Neutral Citation Number: [2024] EWHC 2167 (Ch)

Case No: BL-2020-001417

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

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

Date:19 August 2024

Before :

MR JUSTICE FREEDMAN

- -

Between:

MATRIX RECEIVABLES LIMITED

Claimant/Respondent

- and –

MUSST HOLDINGS LIMITED

Defendant/Applicant

- -

Mr Peter Knox KC (instructed by **Taylor Wessing LLP**) for the **Defendant/Applicant**

Mr Nicholas Gibson and Mr Anirudh Mathur (instructed by **Mills & Reeve LLP**) for the **Claimant/Respondent**

Hearing date: 30 July 2024
Date of hand-down of judgment in draft: 12 August 2024

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Approved Consequentials Judgment

This judgment was handed down remotely at 12noon on 19 August 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 FREEDMAN :

I Introduction

1. On 30 July 2024, the Court heard consequential arguments arising out of a judgment in this matter neutral citation [2024] EWHC 1495 (Ch) ("the Judgment"). The primary issues were about the form of order in respect of Musst's collateral use allegation and the orders as to costs as regards the various applications that were before the court.

2. The Judgment, particularly at paragraphs 8 and 75, comments about overload, or what Lewison LJ in refusing permission to appeal referred to as a 'mini-trial'. The enthusiasm of the parties and determination that no stone goes unturned is reflected by lengthy skeleton arguments for the consequentials hearing comprising 25 pages by MRL and 16 pages by Musst. The consequentials hearing lasted 3 1/2 hours. Due to other judicial commitments of which the parties were aware, there was not time to give judgment at that hearing.

3. The Court had in mind giving judgment orally, but this proved impractical at holiday time with key people understandably being in holiday destinations abroad. Accordingly, judgment is being handed down in writing, and it is a statement of the result on the very orders to be made and the key reasons. It is not intended to cover every single point that has been raised in the above arguments but they have all been considered. This judgment on the consequentials is to be read alongside the Judgment. I shall not extend this judgment by repeating that which appears in the Judgment.

II Decision as to form of order

4. As regards the collateral use allegation, the submission of Musst is that MRL should destroy or delete the documents in the Astra trial bundle and any notes made there. This is save only those documents which (a) it proposes to rely on in these proceedings and (b) which were referred to in open court or which the judge was specifically invited to read or which were specifically referred to in the Judgment in the *Musst v Astra* proceedings.

5. The submission of MRL is that Musst should provide MRL with all public documents in the *Musst v Astra* proceedings including skeleton arguments, written submissions, chronologies, reading list and correspondence with the Judge about suggested reading, the judgments given in the case not limited to the final judgment and transcripts of public hearings such as there are (hereafter collectively referred to as "the Public Documents").

6. MRL also submits that if the filleting exercise is to be comprehensive, then Musst should not use documents disclosed by Astra and which were not already known to Musst (e.g. because they were common documents between the parties such as correspondence). To that end, a part of the filleting exercise should be putting to one side the Astra documents so that they are not used without the permission of the court or the consent of Astra in the instant proceedings.

7. Musst submits that it will be very costly for it to be involved in this process. Musst says that MRL has brought it about, and so Musst should not have to concentrate its resources on a filleting exercise, but if it does, it should be at the expense of MRL.

8. MRL submits that Musst has knowledge of the *Musst v Astra* proceedings. Only Musst can assist in relation to the details of whether documents fall within or outside the prohibition against collateral use and within the exception in CPR 31.22(1)(a). Thus, Musst should do the filleting exercise.

9. As regards Musst removing the Astra disclosed documents, Musst says that its position is different from MRL in that Musst was a party in the proceedings with Astra and there is no question of it using any documents from Astra. In any event, there was no application to this effect, and it should not be countenanced at this stage. On review, it was said by MRL that they did make this point: to the extent that they did, it appears to be more a defensive technique to show that any breach on its part was a technical breach. It showed that such a breach was so prevalent that it was technically committed by Musst as well. It is too late for this point to be considered as a freestanding point, if it was ever intended as such, but it is not too late in the context of regulating the future by a filleting exercise, to make sure that there is taken out of the documents disclosed in Musst v Astra any infringing documents whether emanating from Musst or Astra.

