Case No: LM-2019-000198

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

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)

Date: 21/09/2020

Before :

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

WINLINK MARKETING LTD	**Claimant**
- and -	
THE LIVERPOOL FOOTBALL CLUB & ATHLETIC GROUNDS LTD	**Defendant**

- -
- -

Mr Andrew Sutcliffe QC and Mr William Day (instructed by **BLM Solicitors**) for the **Claimant**
Mr Robert Anderson QC and Mr Theo Barclay (instructed by **DLA Piper UK LLP**) for the **Defendant**

Hearing date: 14 September 2020

- -

COSTS RULING

HH Judge Pelling QC :

Introduction

1. This is a ruling following detailed costs submissions made by the parties at a hearing on 14 September 2020 at which the substantive judgment in these proceedings was handed down. Normally costs issues in a case of this sort will be dealt with orally. However the parties occupied the time of the court from 10.30 until 13.20 and I was due to commence the hearing of another matter at 14.00 that day so I had no choice but to reserve this issue. It is not my intention that this ruling should descend to the sort of detail to be found in the submissions.

The Outcome of the Trial

2. Readers of this Ruling are referred to the substantive Judgment ([2020] EWHC 2271 (Comm)). In summary until shortly before the trial there were four issues to be determined:

   i) A No Agreement issue – it being contended by the Defendant ("LFC") that there was no signed copy of the agreement of which it was aware that had been signed on its behalf;

   ii) An Out of Time issue – it being contended by LFC that the underlying agreement said to entitle the Claimant ("WML") to a commission under the agreement that it sued on ("IA") was entered into after the expiry of the Introduction Period as specified in Clause 1.1.8 of the IA;

   iii) An issue as to whether either as a matter of construction or implication, the IA was subject to a requirement that WML be the Effective Cause of the sponsorship agreement in respect of which it claimed commission under the IA; and

   iv) Whether, if the answer to (iii) was affirmative, WML was an Effective Cause of the sponsorship agreement in respect of which it claimed commission under the IA.

3. Of these issues, Issue (i) was abandoned by LFC on the Friday before trial. WML succeeded in the result in relation to Issue (ii) but not on the basis of the construction for which it contended – see Judgment, paragraphs 34 – 48. This was an issue of construction that did not generate significant costs prior to trial other than in relation to pleadings and took up a relatively limited amount of time at trial. LFC was successful in relation to Issue (iii) – see Judgment, paragraphs 49-65 – and Issue (iv) – see Judgment, paragraphs 66-90. In reality issues (iii) and (iv) were the main issues for trial and factually the trial was concerned almost exclusively with evidence relevant to (iv).

Offers to Settle Prior to Trial

4. The only offer to settle made by any party prior to trial was by LFC by a letter dated 5 May 2020. The letter was in Calderbank terms not CPR Part 36 terms. Having set out a summary of the law and facts as LFC's solicitors perceived them to be, the letter offered to agree that each side should bear their own costs provided that the claim was

discontinued before 09.00 on 11 May 2020. In the event that the offer was not accepted, LFC reserved the right to bring the attention of the court to the letter when the question of costs came to be determined and asserted that it would claim its costs on the indemnity basis. Mr Anderson QC relied on the letter whilst making clear that he was not seeking costs to be assessed on the indemnity (as opposed to the standard) basis.

Applicable Principles

5. The applicable principles are those set out in CPR r. 44.2 namely:

> "**Court's discretion as to costs**
>
> 44.2—(1) The court has discretion as to—
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid.
>
> (2) If the court decides to make an order about costs—
>
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
>
> (b) the court may make a different order.
>
> …
>
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
>
> (5) The conduct of the parties includes—
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction—Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.
>
> (6) The orders which the court may make under this rule include an order that a party must pay—
>
> (a) a proportion of another party's costs;
>
> (b) a stated amount in respect of another party's costs;
>
> (c) costs from or until a certain date only;
>
> (d) costs incurred before proceedings have begun;
>
> (e) costs relating to particular steps taken in the proceedings;
>
> (f) costs relating only to a distinct part of the proceedings; and
>
> (g) interest on costs from or until a certain date, including a date before judgment.
>
> (7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph m(6)(a) or (c) instead."

