



Neutral Citation Number: [2024] EWHC 3238 (Comm)

Claim No. FL-2022-000004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (COMMERCIAL COURT – KBD)
(ON PAPER)

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

Date: 13 December 2024

Before :

The Hon. Mr Justice Bryan

Between :

DEXIA S.A.

Claimant

– and –

REGIONE EMILIA ROMAGNA

Defendant

Andrew Lodder (instructed by **Bonelli Erede Lombardi Pappalardo LLP**) for the **Claimant**
The Defendant has solicitors on the record but did not appear.

Costs Approved Judgment

This judgment was handed down remotely at 3pm on 13 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE BRYAN:

1. Upon the hand-down of my judgment ([2024] EWHC 3236 (Comm) (“the Judgment”)) there is only one consequential matter to consider, and that is the incidence of costs.
2. In circumstances in which Emilia Romagna has disengaged from the proceedings, and in which Dexia invited me to address costs on the papers, and having considered the points made in Dexia’s Skeleton Argument on Consequential Matters, I considered it appropriate to address costs on paper, and this is my judgment in relation thereto.
3. Dexia submits:
 - 3.1. Dexia was the successful party in all respects, and it follows there should be an order for Emilia Romagna to pay Dexia’s costs of the proceedings.
 - 3.2. Costs should be assessed on the indemnity basis pursuant to CPR 44.5 in circumstances where Dexia has a contractual entitlement to be paid its costs under the indemnity in the Master Agreement, as recognised in paragraph 182 of the Judgment and reflected in paragraph 21 of the draft Order provided to the Court.
 - 3.3. In the circumstances of this case, it is appropriate for there to be a detailed assessment of costs and an interim payment on account of those costs. Dexia is content for the Court to assess the amount of the interim payment on the papers, by reference to Dexia’s Schedule of Costs filed on 12 December 2024.
4. The general rule in CPR 44.2(2)(a) is that the unsuccessful party will be ordered to pay the costs of the successful party. I am satisfied that Dexia is the successful party in the proceedings, and as such it is entitled to its costs of the proceedings from Emilia Romagna.
5. Further, as I recognised in my Judgment (at [182]) Dexia is contractually entitled to be indemnified in respect of its costs of the proceedings under Clause 11 of the Master Agreement, with, I am satisfied, the consequence that its costs are to be assessed on the indemnity basis pursuant to CPR 44.5. In particular:
 - 5.1. Clause 11 of the Master Agreement contains an indemnity requiring Emilia Romagna to “indemnify and hold harmless [Dexia] for and against all reasonable out-of-pocket expenses, including legal fees and Stamp Tax, incurred by such other party by reason of the enforcement and protection of its rights under this Agreement”.
 - 5.2. In circumstances where I have recognised in the Judgment (at [178]), that Emilia Romagna has breached Clause 13 of the Master Agreement by commencing the Italian Proceedings, and where Dexia brought the present English for the “enforcement and protection of its rights under [the Master Agreement]” within the meaning of Clause 11, I am satisfied that Dexia has a contractual entitlement to be indemnified by Emilia Romagna for the costs of these proceedings.
6. CPR 44.5 provides as follows:

“(1) Subject to paragraphs (2) and (3), where the court assesses (whether by summary or detailed assessment) costs which are payable by the paying party to the receiving party under

the terms of a contract, the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which—

(a) have been reasonably incurred; and

(b) are reasonable in amount, and the court will assess them accordingly.

(2) The presumptions in paragraph (1) are rebuttable. Practice Direction 44—General rules about costs sets out circumstances where the court may order otherwise.”

