Claim No BL-2023-000899

Neutral citation number [2024] EWHC 3127 (Ch)

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

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.**

Judgment on issues reserved at the CMC held on 27 November 2024 Handed down on 5 December 2024

1. At the end of the hearing on 27 November 2024 two issues were left over to dealt with on paper. First, whether the court approves Disclosure Issue 22 in the form proposed by the claimant or the first defendant. Secondly, the first defendant's claim for costs in respect of the application for security for costs reserved to the CMC pursuant to the consent order dated 31 January 2024.

2. The background to the claim can be seen in my judgment dated 27 November 2024 dealing with the claimant's application for a split trial.

Disclosure Issue 22

3. The approach adopted by the claimant to the formulation of the Issues for Disclosure in a number of instances, including Issue 22, is to define an issue at a high level of generality followed by a series of sub-issues which are designed to illustrate particular areas that are covered by the general question. The sub-issues are examples of issues that are said to be included within the headline issue. Mr Davies, who appeared for the claimant, explained at the hearing that the sub-issues are intended to assist the document reviewer identifying documents which fall within Issue 22. At the end of the hearing approval to Issue 22 was left over for further consideration to be given.

4. Issue 22 is defined in the following way:

> *"What steps were taken for the purposes of HSFL 1's proposed IPO? In particular:*
>
> *(1) What discussions took place with and what advice and services were provided by professional advisers, including Cenkos?*
>
> *(2) Which music industry figures were identified, approached and/or retained to provide advice including as members of HSFL 1's Advisory Board?*
>
> *(3) Which music catalogues were identified as potential acquisitions and what negotiations were undertaken in relation to their acquisition?*

(4) What discussions took place in relation to HSFL 1's entry into the portfolio administration agreement with Kobalt?

(5) What steps were undertaken to market the investment in the IPO to investors? Which individual(s) provided the instructions to take the various steps referred to in answer to the questions above for the purposes of HSFL 1's proposed IPO?"

5. Issue 22 has seven elements; the general issue at the outset, five sub-issues and an extension to the general issue at the end making it clear that the documents for which searches are to be made should reveal who gave the instructions for the steps that took place.

6. The first defendant does not accept the claimant's approach. Mr Cullen, who appeared for the first defendant, submitted that the general formulation does not identify an issue for disclosure as defined in paragraph 7.6 of PD57AD. He submitted that the formulation is too far removed from the statements of case and does not identify a key issue which is in dispute which can only be tried by reference to contemporaneous documents. He says that of the five sub-issues only two arise from a disputed issue in the statements of case. The first defendant proposes that the issue is re-drafted in the following form:

"As to the steps taken for the purposes of HSFL 1's proposed IPO:

(1) Did the nine "Pipeline Catalogues" referenced in the HSFL 1 Prospectus include any of the five catalogues whose acquisition was envisaged in the Bond Prospectus; and were any of those Pipeline Catalogues included in the 15 music catalogues referenced in the Dante report?

(2) Did Mr Mercuriadis or HSFL 1's directors procure and cause HSFL 1 to enter into an administration agreement with Kobalt on 23 June 2017?"

7. The guidance from Sir Geoffrey Vos C in *McParland & Partners v Whitehead* [2020] EWHC 298 (Ch) was provided in relation to the Disclosure Pilot and some significant amendments were made to the disclosure regime before PD57AD was approved by the

CPRC. Significantly, paragraph 7.6 now opens with words which reflect the Chancellor's guidance. It states:

> "The list of issues should be as short and concise as possible."

In this respect, the Chancellor's guidance has been translated into a requirement of the disclosure regime which applies in the Business and Property Courts. Furthermore, paragraph 7.7 now requires the parties when preparing and discussing Issues for Disclosure (discussion between the parties is a requirement set out in paragraph 7.10) to have regard to the five primary functions of Issues for Disclosure that are articulated. In my experience, however, the need for concision is still often overlooked and it was disappointing to learn in this case that there had been only very limited discussion between the parties.