Mr Anderson QC submitted and I accept that the summary of general principle set out in Para 44.2.10 in Vol. 1 of the current edition of the White Book correctly summarises the current practice in relation to applications for costs orders that depart from the General Rule. In summary:

> "Propositions that may be derived from the authorities and which may be stated with a degree of confidence are as follows.
>
> 1. The rules themselves impose no requirement to the effect that an issue-based costs order should be made only "*in a suitably exceptional case*", and none is to be implied, although "*there needs to be a reason based on justice*" for departing from the general rule, and that the question of the extent to which costs of a particular issue are to be disallowed should be left to the evaluation and discretion of the judge, "*by reference to the justice and circumstances of the particular case*" …
>
> 2. The reasonableness of taking failed points can be taken into account, and the extra costs associated with them should be considered …
>
> 3. Where the circumstances of the case require an issue-based order in the form of an order expressed by reference to the costs of the issue, that is what the judge should make; however, generally, because of the practical difficulties which this causes, the judge should hesitate before doing so and, where practicable,

> the order should be expressed as a percentage or with reference to a distinct period of time …
>
> 4. There is no automatic rule requiring an issue-based costs order in the form of a reduction of a successful party's costs if he loses on one or more issues … The mere fact that the successful party was not successful on every last issue cannot, of itself, justify an issue-based costs order …
>
> 5. The courts recognise that in any litigation, especially complex commercial litigation but including personal injury litigation, any winning party is likely to fail on one or more is- sues in the case (possibly issues on which the losing party could have taken steps to protect himself, at least to an extent, to costs liability)."

Parties' Submissions

6. LFC submits that it has been the successful party and should recover the whole of its costs to be assessed at a detailed assessment if not agreed on the basis that it was the successful party, applying the General Rule set out in CPR r.44.2(2)(a).

7. WML submits that LFC should pay costs of the No Agreement Defence and the Out of Time Defence, alternatively that there be a proportionate discount on Liverpool's costs to reflect the outcome on those Defences; and a further cost sanction be applied against LFC to reflect its conduct in respect of disclosure and evidence relating to the case more generally. It submits that the combined effect of these points should lead to the conclusion either that there should be no order as to costs or failing that, there should be an order permitting LFC to recover no more than 30% of its otherwise recoverable costs.

The No Agreement Defence

8. Although Mr Sutcliffe characterised this as LFC's primary defence until it was dropped on the Friday before trial, I consider that is to over-state its importance. It was the logically first in time defence. I accept that in addressing this issue, WML incurred significant cost though how much is not anywhere in evidence. Thus the proportion of the total costs of the parties attributable to that issue is one I will have to evaluate without the assistance of any evidence on the issue. Had WML wished to make good its contention that 40% of its total costs were attributable to that issue then it could and should have filed evidence to that effect. Mr Sutcliffe submitted that I should (a) disallow 40% of LFC's total costs by reference to this issue and (b) award WML 40% of its total costs by reference to the same issue. Assuming the costs of each party were similar in amount and there was a set off, Mr Sutcliffe was driven to accept that the effect of this submission if accepted would be that LFC would end up recovering only 20% of its total costs of the claim. If I acceded to WML's submission that a further 10% should be deducted in relation to the Out of Time defence and a further 20% of other litigation misconduct that would appear to result in WML being entitled to 10% of its costs. In fact Mr Sutcliffe submitted the effect of these issues should go no further than there being no order as to costs. Given the ultimate result, this is a counter-intuitive outcome.

9. I accept that the decision to drop this defence followed a change of leading counsel by LFC and although Mr Sutcliffe QC was critical of the fact that it was dropped only on the Friday before trial, I consider that criticism is misplaced. Mr Anderson told me and I accept that he was first instructed about a month before the trial was due to start and I accept that this defence was dropped on his advice (although he was quite properly careful not to waive privilege in relation to that advice). Whilst it would no doubt have been more convenient and less costly if the decision could have been taken and communicated sooner than in fact it was, I reject the notion that LFC delayed informing WML of the decision deliberately and in any event it does not matter. Plainly, WML are entitled to a cost adjustment to reflect the fact that its case in relation to this issue had been fully prepared by the time it was informed that the point was being dropped.

10. This is an issue where it is questionable whether it should have been persisted with for as long as it was. It was one that generated some cost in relation to pleadings and evidence as well as some expenditure of time while preparing for trial. However, I accept that no document relating exclusively to this issue was the subject of disclosure and I accept also that the witness statements served in these proceedings would have been in substantially the same format whether or not this issue had been relied on or dropped before disclosure. Thus whilst there was some cost that was attributable to the issue it was not anywhere near as extensive as WML would have me accept. The issue was a binary one – either LFC was right or WML was. This issue therefore is one that in principle ought to be the subject of an issue-based costs order. In my judgment however, an order in these terms will simply increase costs and should be avoided if possible and in my judgment this is most reasonably, proportionately and fairly addressed in the circumstances by a percentage reduction in the costs otherwise recoverable by LFC.