III Discussion

10. This matter needs to be dealt with in a proportionate manner. In the Judgment, I found the following:

    (i) no specific prejudice has been identified from any breach of the rule against collateral use;

    (ii) Musst has not identified any deployment by MRL of any documents disclosed in the *Musst v Astra* proceedings;

    (iii) In the course of the hearing before the Judgment was handed down in draft, Musst did not identify any specific use of documents which were used without being deployed in this action. Since the hand down of the Judgment, Musst sought to identify three instances of such breach. The court held that it was too late to micro analyse these points and in any event it was unnecessary. The reason for this is that any specific breach did not have any practical effect. The points were not of such a nature which require a sanction or a striking out of all or part of the case [J/101-103];

    (iv) The key documents in this action appear to be those documents which have been referred to in court or read by the court in the first action [J/106-107].

11. In my judgment, it is likely that the process of filleting out the documents in the *Musst v Astra* bundles which are prohibited from use pursuant to CPR 31.22 is not a

vast exercise. I have identified in the hearing three stages in order for this to be done, namely as follows:

(i) Musst should provide to MRL the Public Documents in the *Musst v Astra* proceedings. If the trial bundles do not include the list of documents, these should be included for the purpose of the checking exercise only.

(ii) MRL should then go through the Public Documents and identify the documents which have been read to the court or referred to in the hearing (including where there is an inference that it has been read by the court e.g. the documents referred to in skeleton arguments or in submissions or chronologies). MRL should then identify what documents are being retained and which not retained in the easiest and most economical way of doing this. It should state how it is dealing with the non-retained documents so as to ensure that no use hereafter will be made of them. The preparation of a detailed list document by document is not required.

(iii) Thereafter, Musst should go through the documents and identify what documents it has which derive from Astra through disclosure) and (a) which Musst did not have in any event (e.g. by correspondence between Musst and Astra), and (b) which have not been read to the court or referred to in the hearing and where there is no inference that they have been read by the Court. Musst should then identify what documents are being retained and which not retained in the easiest and most economical way of doing this. It should state how it is dealing with the non-retained documents so as to ensure that no use hereafter will be made of them. The preparation of a detailed list document by document is not required.

12. The parties are to prepare an order to give effect to the foregoing including timings.

IV The costs consequences of the application for strike out on the basis of collateral use

13. The Judgment has found that there has been a breach of the obligation not to use documents obtained in disclosure from the *Musst v Astra* action. The breach has not been in deployment, but in considering the documents (without filleting) for the purpose of this action. However, there has been rejected the submissions to the effect that Mills & Reeve LLP were less than frank in correspondence. The submission of Musst was that there was a deliberate or at least a highly culpable dereliction of professional obligations on the part of Mills & Reeve LLP and that their correspondence thereafter was intended to misleadMusst submitted in writing that MRL's conduct deserved "the court's strongest opprobrium. Put simply, MRL have not played with a straight bat in respect of their unlawful collateral use (hence the failure to come clean about it until 18 April 2024)". It submitted orally [Day1/64]: "However one cuts it, even if it is entirely innocent, there was no sensible basis on which Mills & Reeve - a very reputable firm - could have thought they could review the trial bundles generally without getting permission." It was said [Day1/66-67] "…

Mills & Reeve were pretty opaque, to use the word, about what had happened, and they ought to have come clean….much earlier about the fact they had the trial bundles….". At [Day1/70], it was said that it was "very serious" In fact, the Judgment rejected the allegation of deliberate or reckless breach or of cover up. The Judgment found that there was a misunderstanding about the relevant law: see [J/100 and J/113-114].

