

Neutral Citation Number: [2023] EWHC 1391 (Ch)

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch D)**

Claim No: BL-2020-000880

Before

MR JUSTICE MICHAEL GREEN

BETWEEN:

EVA GREEN

Claimant / Defendant to Counterclaim

- and -

WHITE LANTERN FILM (BRITANNICA) LIMITED

Defendant / Counterclaimant

- and -

SMC SPECIALTY FINANCE LLC

(a company incorporated under the laws of the State of California)

Additional Claimant

EDMUND CULLEN KC and AMANDA HADKISS (Instructed by **Archerfield Partners LLP**)
appeared on behalf of the Claimant

JAMES GOODWIN and LEMUEL LUCAN-WILSON (Instructed by **Mishcon de Reya LLP**)
appeared on behalf of the Defendant and Additional Claimant

APPROVED RULING

Friday, 26 May 2023

(2.00 pm)

MR JUSTICE MICHAEL GREEN:

Introduction

1. This is the consequential hearing following the judgment after trial that I handed down on 28 April 2023. The judgment is reported at [2023] EWHC 930 (Ch).
I will adopt the same abbreviations and definitions as in my main judgment.
2. By my judgment, I found in favour of Ms Green in relation to the fee of \$1 million and I rejected all the Defendants' defences to her claim. I also dismissed the Defendants' counterclaims in tort.
3. By my order of 28 April 2023, I directed this consequential hearing to deal with costs and any application for permission to appeal. In the usual way, I extended time for the appellant's notice to be filed until 21 days after this hearing, anticipating that the application would first be made to me.
4. However, when I received the Defendants' skeleton argument a couple of days ago, they said that they were not seeking permission to appeal from me.
Mr Goodwin, who appears before me, together with Mr Lucan-Wilson for the Defendants, tells me that his clients are still considering their position in relation to an appeal.
5. In my view, it is regrettable that the Defendants have not taken the opportunity to make an application for permission to me. I know that under CPR Part 52.3 they are entitled to simply go to the Court of Appeal, but the notes make quite clear in

CPR 52.3.6 that an appellant would be well advised to apply for permission to the lower court before going to the Court of Appeal. Five reasons are given in the notes there set out, but I would add to them by saying that it is of benefit to the Court of Appeal considering permission to have the views of the trial judge, who has far greater knowledge, inevitably, of the case and the issues that are sought to be appealed. This approach was firmly endorsed by the Court of Appeal in *Re T (A Child)* [2002] EWCA Civ 1736.

6. I obviously do not want to stray into any legal advice that may or may not have been given, but where an appeal is being contemplated and an extension of time obtained, and where there is every opportunity to make the application to the trial judge, it should be made to the trial judge. There is no reason not to, and there may be substantial benefits, both to the parties and the court, in doing so. It would be particularly regrettable if it is being done purely tactically, because the appellant perceives their position to be improved by avoiding the trial judge explaining why he is refusing permission to appeal.
7. Anyway, no application has been made to me and I will, therefore, say no more about it.

Costs

8. The issue of costs is, however, live before me, although, in broad terms, there is not much dispute between the parties. The Defendants agree that they lost and they must pay Ms Green's costs. Furthermore, a Part 36 offer was made by Ms Green, or on her behalf, on 28 July 2022, whereby she offered to settle the whole of the proceedings on the basis that she would receive a payment of

\$900,000 out of the Escrow Funds and the Defendants would receive the balance. The period for acceptance of the offer expired on 18 August 2022, but it was not accepted by the Defendants. They do, however, accept that the judgment was more advantageous to Ms Green than the offer, and that, therefore, the consequences set out in Part 36 apply.

9. Therefore, in accordance with CPR Part 36.17:
- (i) Ms Green is entitled to her costs after 18 August 2022 on the indemnity basis;
 - (ii) she is entitled to interest on her costs incurred after 18 August 2022 at the rate of 10 per cent over base rate; and
 - (iii) she is entitled to the payment of an additional amount of £75,000 from the Defendants.

Whilst the Defendants accept this, they do say that there should be some adjustment to that by reference to the late disclosure that happened shortly before and during the trial that they say was the fault of Ms Green's side. I will deal with that in due course.