11. The authorities distinguish between an order that prevents an otherwise successful party from recovering its costs attributable to an issue on which it was not successful and an order that does that and also provides for a further reduction that has the practical effect of requiring the otherwise successful party to pay the costs of the unsuccessful party attributable to the issue on which it succeeded. The authorities suggest that it will not always be appropriate to make the second type of order. On the facts of this case however and for the reasons that I have identified above, such an order is appropriate in relation to this issue.

12. I do not accept in the absence of evidence, that 40% of the costs of either party can properly be attributed to the issue I am now considering in the absence of any evidence to that effect. Doing the best I can with the material I have, I conclude that about 10% of each party's costs were exclusively attributable to this issue. I consider therefore that it is necessary to reduce the costs otherwise recoverable by LFC by 20% by reference to this issue.

The Out of Time Issue

13. WML was successful in the result in relation to this issue but not on the basis for which it contended. This issue was one that exclusively depended on the correct construction of the agreement, there was no factual matrix evidence that was relevant to that issue and the facts relied on by the parties which are relevant contextually were common ground or not disputed – see paragraphs 45 – 46 of the Judgment. The issue was one that I determined as a matter of textual construction by reference to the other relevant

terms of the IA – see paragraphs 41 – 44 and 48 of the Judgment. In arriving at that conclusion I rejected WML's construction – see paragraph 47 of the Judgment.

14. Two conclusions flow from this. First, I reject the notion that 10% of each party's costs of these proceedings are to be attributed to this issue as Mr Sutcliffe contended. The issue is one that will have resulted in some pleading expense but will have had no material impact on the scope or cost of either disclosure or witness statements. It will have had some impact on trial preparation and took up some time in both written opening and closing submissions as well as some time in oral submissions. LFC's costs were just short of £500,000. In my judgment it is entirely unreal to suppose that £50,000 of those costs should be attributed to the issue I am now considering. There is no evidence from WML as to the portion of its costs exclusively attributable to this issue. The second conclusion that follows from what I have said so far is that whilst LFC failed on the issue, WML did not succeed on its construction.

15. These two factors together leave me to conclude that I should treat this issue as one that justifies an order that prevents LFC from recovering its costs attributable to the issue but does not justify me attempting a further reduction equivalent to WML's costs of this issue. Since there is no evidence as to the cost attributable exclusively to this issue, that is something I have to evaluate from the factors I have referred to earlier. Doing the best I can, I conclude that there should be a further 5% reduction in the costs otherwise recoverable by LFC from WML.

Failure to Preserve Documentation

16. WML maintains that there should be a further reduction in the costs that are otherwise recoverable by LFC to reflect the court's disapproval of the failure by LFC to stop its automatic document destruction programme earlier than in fact it did. I reject that submission for the following reasons.

17. It is not and never has been alleged by WML that LFC has deliberately destroyed documents in anticipation of litigation. Generally, there is no duty to preserve documents prior to the commencement of proceedings – see Douglas v. Hello! Limited [2003] 1 All ER 1087 at para 86 followed in Earles v. Barclays Bank Plc [2009] EWHC 2500 (Mercantile) at para 28. The claim was served on LFC on 17 May 2019. It is not suggested that there was any failure after that date.

18. Although WML submitted that the costs recovered by the defendant bank in Earles (ibid.) were reduced as a result of a failure to preserve documents, that is not how I read the judgment. The relevant paragraphs are paragraphs 75-77 and are exclusively concerned with a failure to give electronic disclosure two years prior to when in fact it was given. The Judge reduced the costs otherwise recoverable because his view was that there was a reasonable prospect of the action being settled before trial if the e-disclosure had been given when it should have been. That is not what this case is about. There is nothing here that is relevant to accidental destruction prior to the commencement of a claim.

19. Mr Sutcliffe submitted that the law was changed by the Disclosure Pilot because paragraph 3.1 of the relevant Practice Direction (Practice Direction 51U) says that it is the duty of a party to preserve documents when litigation is in reasonable contemplation. However, that Practice Direction came into effect on 1 January 2019

and applies to new or existing proceedings from that date. It did not apply on or before the commencement of these proceedings.

