difficult about disclosure and custodians, refused to mediate and was generally obstructive.

Analysis

22. Looking at the matter in the round, I bear *three factors* in mind, in no particular order:

23. First, there were essentially two separate issues before the court which occupied the court for roughly an equal amount of time during the 5 days of the trial itself. One concerned the proper construction of the Completion Guarantee and a considerable amount of time was spent in analysing that issue; the other was the waiver, estoppel and acquiescence case. Active won on its construction case but lost on the waiver case. However, I also take account of the fact that the vast majority of the witness evidence and disclosure in the action (including the interlocutory skirmishes to which Mr. Cullen has referred), went to the issue of waiver and the like, and most of the court's judgment was necessarily concerned with that question.

24. Second, it was undoubtedly reasonable for the Guarantor Defendants to pursue their case on the proper construction of the Completion Guarantee. However, they relied firmly upon the evidence of Ms Crone in support of their case that completion and delivery took place by the Delivery Date because everything that happened thereafter concerned the production of an Enhanced Film. I accept that her evidence was directed overwhelmingly to that issue. I found that Ms Crone sought to mislead the Court regarding the completion and delivery of the film. Her account was one which the Guarantor Defendants enthusiastically supported at trial. Each of the Guarantor Defendants (acting through EFB), DDI and LRP cooked up a scheme which was

intended to mislead the relevant parties into believing that the Film had been completed and delivered in accordance with the terms of the Completion Guarantee, albeit that I found that Active was estopped from recovering under the Completion Guarantee by reason of its subsequent conduct in November 2017.

25. That was not an honest case to advance and it required time and effort from both Active and the Court itself to unravel as the Guarantor Defendants advanced it as a complete answer to Active's claim. CPR 44.2(5)(c) allows me to reflect that fact in any costs order that I make, by taking into account the *manner* in which the guarantor defendants pursued its case on this issue.

26. However, thirdly, it is important not to lose sight of the overarching factor that, in the light of my factual findings on the Guarantor Defendants' waiver defence, Active's conduct in the pursuit of its claim both before and during the trial was reprehensible, as it now realistically accepts. Mr. Cullen QC rightly emphasises that fact in his submissions before me. I should add that Active also failed to engage in ADR, without giving reasons for its refusal, when the other parties expressed their openness to mediation.

27. I consider that I have to give weight to those three factors as best I can, whilst always keeping firmly in mind that the Guarantor Defendants have nonetheless been successful overall in defeating the claim.

28. I consider that Ms Wood's approach is the most suitable approach to adopt in this case but that 60% is too low a figure in not reflecting sufficiently these three overarching factors.

29. In all the circumstances and having taken into consideration all of the arguments advanced in both parties' very helpful skeleton arguments, I consider that the right order is that Active should pay 75% of the Guarantor Defendants' costs on an indemnity basis.

Payment on account

30. The Guarantor Defendants also seek a payment on account of their costs of just over £1m. Active offer £775,000. The Guarantor Defendants have incurred approximately £2m in costs. In view of the fact that I have ordered Active to pay 75% of those costs on an indemnity basis, I consider that the appropriate payment on account is £900,000.

DDI's costs

31. So far as the costs of DDI are concerned, DDI seeks an order that Active pay its costs of £135,688.68, assessed on the indemnity basis, said to be its costs of (i) counsel; and (ii) disclosure. It seeks "interim payment" of the full amount.

32. Mr. Ron Moring on behalf of DDI told me that DDI was unable to mount a full defence because it could not afford the cost of doing so. The Covid pandemic which has shut down theatres has led to a significant drop in revenues for businesses such as DDI. He suggested that had DDI been able to mount a full defence it would have called Dan Krech of LRP, whose evidence would have assisted the parties and the

court. He accepted that DDI had been "clumsy" in its role as sales agent for the Film, and that it made "mistaken decisions" under pressure to get the Film distributed.

33. The claim against DDI was brought on the contingent basis that *if*, as the Guarantor Defendants contended in pre-action correspondence, the Purported Delivery Notice and/or the Purported Acceptance Notice did have the contractual effect that completion and delivery had been effected in compliance with Schedule 4 such that clause 1.10 was satisfied and clause 2.1(b) was not triggered, then this was caused by a breach of DDI's obligations owed to Active under the Completion Guarantee.

34. Accordingly, the claim against DDI was only brought as a result of the Guarantor Defendants' dishonest case as to the validity of the false contractual notices and the enhanced version of the film to which DDI was a party at the relevant time. I accept Ms Wood's submission that had the Guarantor Defendants *not* brought that false case, and pursued only their case based on the equitable defences, Active would not have brought any claim against DDI.

35. Despite Mr Jason Moring being one of the three Ms in M3, DDI did not plead any case based on agency, or any equitable defence, or that there was a lack of causation: see DDI Defence, §§22 and 34.

36. In those circumstances, I agree that the starting point is that the costs of DDI being involved in the proceedings ought to be for the Guarantor Defendants and not Active. However, I also agree with Ms Wood that DDI's conduct as found by the Court must also be taken into account. Those findings are as follows:

    (1) Together with Ms Crone and Mr Krech, Mr Jason and Mr Ron Moring of DDI devised the scheme whereby they pretended that delivery and completion of the film had taken place by *back-dating* a Delivery Notice by 3 weeks to 31 August 2017 so as to get the Guarantors 'off the hook'" [§§3 and 115].

    (2) DDI had given a false acceptance notice [§154].

    (3) DDI falsely suggested, once litigation was in prospect, that a letter of 4 December 2017 was a letter of Non-Acceptance of Delivery: [§168].

    (4) DDI's further correspondence in July 2018 was "*a complete re-writing of history by DDI as it took every point it could think of, no matter how unmeritorious, in order to save its own skin. Whilst it is true that a valid Delivery Notice was not given under the Completion guarantee, that was not what Jason Moring thought he had achieved when he was in cahoots with Ms Crone and Mr Krech at the time.*" [§231]

    (5) "*DDI belatedly confessed to the fact that there had been no completion and delivery of the Film under the terms of the Completion Guarantee, once it became apparent to Mr Jason Moring that DDI's neck was on the line for wrongfully issuing an acceptance notice.*" [§258]

37. As Ms Wood rightly states, but for DDI's behaviour, the case based on the false delivery and acceptance notices could never have been run. Mr. Moring referred to DDI's behaviour being "clumsy" but I have found in my judgment that it went further than that, as it played a central part in the acceptance of the false Delivery Notice.

38. In all the circumstances, and in the exercise of my discretion as to costs, I consider that DDI should bear its own costs of these proceedings, which are a consequence of its own wrongful behaviour. Indeed, it is only as a matter of good fortune that it is not on the wrong end of a costs order itself.