8. Despite these changes to the disclosure regime, the guidance in *McParland* remains important. The Chancellor noted at [4] that:

> "The Disclosure Pilot should not become a disproportionately costly exercise. This latter requirement means that the parties have to think co-operatively and constructively about their dispute and what documents will require to be produced for it to be fairly resolved. In smaller value disputes particularly, but also in higher value ones, unduly granular and complex solutions should be avoided."

9. Later in his judgment the Chancellor said at [44]:

> "The starting point for the identification of the issues for disclosure will in every case be driven by the documentation that is or is likely to be in each party's possession. It should not be a mechanical exercise of going through the pleadings to identify issues that will arise at trial for determination. Rather it is the relevance of the categories of documents in the parties' possession to the contested issues before the court that should drive the identification of the issues for disclosure."

10. And at [57] the Chancellor said:

"… unduly granular or complex lists of issues for disclosure should be avoided."

11. In this case, the claimant invited the court to have regard to the fact that the claimant is in liquidation and has limited access to contemporaneous documents. However, Mr Cullen rightly drew attention to a liquidator's wide powers to obtain documents relevant to the liquidation. In any event, the claimant has been able to plead fully a claim alleging breaches of duty by the first defendant and dishonest assistance by the second and third defendants. The claimant's liquidator is not entitled to disclosure that is more generous in scope than any other party. In the classic description, the claimant is not permitted to undertake a fishing expedition in the hope of obtaining documents, beyond those which directly respond to issues for disclosure as defined in paragraph 7.6 of PD57AD, with the primary purpose of bolstering its case or providing material for cross-examination.

12. Paragraph 59 of the amended particulars of claim (which is one of the paragraphs from which Issue 22 is said to arise) opens with the words:

> "Pending disclosure as to the process and timing of the preparation of the HSFL 1 Prospectus it is reasonably to be inferred …".

If those words merely explain the degree of particularity which follows and why the case is based upon inference, they are unobjectionable. They do not inform whether, in light of the response in the defence, there is an issue for disclosure or affect the scope of disclosure.

13. There is no one correct way to formulate issues for disclosure and I accept that in a complex case such as this one the task is not straightforward. However, it seems to me that the issues for disclosure drafted by the claimant are too granular and fail to have regard to the guidance provided in McParland that the drafting of issues for disclosure should start by having in mind the types of documents that are likely to be disclosable in response to key issues. Furthermore, in my judgment, it is unwise to draft an issue for disclosure using general words followed by sub-issues, albeit the approach may be motivated by a desire to

assist the document reviewer. I doubt that document reviewers are helped by longer and more granular issues and additional granularity inevitably makes it harder for disclosure issues to be agreed.

14. Issue 22 covers part of the narrative of events in relation to which there is little dispute about what happened. The IPO which is referred to in Issue 22 did not proceed. It could have peripheral relevance to the counter-factual case on loss the claimant wishes to expound but it is clear from the amended particulars of claim that the claimant does not need wide search based disclosure relating to the steps taken concerning the failed IPO for there to be a fair trial. By contrast, issues 5 and 29, which use the formula"what steps" etc are central to the claim.

15. I consider that the first defendant's approach correctly identifies the only issues for disclosure which arise from paragraphs 59, 62 and 66 of the amended particulars of claim and I approve the first defendant's formulation of Issue 22.

Costs of the first defendant's application for security for costs

16. On 8 November 2023 the first defendant applied for security for costs upon ground (c) set out in CPR 25.13(2) up to and including the filing of his defence. There has never been any dispute about the claimant's inability to meet the first defendant's costs if ordered to pay them. It is, however, worth noting that in addition to satisfying the court that one of the grounds applies, the court must be satisfied that it is just to make an order. Furthermore, there will often be issues that need to be resolved about the manner of giving security, the amount of security and the period or stage that is to be covered.

17. The application was compromised on the terms recorded in the consent order made by Master Clark on 31 January 2024. In outline the parties agreed that an insurance policy dated 29 November 2023 with an endorsement on the policy dated 16 January 2024 would stand as security and, save as to costs which were reserved by the order, the first defendant would

"withdraw" the application for security. I am not convinced that the CPR permits an application to be partially or indeed wholly withdrawn but it is clear the claimant and first defendant intended that no order would be made on the application other than as to costs. The issue between the parties is whether the application was issued prematurely and could have been avoided. Put another way, was it reasonable for the first defendant to have issued the application when it did, or at all?