20. The formal sponsorship agreement by reference to which commission was claimed by WML had been signed on 27 May 2016 but had been agreed in principle by 8 April 2016. WML maintains that LFC should have stopped its 3 year document retention policy by September 2016 (being when WML informed LFC that it was appointing solicitors) and certainly no later than 6 January 2017 being the date when its solicitors were instructed to act on its behalf in relation to the claim. It is not suggested that LFC were asked to preserve documents at that stage. There was a 11 month gap prior to the service of proceedings when there was no contact between the parties..

21. Although WML submit that there is no " … *acceptable excuse for Liverpool's wholesale destruction of documents relevant to this dispute, even if inadvertent* …", in my judgment that ignores two points, being (a) the legal position, being summarised earlier, at the date when WML allege LFC should have but failed to suspend its document retention policy and (b) the absence of any evidence to support the proposition that WML's effective cause case would have been stronger had the retention policy been suspended. Its case in very broad summary had been that all it was required to do was make an introduction and that it had drawn to the attention of LFC that BetVictor had a very substantial Asian market presence. It is difficult to see what documentation there could have been that would improve that case not least because it was not in dispute that WML had affected an introduction in 2013 and had done so by reference to the synergies available from the connection of both LFC and Bet Victor to their respective Asian markets. However that was not the critical issue. I do not see what evidence there could have been to meet the critical point referred to in paragraphs 83-85 of the substantive judgment.

22. Although WML submits that I should treat this as misconduct and reduce the costs otherwise recoverable by LFC as a result of that conduct, I do not consider that to be an appropriate step to take for the reasons I have explained in detail above. LFC had a document retention policy that it did not suspend until it was served with proceedings. Whilst the position may be different now, down to the time when these proceedings were started there was not an obligation to preserve documents prior to the commencement of proceedings and in any event LFC was entitled to treat the gap prior to the commencement of proceedings as reflecting a decision not to commence proceedings.

Redaction of Documents

23. I do not consider LFC's approach to the redaction of documents justifies a further reduction in costs recoverable either. The documents where redactions took place were checked by Mr Anderson after he was instructed. As a result a few further documents were released with some of the redactions removed but it is not suggested any of these were material to the issues that had to be decided. In relation to the BetVictor sponsorship agreement by reference to which WML claimed commission, that was disclosed in a partly redacted format. WML's junior counsel was permitted to inspect the document. Nothing further was said about that document until trial when an application was made for access to an unredacted form. It was then disclosed on a confidential basis. The main point of concern may have been to see whether it contained a break clause. Had it done so, this would have formed the basis of a submission by

WML that in that respect the agreement was functionally no different from those being considered in 2014. However in the end no points were made in relation to the sponsorship agreement. None of this justifies a special order as to costs whether by reference to conduct or otherwise.

Conclusion on Issues of Principle

24. For the reasons set out above, WML must pay 75% of LFC's costs of and occasioned by these proceedings to be assessed at a detailed assessment on the standard basis if not agreed.

Application to Set Aside Permission to Rely on Witness Summaries

25. By an application notice dated 22 April 2020, WML applied to set aside an order made by me on 12 March 2020 on a without notice application by LFC giving it permission to serve witness summaries on behalf of Mr Meinrad and Mr Grinneback. As is required by the CPR, the order included at paragraph 3 permission for WML to apply to vary or set aside the order providing that any such application was made within 7 days after service of the order on it. The basis of the application was that LFC owed duties of full and frank disclosure and fair presentation in relation to the application but that the evidence in support of the application was "*... incomplete, inaccurate and misleading*".

26. The evidence filed in support of the application was said to breach the full and frank disclosure and fair presentation duties because (a) the impression given by the evidence was that Mr Grinneback had provided a statement as a result of a formal proofing exercise whereas in fact the statement had been constructed by LFC's solicitors from information provided by Mr Meinrad and had not been approved by direct communication between Mr Grinneback and LFC's solicitors; and (b) the evidence suggested that LFC was hoping that each would give evidence when in fact Mr Meinrad had said from the outset that he did not want to give evidence at trial and he had been assured that he could not be made to do so.

