Neutral Citation Number: [2020] EWHC 2656 (Ch)

Claim No: BL-2017-000368

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

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

Date: 8 October 2020

Before :

LORD JUSTICE NUGEE

- -

Between :

THE FINANCIAL REPORTING COUNCIL LTD — **Applicant**

- and -

FRASERS GROUP PLC
(*formerly Sports Direct International Plc)* — **Respondent**

- -
- -

Mark Simpson QC and **Rebecca Loveridge** (instructed by **Legal Services, Financial Reporting Council**) for the **Applicant**

Richard Lissack QC and Adam Sher (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondent**

Sitting without a hearing

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10 am on Thursday 8 October 2020.

.....

LORD JUSTICE NUGEE

Lord Justice Nugee:

1. I handed down my written judgment on this application on 5 October 2020. I will not repeat the background which is apparent from my judgment, whose neutral citation is *The Financial Reporting Council Ltd v Frasers Group plc* [2020] EWHC 2607 (Ch). I now have to deal with consequential matters, namely permission to appeal and costs. The parties have filed helpful written submissions, and I am dealing with this matter without a hearing.

Permission to appeal

2. I propose to refuse permission to appeal, as I do not consider that there is any real prospect of success and there is no other compelling reason for an appeal.

3. Two grounds of appeal are put forward. Ground 1 is that the purpose of the Deloitte Material was to defend against the contemplated litigation. I accept that the evidence was to the effect both that the Deloitte Material was created in the course of the retainer, and that the general purpose of the retainer was, in the words of Mr Waterson cited in SDI's submissions, to:

> "respond to and/or defend and/or avoid the anticipated litigation with the French tax authority and any subsequent challenges from other tax authorities."

This does not seem to me materially different from the evidence of Mr Monteith cited in my judgment at [18].

4. But the particular way in which the Deloitte Material did that was to put forward a new or enhanced structure. For the reasons given in my judgment, although that was no doubt a reaction or response to the perceived threat from the French authorities, it had nothing to do with winning the litigation over the 2010 Structure (or assessing its prospects of success); nor could it be said that the reason for putting the 2015 Structure in place was to defend the litigation over the 2015 Structure, which seems to me to be logically incoherent. Nothing in Ground 1 undermines, or even engages with, the analysis in my judgment.

5. As to the suggestion that I was in error in concluding that the purpose of the first report was to recommend the 2015 Structure, I took that directly from Mr Waterson's evidence which was as follows (2nd witness statement at para 47):

> "I received the First Responsive Document by an email from Mr Stephens of Deloitte at 15:57 on 13 January 2015. Mr Stephens' email explained that the First Responsive Document "sets out the recommendation for the revised structure" and requested that RPC provide comments."

In other words this was Deloitte's own summary of what the first report did. Mr Waterson does not say, or suggest, that this summary was inaccurate. I do not see that there is any real possibility of the Court of Appeal finding an error here.

6. Similarly with Ground 2. This is that the Deloitte Material was created for the overarching purpose of litigation. The evidence simply did not establish this. What it established, which is quite a different thing, is that the Deloitte Material was created in the context of the perceived threat of litigation and as a reaction to it. That does not

seem to me to make its purpose a litigation purpose, for the reasons I gave. Again this proposed ground does not engage with the reasoning in the judgment.

7. In those circumstances I do not consider that the proposed appeal has any real prospects of success. I have already extended time for applying for permission to the Court of Appeal to 26 October 2020 and no further extension is asked for.

Costs

8. By CPR r 44.2(2)(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. There is no doubt that the FRC is the successful party.

9. By CPR r 44.2(2)(b) the Court may make a different order. SDI asks for an order that it pay only 70% of the FRC's assessed costs on the basis that the FRC was unsuccessful on the contemplation of litigation issue.

10. I agree that although I dealt with it very briefly, I accepted SDI's case on this and the FRC was therefore unsuccessful on this issue. That undoubtedly raises the possibility of there being some reduction in the costs that it can recover: see my judgment in *R (Viridor Waste Management Ltd) v HMRC* [2016] EWHC 2502 (Admin), cited by SDI in its submissions, where I reviewed some of the many authorities. But it does not always follow that a successful party will only recover a proportion of its costs simply because it has lost some issues along the way. As I said in *Viridor* there are considerations on both sides, and it is possible to point to statements in the authorities both in favour of, and against, making a deduction from the successful party's costs: see at [8]-[9]. As I also said there, it has also been said that costs, which are of course discretionary, are peculiarly fact-sensitive.