14. The points about whether the breaches were deliberate or reckless were not peripheral. They were central to the question of sanction. If the characterisation of Musst in respect of the character of the breaches was upheld, then a sanction of strike out or some other less draconian sanction might ensue. Having found that there was no deliberate breach nor any evidence of any specific prejudice arising from innocent use of documents, the Court found that the points were not of such a nature as required a sanction let alone striking out of all parts of the case: see J/103.

15. Notwithstanding the foregoing, the submission of Musst was that there should be a penalty in respect of costs. In particular, it was submitted that MRL should be deprived of its costs for the entirety of the period during which it used the documents in question. The effect of that would be that they ought to be deprived of any costs which they would otherwise receive in respect of the abuse of process and summary judgment applications before the court, they should also have to meet all of the costs of the informal application about collateral use. Sometimes it is the case that where a party has been found to be in breach that the action is not struck out for breach but that the party in breach has to meet the costs of the application. There are cases where there are further sanctions about costs.

16. The facts of this case are different. In the context of other routes to procure the striking out of the claim as a whole (summary judgment and abuse of process), the objective of the informal application based on collateral use of documents was to found a further ground for striking out or bringing to an end the action of MRL against Musst. That objective informed the allegations about deliberate or reckless breach of obligations on the part of the solicitors for MRL. In this regard, Musst has not only failed as regards the objective, but it also failed to substantiate the very serious allegations made against the solicitors for MRL. Although the court has some concern as to whether those allegations should have been made, it is not necessary to go that far. It suffices to say that Musst has failed comprehensively in this aspect of its submissions. Further, Musst failed to establish any specific prejudice or deployment of documents on the part of MRL. Nevertheless, the Court accepted that there was a breach: [see J/94-98].

17. In my judgment, the order in respect of costs ought to reflect the fact that although there was a breach, there was no evidence of any specific deployment or specific prejudice arising from it. Further, it ought to reflect that the fact the serious allegations made against Mills & Reeve LLP have not been substantiated and that the application to strike out on this ground or to obtain some other sanction has not succeeded. Other cases where a party has been in breach and there has been an indulgence by the court and not marking the breach in a way other than in costs are not directly in point. This is because of the failure of the primary objective on the part of Musst, namely strike out, and the failure of a large part of the allegations made on the informal application.

18. At the same time, there should be reflected the fact that MRL has been found to be in breach of the obligation in respect of the use of documents. The way of reflecting both the matters set out in the preceding paragraph and MRL's breach is to make no order as to costs in respect of the application to strike out for collateral use. Further there will be no order made as regards the process for filleting because that filleting ought to have taken place in any event from the outset. It also follows that there will be no sanction on MRL and therefore the submission that MRL should not be entitled to claim any costs in the action during the period of collateral use is rejected.

V Costs of summary judgment application

19. Musst sought reverse summary judgment in respect of (a) the 80/20 contractual claim, (b) the alternative contractual claim, and (c) the restitutionary claim. Musst has failed in respect of each of those parts of the application. Musst submits that in view of the criticisms of the claims made including real questions as to whether they have a substantial basis and/or the contradictory nature of the instant case to that run at the trial in the *Musst v Astra* case and/or the fact that Mr Reeves has not given any written evidence in relation to the claims now formulated, Musst was entitled to pursue the claims for summary judgment. Further, if those criticisms are substantiated at the trial, as is confidently expected by Musst, then any costs order in favour of MRL may be regarded as unjust. The very evidence and arguments that had been deployed to contradict the assertion that the claim had no real prospect of success would, in the event that Musst succeed at trial, be demonstrated to have been not well founded and even unjust.

20. Musst submits that one order would be to reserve the costs. Given that I am ticketed to be the trial judge, it is submitted that I would have no difficulty in dealing with those reserved costs having had the feel of both the trial and the summary judgment application. There is an analogy that is prayed in aid in respect of the costs of a successful applicant for interlocutory injunctive relief turning on the balance of convenience. In those cases, the starting point is to reserve the costs. That is because the success in obtaining an injunction is only in holding the ring whereas ultimate success only occurs as a result of determination at trial.