10. As to the further common ground between the parties, the Defendants agree that, prior to 18 August 2022, Ms Green is entitled to her costs. But they say it should be assessed on the standard basis, whereas Ms Green says it should be on the indemnity basis. The Defendants also agree that, prior to 18 August 2022, Ms Green is entitled to interest on her costs at the rate of 2 per cent over base rate. Finally, the parties are also agreed that there should be an interim payment on account, although they are quite far apart on the amount.

Standard or Indemnity basis

- 11.** So, turning to the disputed issues, and, first, whether the pre-18 August 2022 costs should be assessed on the standard or indemnity basis. The test for indemnity costs is easy to state and well-established. It is less easy to apply the test in any particular case.
- 12.** From *Excelsior Commercial & Industrial Holdings Limited v Salisbury Hamer Aspden & Johnson* [2002] EWCA Civ 879, the test is whether there is something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs. Mr Cullen KC also referred to the factors set out by Mr Justice Tomlinson, as he then was, in *Three Rivers District Council v Bank of England* [2006] EWHC 816 (Comm) at paragraph 25, and those factors are repeated essentially in the White Book notes and are helpful.
- 13.** Mr Cullen relied on a number of factors that he submitted meant that the defendant's conduct was out of the norm.
- 14.** First, he says, and picking up something that I said in the judgment at [238], the Defendants' defence was constructed by lawyers after the event. I assume what he meant by that is that there never really was any defence to Ms Green's straightforward contractual claim. I think that this cannot really be considered in isolation from his second point, which is that the defences that they did come up with were based, up to trial, on the Defendants' witnesses' dishonest evidence.
- 15.** I found the Defendants' witnesses to have put forward false evidence in a co-ordinated way as to what they had allegedly been told had happened on the crucial telephone call between Ms Green and the Former Directors on

22 September 2019 when she is said to have renounced her obligations under the Artist Agreement. Apart from some other circumstantial evidence, this was really the only evidence the Defendants had as to the alleged renunciation, which was the whole basis of their defence, and indeed their counterclaims. It was exposed as false by the recordings that emerged late on.

16. Even though the Defendants changed tack at trial and relied principally on the admission of Ms Green and the Former Directors that she had used the word "*impossible*" on the crucial call, the Defendants' witnesses still maintained that their account was broadly true.
17. In my judgment, this is grounds for awarding indemnity costs and it does take the case out of the norm because it cannot be said to be the ordinary and reasonable conduct of proceedings for all of the Defendants' witnesses to put forward the same false story about this, when they must have known it was untrue. They thought it could not easily be disproved. They had no idea, when they made their witness statements, that the recordings would emerge. Their defence was essentially based on a lie, and I agree with Mr Cullen that, without that false evidence, there was really no defence to Ms Green's claim.
18. Mr Goodwin submitted that, inevitably, a judge has to decide between two competing narratives put forward by the opposing parties. Furthermore, he said that Ms Green was found to be, herself, an unsatisfactory witness and, to a certain extent, went outside her pleaded case in admitting that she said it was "*impossible*" to make the film with Mr Seal. He also said that the renunciation case eventually turned on the meaning of the word "*impossible*" in context, and the Defendants' witnesses' evidence actually became irrelevant. This was

basically what Mr Mallin KC had been submitting on behalf of the Defendants in his closing submissions at the trial.

19. To my mind, it misses the point. I am concerned with the period before 18 August 2022 because, since then, it is already established that Ms Green is entitled to indemnity costs because of the rejected Part 36 offer. Prior to August 2022, the Defendants were relying almost exclusively on their evidence which I have found to have been knowingly false. The court must express its disapproval of such an approach and conduct and the only way it can really do so is through an order for indemnity costs.

20. Mr Cullen also referred to a number of other factors.

(1) First, he said that the Defendants' pleadings were prolix, vague and ill-formulated. In particular, they pleaded many breaches of the Artist Agreement which they maintained constituted repudiatory breaches. I repeatedly pressed Mr Mallin at trial to confirm that he was not relying on these, but he always said that he was. However, he made virtually no submissions on them. Having pleaded them, they will inevitably have given rise to many extra costs. Mr Cullen says that this was disproportionate behaviour that should not lead to a requirement to assess Ms Green's costs proportionately. Mr Goodwin said that the pleaded facts were, in any event, necessary context for the renunciation claim. But if that was the reason that they were raised, in my view they should not have been pleaded as supporting a claim for repudiatory breaches.