7. The Court will thus usually exercise its discretion as to the basis of assessment of costs so as to correspond with the contractual entitlement to costs, namely on an indemnity basis: see *Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No.2)* [1992] 3 WLR 723 as applied outside the mortgage context in *Renewable Power & Light Ltd v McCarthy Tetrault* [2014] EWHC 3848 (Ch) at [40] (Morgan J). In the *Brescia* case, Hildyard J applied the principles from these cases, in materially identical circumstances, in awarding the banks their costs on the indemnity basis pursuant to CPR 44.5 (see the unreported judgment dated 4 December 2024 at [3(2)]).
8. Following paragraph 6.1 of PD44, the Court should thus only disallow any costs: (1) which it finds to have been unreasonably incurred or (2) which it considers to be unreasonable in amount.
9. I am satisfied that none of Dexia’s costs have been unreasonably incurred or are unreasonable in amount. In this regard:
 - 9.1. The proceedings were clearly of real importance to Dexia and of significant value (CPR 44.3(5)(a) and (b) and 44.4(3)(b) and (c)). The proceedings concerned Dexia’s ability to enforce a Transaction with an initial notional amount of approximately €142 million, and avoid Emilia Romagna using the Italian Courts, and Italian law arguments, to avoid its obligations under an English law contract subject to exclusive English jurisdiction.
 - 9.2. Dexia has been previously, and still is currently, involved in a number of similar cases and the outcome and principles established in this case will have repercussions for those other cases and, indeed, other on-going derivative transactions to which Dexia is a party that could be challenged by Italian public authorities and territorial entities.
 - 9.3. The proceedings raised complex issues of Italian finance and public law (CPR 44.3(5)(c) and 44.4(3)(d)) and accordingly required extensive skill, effort and specialised knowledge, including in particular specialised knowledge of Italian law (CPR 44.4(3)(e)). I am satisfied that Dexia reasonably had to incur the costs of obtaining foreign law expert evidence (given Italian law is not sufficiently similar to English law) and derivatives expert evidence, and also to prepare relevant witness evidence. Dexia limited the amount of foreign law evidence through the use of Civil Evidence Act notices in respect of previous English decisions.
 - 9.4. Dexia also had to cover off all of the various Italian law arguments that Emilia Romagna has attempted to run in Italy and, due to Emilia Romagna’s non-participation, to raise points that it might have raised had it participated. Regardless of the obvious lack of merit of many of the Region’s points, they have had to be dealt with in expert evidence and through witness statements going to the factual assertions that underpin them.
 - 9.5. I am satisfied that the costs incurred have also been caused by Emilia Romagna’s conduct in refusing to engage with the proceedings. Dexia has had to engage in efforts to serve all

documents on Emilia Romagna and has been unable to proceed by consent, which has necessitated applications to the Court for directions in respect of matters that would ordinarily have been agreed between the parties.

- 9.6. It is also appropriate to take into account costs in similar litigation: see paragraph 44.3.3 of the White Book. The amounts sought by Dexia are lower than the costs that it incurred in *Brescia*, which were £638,394 (see paragraph 3(4) of the *Brescia* costs judgment). The costs in both cases are far lower than the costs Dexia was awarded by this Court in *Busto Arsizio*, which were €3.6 million (£3 million using the exchange rate on the date of judgment). Although *Busto Arsizio* was a contested trial, and so one would expect the costs to be higher, I consider that it is indicative of the reasonableness of the costs in this case that Dexia has incurred less than a quarter of the amount of costs awarded in *Busto Arsizio*.
10. The question then arises as to whether the costs should be summarily assessed, or should be subject to detailed assessment. For the reasons given by Hildyard J in *Brescia* (at [3(3)] of the costs judgment), with which I agree, I consider that it is appropriate (notwithstanding paragraph 9 of PD44) for Dexia's costs to be subject to detailed assessment.
11. There should also be a substantial interim payment on account in respect of those costs under CPR 44.2(8). That interim payment should reflect an assessment of Dexia's likely level of recovery, with an appropriate margin for error, and take account of all the circumstances: see *Excalibur Ventures LLC v Texas Keystone Inc and Ors* [2015] EWHC 566 (Comm) at [14]–[24].
12. I am satisfied that, as in *Brescia*, a reasonable payment on account in circumstances where the costs are to be assessed on the indemnity basis is 80% of the amount claimed in the Statement of Costs, i.e., 80% of £594,762.17, which is £475,809.73. Indeed, I consider that that is a conservative figure in circumstances where Dexia's costs in this case are significantly lower than either of the banks in *Brescia*, where the interim payment was set at 80% (above the 75% sought by the banks). I am also satisfied that there is also no risk of Dexia being unable to repay any amounts if that becomes necessary following detailed assessment.
13. In paragraph 3 of the Draft Order, Dexia seeks to include wording as to interest on costs for ease of enforcement in Italy. The order sought is the usual order under CPR 44.2(6)(g) for interest at the statutory rate from the date of the order (see paragraph 44.2.29 of the White Book). I am satisfied that such an order is appropriate.
14. Accordingly, and for the above reasons, I order Emilia Romagna to pay Dexia's costs of the proceedings on an indemnity basis, to be subject to detailed assessment if not agreed, with an interim payment on account of those costs in the sum of £475,809.73.