11. I have decided that this is not an appropriate case to make a deduction from the FRC's costs to reflect its failure on this issue. My reasons are as follows:

    (1) This was not an issue which only had to be addressed because it had been initiated by the FRC (contrast the "cards face up" issue in *Viridor* which only had to be addressed at all because HMRC took the point). It was SDI who asserted privilege and it needed to establish that litigation was in reasonable contemplation in order to make that assertion good. The facts, as they almost always are in a case of privilege, were peculiarly within SDI's knowledge so it had to address the point in sufficient detail to make its case in any event.

    (2) Nor was it a discrete and stand-alone issue. The parties addressed it in their arguments as if it were a separate issue from the litigation purpose issue on which SDI lost, but the two were in truth bound up together. SDI had to explain what the litigation was that it contemplated in order to explain why it said that the Deloitte Material was produced for the purpose of that litigation. So even if the point had not been actively contested, the issue would still have had to be sufficiently evidenced.

    (3) Although I did not accept the FRC's case on this issue, it was perfectly proper for them to probe the explanation that was put forward, not least in the light of the very bland French e-mail. It has not been suggested that they took a

hopeless point or acted unreasonably (and if it had been I would not have accepted it).

(4) It is no doubt the case that if the FRC had not argued the point some time would have been saved both in preparation and at the hearing. But it was SDI's decision to raise the privilege issue at all, in circumstances where, for the reasons given in my judgment, I take the view that the claim was always misconceived. If they had not done that, no costs would have been incurred at all.

(5) I agree with the FRC that the obvious time to take, and adduce evidence on, the privilege point was before Arnold J. Had that been done, it no doubt could have been argued and disposed of without a significant increase in costs. The need for a separate hearing, and the time taken to educate another judge into the background and issues, were entirely caused by SDI's decision to assert privilege after Arnold J's judgment rather than before. I do not need to decide if this was, as suggested by the FRC, a tactical decision designed to cause delay. I will assume that there was nothing tactical about it, and it was simply a case of SDI and its legal team thinking again. But even so that would indicate that they had not thought it through thoroughly first time round, and it remains the case that the entire need for a separate hearing was due to the litigation decisions taken by SDI.

12. I will therefore order SDI to pay 100% of the FRC's costs of this hearing, on the standard basis (it not being suggested that this is a case for the indemnity basis).

13. The remaining question is assessment, which I am asked to do summarily. The FRC's Statement of Costs shows a Grand Total of £36,623.04, made up as follows:

(1)	Solicitors' costs (in-house):	£ 4,853.04
(2)	Counsel's fees for preparation and advice	
	Mr Simpson QC	£15,200.00
	Ms Loveridge	£ 7,900.00
(3)	Counsel's fees for hearing	
	Mr Simpson QC	£ 2,375.00
	Ms Loveridge	£ 1,000.00
(4)	VAT (on Counsel's fees only)	£ 5,295.00

14. No specific criticism is made of either (1) solicitors' costs or (3) brief fees. I agree. These seem to me not only not excessive, but much lower than I would usually expect to see for a reasonably heavy interlocutory hearing in the High Court that took a full day, even taking account of the fact that the burden of preparation in terms of evidence fell almost entirely on SDI. Part of the reason is no doubt the use of in-house solicitors whose hourly rates are understandably much lower than those in private practice who have more overheads to bear. I agree that a simplistic

comparison between the FRC's overall costs and SDI's overall costs is therefore not particularly helpful. Nevertheless I can see no basis for reducing these elements of the costs.

15. Specific criticism *is* made of the amounts charged by counsel on preparation, amounting to £23,100 in all (and with VAT £27,700). It is pointed out that the only document prepared for this hearing was the skeleton argument, and it is submitted that in the absence of further explanation it is unlikely that this would be recovered in full on a detailed assessment.

16. This submission illustrates a disadvantage of conducting a summary assessment without a hearing, which is that the Court often has very little material to go on and can do no more than apply its accumulated experience to its knowledge of the case. On their own I can see why it is said that these figures, unexplained as they are, seem high for a case where no evidence was filed on behalf of the FRC.

17. But that would be to ignore the fact that the brief fees are very low. I infer that that means that all the preparation of the case (reading in, legal research, thinking time, formulating the arguments) has been charged as advice, conference and documents. Had all these matters been rolled into the brief fees, as they could have been (and probably would have been in former times), the brief fees would have been £17,575.00 and £8,900 respectively. Those do not seem to me to be excessive, or even particularly high for a hearing of this complexity. I consider that they are both reasonable and proportionate

18. In those circumstances I propose to award the costs claimed in full. It is agreed that they should be paid within 14 days, that is by 22 October 2020. Pursuant to my order of 28 July 2020, however, interest under the Judgments Act 1838 on the costs will run from that date.