(2) The second point that Mr Cullen made was that all these serious allegations received much publicity in the press and media. In particular, by pleading so

much evidence, including, in particular, the content of Ms Green's private texts and WhatsApp messages, this was intended by the Defendants to generate adverse press in order to put pressure on Ms Green to desist from her claim. Ms Green was, therefore, entitled to defend herself fully from these attacks on her personal and professional reputation.

(3) Thirdly, he said that the Defendants made serious allegations of fraud and conspiracy against Ms Green and others which failed comprehensively. I felt all along, and found in my judgment, that they were contorted claims and had "*an air of artificiality and legal construct to them*". The claims were only made two years after proceedings had begun and they do feel as though they were there to add to the campaign of pressure being exercised on Ms Green in these proceedings and to cause ever more costs to have been expended. In any event, they were dependent on there having been a renunciation, as the Defendants appeared to accept, although they are still apparently maintaining that they were not necessarily so. I have never received a satisfactory explanation as to how they give rise to any sort of substantive claim without there having been a renunciation.

(4) Fourthly, Mr Cullen said that the Defendants, through their solicitors, have pursued the case unnecessarily aggressively, which should be viewed in the light of my findings in the judgment.

(5) Finally, he relied on the rejection of reasonable offers put forward by Ms Green to settle the case.

21. The latter point is effectively dealt with by Part 36. But the other points do add to Ms Green's case that she should have all her costs assessed on the indemnity

basis. As I have said, it is particularly the putting forward of a co-ordinated false case on the evidence that should be marked by such an order. But I also think that the other factors identified by Mr Cullen should mean that Ms Green should not have to satisfy the costs judge that she has reacted proportionately to the excessive and unjustified case and allegations that were made against her.

22. Mr Goodwin submitted in his skeleton argument that the different bases would make very little difference in monetary terms. If that is so, then it seems to me to be all the more important that the court does express its disapproval of the conduct of the Defendants and orders them to pay indemnity costs, and I so order.

Allocation of costs between the two Defendants

23. Turning to the allocation of costs between the two Defendants, Mr Goodwin submitted that the wide discretion in CPR 44.2 allows me to allocate the costs liability between the two Defendants. He said that, as SMC was only joined to the proceedings from 14 March 2022, it should not be liable for the costs prior to then. In relation to the costs thereafter, he says that the costs should be split one-third to SMC and two-thirds to White Lantern, reflecting the time spent on the main claim and the counterclaims.
24. When the parties were preparing for this hearing and exchanging draft orders, the Defendants made no such suggestion that the costs liability should be split, and appeared to be accepting the usual joint and several liability in such respect. It was only in Mr Goodwin's skeleton argument that the point was first raised.
25. Mr Cullen said that such a split would be entirely inappropriate. He, like me, has

concerns that the reason that the Defendants have belatedly sought to do this and to pile the majority of the costs liability onto White Lantern is because White Lantern is just a shell company now and it may be allowed to go into liquidation to avoid any costs liability over and above the security already provided. I can think of no other reason for this new approach and Mr Goodwin did not offer one.

- 26.** Mr Cullen took me to various pieces of correspondence going back as far as the letter before action, but also offers of settlement and in relation to security for costs, all of which were written, essentially, on behalf of SMC and the Sherborne Media Group. That correspondence revealed that the Artist Agreement had actually been assigned in equity to SMC and that the defence and counterclaim being run by White Lantern was considered to be held on trust for SMC as a result of the assignment.
- 27.** It is clear from the correspondence, from the Defendants' pleadings and the witness statement of the Defendants' solicitor in November 2021 that the proceedings were at all times being controlled and run by, and for the benefit of, SMC. I agree with Mr Cullen that, if SMC had not become a party, there would have been a very strong case for it being subject to a third party costs order.
- 28.** When security was put up, it was by SMC. White Lantern was just a nominal defendant and I do not think it would be fair or just to expose Ms Green to the risk that some part of the costs order may go unsatisfied because White Lantern is put into insolvency. I will, therefore, not be making any allocation, and the Defendants are liable jointly and severally to the costs orders that I make.