21. MRL submits that the usual rule is that the successful party should have their costs: see CPR 44.2(2). In a summary judgment application, there is a winner and a loser. It is not a question of holding the ring. If Musst had succeeded, it would have been able to recover the costs both of the application and of the action. The symmetry is that if Musst fails, it should be liable in costs to the respondent to the application. That is the usual order in summary judgment applications under the CPR.

22. Musst says that it is a matter for the discretion of the Court in each case, and the rule that the unsuccessful party will be ordered to pay the costs of the successful party is subject to a court being able to make a different order. The court was referred to a decision of Nugee J (as he then was) in *Sharp v Blank* [2016] EWHC 776 (Ch). That was a case in which there was a number of discrete allegations on which the applicant for summary judgment lost on some and won on others. In other words, as the Judge said, the application had mixed success. The respondent submitted that the court should make an estimated apportionment of the costs attributable to the parts of the

application on which they were successful and order the applicant to pay those costs. The applicant submitted that having regard to the issues on which they were successful and those on which they were not, the appropriate order was costs in the case.

23. A part of the Judge's reasoning is said to be instructive by Musst including the following:

> *"16…In any event the natural consequence of a defendant issuing and pursuing a summary judgment application is to require a claimant to bring forward at least part of his evidence early, and I do not see anything objectionable in principle to the defendant in effect bearing the risk of having to meet the cost of doing so if his application fails.*
>
> *…*
>
> *19. These circumstances do to my mind raise a real question as to whether a simple order that the Defendants pay the Claimants their costs of these parts of the application does most justice between the parties. I fully accept that the general rule is that costs should follow the event; and that it is a salutary principle that those who make interlocutory applications and lose them should normally pay the costs of the applications, and should do so when they lose them, not at the end of the day. But costs are always in the discretion of the Court: under CPR r 44.2(2)(b) the Court has power to make a different order from the general rule, and under CPR r 44.4 the Court is to have regard to all the circumstances.*
>
> *20. In the present case both these parts of the application were in my judgment reasonably brought having regard to the nature of the case pleaded; if it turns out at trial that there is indeed nothing in either allegation, it is not obvious to me that it would be just to require the Defendants to pay the Claimants the costs of the evidence deployed, and the argument presented, in support of the submission that they should be free to take forward claims for which they have little support at the moment, and may never have sufficient to make good their case. In such a case I think it would be more just to leave the Claimants to bear their own costs of these allegations. That suggests to me that so far as the Claimants' costs are concerned, it is fairer to order that the Defendants should pay them only if the allegations are made good at trial, rather than being paid by the Defendants now regardless of what happens to these particular allegations."*

24. It is said that this case is analogous with the above reasoning. It is submitted that the application for summary judgment was reasonably brought and that it would not be

just to require Musst to pay MRL's costs of the evidence deployed and the argument presented in the event that MRL at trial is unable to make out its case.

25. I have taken the above into account. However, I conclude as follows:

(i) MRL has been entirely successful in defeating the summary judgment application.

(ii) There is no reason to depart from the usual starting point which applies also on an interlocutory application that the unsuccessful party should pay the costs of the successful party.

(iii) There was a recognition that the restitution claim was not subject to summary judgment subject only to the limitation point. Even without the additional concealment point, I concluded that the determination of the date on which the cause of action accrued was not clear cut. As Lewison LJ put it in the summary of the application for permission to appeal in summarising the Judgment, it required a fact finding exercise which was inappropriate on an application for summary judgment.

(iv) It therefore followed that there would be little, if any, saving in time or costs since there would be a trial of the restitutionary claim. Once the restitutionary claim was being contested, there was the real possibility that there were matters which would emerge which would provide some support for a contractual claim.

(v) The volume of material placed before the court on the summary judgment application as reflected in paras. 8 and 75 of the Judgment contributed to the reasons not to grant summary judgment.

26. The Court does not have to go so far as to find that the application for summary judgment was not reasonably brought. If that were the case, that would marginalise the general starting point that the successful party recovers its costs. The case of *Sharp v Blank* turned on its own facts, not least that there was a mixed success in the applications. In the instant case, MRL has succeeded entirely in resisting MRL's summary judgment application. There is no reason to depart from the starting point that the costs should be paid by the unsuccessful applicant.