27. WML suggested that this conduct should lead to a further reduction in the costs recoverable by LFC. This is mistaken in my judgment. The application was never effective because neither witness attended trial and it was not suggested that the witness summaries could or would be relied on by LFC at trial in the absence of the witnesses. Where an application of this sort has been issued, it must be disposed of on its merits and if appropriate a costs order made in relation to it. There is no justification for a more general reduction in the costs recoverable from an otherwise paying party by reference to conduct of this sort unless it had an impact on the conduct of the case that went beyond the making of a without notice application followed by an application to set aside. There was no such impact here.

28. LFC submit that all WML's submissions concerning this application should be rejected and it should be awarded its costs of the application which are claimed in the sum of £2667.60.

29. LFC first submit that the application was made out of time because it was issued in excess of 7 days after service of the application. I reject this as a relevant consideration because the information on which WML rely was not available in that time period and

a court would usually exercise discretion to permit an application to set aside in such circumstances.

30. More pertinently, LFC submits that the application was wholly unnecessary. Either the witnesses would have attended, in which case they could have been cross examined, but in the event they did not attend and so the summaries became redundant and on 27 April 2020, LFC's solicitors informed WML's solicitors of that fact and that the " … *Witness Summaries are therefore now redundant, as they have no status as evidence and cannot be relied upon in the absence of oral evidence. It follows that your client's Application to Set Aside falls away and no longer needs to be pursued* …".

31. In my judgment that is not an answer to the application either – had the witnesses attended the summaries could have proved inaccurate. That could have led to an unfair outcome and would have increased costs and the amount of time needed to resolve the dispute. This is no doubt why the rules applicable to witness statements apply as far as practicable to summaries – see CPR r. 32.9(5) and why the summary should include "*… the evidence if known which would otherwise be included in a witness statement …*" – see CPR r. 32.9(2)(a). The notes at para 32.9.1 of Volume 1 of the White Book summarise the issues identified in the case law that have to be considered on an application, including in particular the adequacy of the content and whether it is fair for the opposing party to be faced with the material. Giving the impression that a summary had been formulated with the same care and attention required for a witness statement coupled with a failure to indicate that the person concerned had been assured that he would not be required to attend trial is all material to that assessment.

32. In those circumstances, LFC's final point that there was no material non-disclosure or unfair presentation must be rejected. As to that, the texts on which LFC rely show that Mr Grinneback's statement was approved via Mr Meinrad. That is not materially the same as the content having been checked through by a solicitor directly and impacts directly on the assessment that has to be carried out on such an application. The same texts also demonstrate that as at 3 March 2020, LFC knew full well that they would not be getting signed statements from either Mr Meinrad or Mr Grinneback. That too is something that was material to the assessment to be carried out when determining the application.

33. In my view the material provided to the Court was materially misleading. The evidence in support gave the impression that LFC and/or its solicitors had been dealing directly with Mr Grinneback whereas that was not in fact the case and that there was a possibility that each would give evidence when in truth there was no such possibility. In the circumstances that was material to an assessment both of whether the material complied with CPR r. 32.9(2)(a) and whether it was fair for WML to be confronted with the material.

34. In those circumstances, WML is entitled to its costs of and occasioned by the application down to 27 April 2020, when it was informed that LFC would not be calling either witness or in consequence relying on the summaries. That can be addressed as part of the detailed assessment exercise.

Payment on Account

35. LFC's costs adjusted in the manner referred to in its skeleton for the consequentials hearing come to budgeted costs of £406,00.00 and incurred costs of £81,702. The starting point for arriving at an interim payment is 90% of budgeted costs and 50% of incurred costs – that is £274,313,25 and £30,638.59. I accept that the receiving party should receive a higher sum for budgeted than incurred costs. That makes a total of £304,951.84.. An allowance needs to be made for the costs of the application to set aside which as I have said WML is entitled to recover down to 27 April 2020. I have no means of assessing that but I consider it appropriate to reduce the interim payment otherwise recoverable by £4,950 to provide for that. I also deduct sums budgeted but not spent by LFC on IT support for the remote trial amounting to £7,500. This leaves a net sum of £292,500 (rounded down) payable by way of interim payment.

36. After I provided a draft of these reasons to the parties, LFC sought its costs of the consequentials hearing. I take the view that generally the costs of the parties at a consequentials hearing should be borne by the parties in the same proportions that the costs of the claim generally are directed to be borne unless there is some valid conduct issue that justifies a departure from this approach. I am satisfied that there is no relevant conduct issue that justifies such a departure here, and order that WML pay a further sum on account of £10,481.25.

37. That leads to a total figure, rounded to the nearest pound, of £303,000. I accede to the submission that WML should have 28 days in which to pay that sum.