Mr Merrifield's late disclosure of the recordings

- 29.** I turn now to the first issue of late disclosure. As I recorded in the judgment, there was late disclosure of Mr Merrifield's recordings of conversations. These proved to be of very great importance. The Defendants say that the late disclosure caused a delay to the start of the trial -- it was actually pushed back to the end of the window -- and that the costs of dealing with the late disclosure, including obtaining all the relevant recordings from Mr Merrifield, transcribing the same and analysing their significance fell on the Defendants.
- 30.** A complication is that Mr Merrifield was one of Ms Green's witnesses, but he was a former director of White Lantern and was one of its custodians for disclosure purposes.
- 31.** Mr Goodwin says that the fault probably lies with Mr Merrifield, not the parties, but that the Defendants were disproportionately affected. In reliance on *Walton v Gardner* [2001] EWCA Civ 1788, Mr Goodwin asked that Ms Green's costs in relation to the late disclosure be disallowed. Alternatively, he said that one-third of the costs should be costs in the case, and in respect of the other two-thirds, there should be no order as to costs.
- 32.** In my view, that is wholly inappropriate and inconsistent with the Part 36 regime that is in play for this period.
- 33.** By CPR 36.17(4)(b), "*The court must, unless it considers it unjust to do so*" order costs on the indemnity basis. It is clear that this means all of the winning party's costs. In considering whether the order would be unjust, CPR 36.17(5) requires the court to consider "*all the circumstances of the case*". It then seeks to delineate certain specific matters to take into account, but these all relate to the rejected

offer.

34. Mr Cullen referred to *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch), a decision of Mr Justice Briggs, as he then was, which was quoted from with approval by the Court of Appeal in *Webb v Liverpool Women's NHS Foundation Trust* [2016] EWCA Civ 365, that there is not an unfettered discretion to depart from the ordinary costs consequences of Part 36, and that the burden of the party seeking to rely on the injustice of such an order is a "*formidable obstacle*" as "*if that were not so, then the salutary purpose of Part 36 in promoting compromise and the avoidance of unnecessary expenditure of costs and court time would be undermined*".

35. In my view, the Defendants have not shown injustice and have not overcome that formidable obstacle.

(1) First, Mr Merrifield was in that odd position but, for the purposes of disclosure, he was on the Defendants' side and they should have ensured that everything was disclosed. In any event, I do not understand why a failure by a third party who was giving evidence for a party should result in that party being deprived of costs that they would otherwise be entitled to. *A fortiori*, in the context of CPR Part 36 and the issue of injustice.

(2) Second, I found that there was no deliberate concealment by Mr Merrifield of this evidence and that the evidence largely supported his evidence and Ms Green's case.

(3) Third, part of the point of the penal consequences of a rejection of a Part 36 offer is to prevent the sort of costs arguments that might

otherwise be made in the normal situation under CPR Part 44.

(4) Fourth, the costs would have had to have been incurred anyway at some point. I understand that the timing of the disclosure may have led to increased costs of having to transcribe and analyse in very short order, but the actual costs of the adjournment itself are minimal.

(5) Finally, it is very difficult to understand what costs are actually being sought to be carved out and how the costs of reviewing the late disclosure will be disentangled from all the other costs being incurred at that time in preparation for the beginning of the trial.

36. I am, therefore, going to refuse to make any deduction to the costs award as a result of the late disclosure of the recordings by Mr Merrifield.

Late disclosure of Ms Green's and Tavistock Wood communications

37. As to the late disclosure of Ms Green's communications with Mr Collier and Tavistock Wood, the Defendants have called this aspect the costs of the second adjournment. This was the adjournment of the closing submissions as a result of the late disclosure, at the end of the evidence, of telephone logs and messages between Ms Green, Mr Collier and others at Tavistock Wood. In [10] of the judgment, I said as follows:

"Towards the end of the evidence, and as a result of something said in the oral evidence of Mr Charles Collier, who is Ms Green's agent, in relation to telephone calls that he said he had with Ms Green on 23 September 2019, the Defendants sought disclosure of his telephone logs and any other relevant messages passing between Mr Collier or any other members of his team at Tavistock Wood and Ms Green. It emerged that there had been a serious failure in the disclosure process on behalf of Ms Green and a substantial number of additional WhatsApp, text and voicemail messages have been disclosed. This necessitated a delay to the end of the trial to ensure that full disclosure was given and the Defendants

had a good opportunity to review that disclosure and decide whether they wished to recall any witnesses for further cross-examination. In the event, they decided not to apply for such a recall and the trial's closing submissions proceeded thereafter. The effect was a serious disruption to the trial timetable and the use of the court's resources. As it has turned out, the further disclosure may have little impact on the issues I have to decide, in particular, whether there was a renunciation, but Mr Cullen KC properly apologised on behalf of his client and those involved in the disclosure process for their failures and the unfortunate impact it has had on the trial process. I will consider the new disclosure insofar as it is relevant in the course of setting out my factual findings below."