18. The first defendant relies upon correspondence long before the claim was issued in June 2023 in which the claimant was warned that an application for security would be made. I consider such warnings to be of limited relevance to the issue I have to decide. Of much greater significance is the correspondence which commenced with the letter from Payne Hicks Beach (PHB) dated 25 October 2023. Having referred to the relevant provisions of the Civil Procedure Rules, PHB sought security in the sum of £234,000 being 70% of the aggregate of costs (a) incurred before the claim was issued and (b) estimated to be incurred up to service of a defence. Agreement was required by 4pm 27 October 2023 (less than 2 days after the letter was sent). A deadline of 4pm on 10 November 2023 was set for a payment into court being made.

19. Forsters replied on 27 October 2023 saying:

> "Without prejudice to our client's right to contest any application, our client is content to discuss the provision of security for your client's costs."

20. Forsters went on to ask PHB to provide a budget in Form H relating to incurred costs and the estimated costs up to service of the defence. In their reply dated 1 November 2023 PHB misinterpreted the request for Form H as being a request for a budget covering all phases of the claim. They provided only a breakdown of the overall figure of £335,000 as between incurred and estimated costs. Forsters pointed out the misunderstanding in their reply dated 2 November 2023.

21. The application was then issued on 8 November 2023. The first defendant was provided with the application a breakdown of the estimated costs but did not provide any breakdown of the incurred costs until 14 November 2023. Once again, a very short deadline for a reply was specified. However, it was not until 11 December 2023 that Forsters produced an ATE policy which formed the basis, with amendments, of the security provided.

22. The parties have approached the question of costs in a binary way. The first defendant says it was justified in issuing the application when it did and should therefore have all its costs the application. By contrast, the claimant says the application was premature and the first defendant should not recover any costs. In reality the position is more nuanced.

23. It seems to me that:

1. The claimant should have been aware at the point of issuing the claim that an application for security would be made and have planned for it.
2. The first defendant should have provided a breakdown of its incurred and estimated costs with the initial request for security made on 25 October 2023.
3. Issue of the application on 8 November 2023 was premature in the absence of an adequate breakdown. I do not consider PHB could reasonably have understood Forsters to be asking for a budget for the entire claim.
4. The claimant could have unequivocally agreed to provide security and stated the form in which security would be given much earlier than was the case. I note the delay in providing the ATE policy and the fact that adjustment was needed before security could be agreed.
5. The purported imposition of unreasonably short deadlines by PHB was unhelpful and failed to demonstrate the type of reasonable cooperation the court expects.

24. I conclude that it would have been reasonable for the first defendant to have issued an application for security in the period between 16 November and 11 December 2023.

25.Although issue of the application was premature, the first defendant is entitled to recover the majority of its costs of the application because the prematurity had only a modest effect on the amount of work reasonably undertaken and the costs that are recoverable. It is not right to disallow the entire costs of the application merely because of prematurity. The first defendant has succeeded on the application and a discount for prematurity of 10% is appropriate. The imposition of unreasonable deadlines is not, on this occasion, a matter of conduct that should affect the proportion of recoverable costs.

26. I turn to summary assessment.

27. The first defendant seeks costs totalling £23,587.20. £10,957 (before vat) is included for work done on documents. Counsel's fees of £1,635 for Mr Cullen and £2,685 for junior counsel (both figures are before vat) for advice and work on documents are included albeit that the application was straightforward. The witness statement in support of the application runs to 12 pages but quotes extensively from correspondence and deals with issues of only marginal relevance to the application.

28. I am assessing costs on the standard basis. The recoverable sum must be reasonable and proportionate and any doubts resolved in favour of the paying party. I summarily assess the costs on a 100% basis at £12,000 + vat + the court fee of £216. The total is therefore £14,616. Less the 10% discount the sum payable by the claimant is £13,154.40.