- 38.** This was unfortunate and entirely of Ms Green's side's own making. I think it is in a different category to Mr Merrifield's late disclosure. The costs occasioned by the late disclosure were specifically reserved in my order of 15 February 2023. Of course, I did not know about the Part 36 offer at the time. In my view, the court should express its disapproval in some way of the failures of disclosure by Ms Green. The Defendants say that they should have their costs of, and occasioned by, the late disclosure, the further late disclosure, the adjourned written closings and the adjourned oral closings, as defined in my order of 15 February 2023. Alternatively, they suggest that Ms Green's costs in such respect should be disallowed.
- 39.** I think it is a bit ridiculous to suggest that the entire costs of the written and oral closings should be paid by Ms Green or that her costs should be disallowed in that respect. Those would have had to have been incurred anyway and the late disclosure has hardly added to those costs. The late disclosure costs, even though some costs would have been incurred in relation to earlier disclosure, should attract some adjustment to the costs order to reflect the court's disapproval. In my judgment, that can adequately be done by depriving Ms Green of her own costs incurred in relation to the provision of the late and further late disclosure in

accordance with the order of 15 February 2023.

40. In accordance with CPR 36.17(4), I think it would be unjust for the Defendants to have to pay those costs.

Interim payment on account of costs

41. Turning to an interim payment on account, it is common ground that there should be such a payment. Ms Green's solicitors provided a one-page cost information sheet that said that her estimated incurred costs to 12 May 2023 were £1,661,593.33. Her estimated costs, from 13 May to 26 May 2023, were £30,500. That totals £1,692,093.33.
42. I do not understand why some more detail as to the actual incurred costs was not provided. Mr Cullen said that no more useful information could have sensibly been provided, and it is a simple fact that these were the costs incurred by Ms Green.
43. The amount is considerably more than the precedent T, dated 27 May 2022, which provided for incurred costs of £300,628 and estimated costs of £761,460, giving a total of just over £1 million.
44. In *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm), Lord Justice Christopher Clarke said that the court is not looking at the irreducible minimum, but, rather, it is estimating the likely level of recovery subject to an appropriate margin for error. In that case, where there was an indemnity basis assessment, the judge ordered 80 per cent of the costs by way of interim payment. As Mr Goodwin said, there is little point comparing other cases, but it does seem to me that that figure sounds about right for an interim payment on account of an

indemnity-based costs order.

45. The Defendants suggested that 70 per cent of the budgeted costs, which is around £650,000, is the appropriate figure for an interim payment.
46. Ms Green's solicitors proposed, based on their one-page costs summary, a sum of £1.4 million, taking into account the additional payment of £75,000 and approximately 80 per cent of the costs in the summary. Ms Green's figure is, therefore, more than double the Defendants', which is odd, to say the least.
47. Mr Goodwin said that the precedent T budgeted costs should have been amended, in accordance with CPR 3.15A. They certainly could have been, but I am not sure that actually affects the situation before me. As Mr Cullen pointed out, in the indemnity costs world, the costs budget is irrelevant, as proportionality is not taken into account. It is clear that significant extra costs have been incurred over and above those budgeted costs. On an indemnity basis assessment, it will be for the Defendants to show that they were unreasonably incurred.
48. Taking into account the lack of more detailed information, but recognising that Ms Green's costs did, in the end, greatly exceed the budgeted costs from a year ago, I think that it is likely that Ms Green will recover considerably more than those budgeted costs. The budgeted costs could be seen as the irreducible minimum. But I am required to estimate a likely recovery amount and leave an appropriate margin for error.
49. I do not think a straight 80 per cent of the figure produced by Ms Green's solicitors is appropriate in the circumstances of this case, and I have actually deducted a sum in respect of the late disclosure. Taking a broad-brush view, and recognising that there may be difficulties in enforcing orders for costs against

these Defendants over and above the security that has already been placed in court, I am going to order them to pay £1.2 million, which is approximately 70 per cent of the costs figure in the summary, and which leaves an adequate margin, in my view. That is what I will order.

(2.32 pm)