27. Further, it is important to identify the reasoning why the usual order on a summary judgment or strike out application is that the unsuccessful party should pay the costs. That is in part because of the regime within CPR 44.2(2). It is also because of a symmetry. In the event that the applicant is successful, the action comes to an end and the applicant generally recovers the costs of the action. So likewise, if the strategy does not pay off and the applicant loses, the applicant stands to bear the costs. It is a disincentive to interlocutory applications to know that this starting point exists and operates in practice. If it becomes watered down, then the impact of deterring or inhibiting interlocutory applications is reduced.

28. It is still a starting point. I have considered carefully whether there is any reason to depart from that starting point. In all circumstances, and in the exercise of the court's

discretion, I have concluded that there is no reason to do so. Accordingly, the costs of and occasioned by the application for summary judgment are to be paid by Musst as the unsuccessful party to MRL.

VI Costs of the application to strike out for abuse of process

29. On this application, as on the application for summary judgment, MRL has been entirely successful in resisting the strike out. The starting point is, therefore, CPR 44.2(2) that costs follow the event of the application. Whilst it is correct that the abuse of process argument remains open at trial, the analysis concluded with the statement that whilst not excluding the defence of abuse of process (absent an application to strike out that head of defence), "there is no expectation that the argument will become better at a later stage": J/94.

30. Whilst there is the possibility that Musst may succeed at trial on the merits of the case, the foregoing conclusion recognises real difficulties for Musst in respect of the abuse of process argument. With no expectation of success at trial, there is no reason to depart from the usual rule that the cost should be paid by the unsuccessful party. In any event, even without this, there is no reason to take away the starting point that Musst as the unsuccessful party should pay the costs of MRL as the successful party, and the considerations above about not diluting this starting point apply with the same force. There is no reason for a different order in this case.

31. MRL goes further and submits that the application should not have been brought and that an award of indemnity costs should be made. They draw attention to the way that the application was made on a wider basis, which was at least tacitly abandoned at the hearing. Even at the hearing of the application, the abuse of process application was relegated in order of argument to the summary judgment application. The intellectual oddity of that is that if something is an abuse of process, then it ought to be considered first. By not doing so, it was said to be telling about a lack of conviction in the abuse of process argument, which in turn reflected the fact that the abuse of process argument was devoid of merit.

32. The law in respect of when indemnity costs are ordered is well travelled and often cited. The relevant principles have been helpfully set out in the skeleton argument on behalf of MRL at paragraph 15. In short, the question is whether there was something "out of the norm". It does not require a finding of moral obloquy. Something can be out of the norm without requiring that it happens only exceptionally or very infrequently.

33. Musst submits that the application was not out of the norm. Whilst it is right that generally there cannot be an abuse of process when the second action is not between the same parties, there is limited scope for such a finding. This can be where it would be manifestly unfair to a party to the later proceedings or where to permit such re-litigation would bring the administration of justice into disrepute. Musst pointed to some unusual features in the case, namely how the agreement put forward by MRL was at odds with the evidence of Mr Reeves of MMM in the case of *Musst v Astra* and how the new case depends on Mr Reeves' evidence, yet no second statement has been advanced to explain this.

34. There is therefore a different case second time round from the one advanced from Mr Reeves in the *Musst v Astra* case without any explanation in the second action as to how such a different case is proposed. It is said that it is manifestly unfair for the case to be at odds with the evidence previously given by Mr Reeves in the first action or that it brings the administration of justice into disrepute for the case to be based on a different case from the evidence of Mr Reeves in the earlier action. It is said that it might also bring the administration of justice into disrepute for the claimant in the second action to contradict the evidence effectively given by its relevant person in the first action. Some of this dichotomy could have been explained by a witness statement in the second action from Mr Reeves, but there has been no witness statement to explain this change.

35. The Judgment provided what on its face seems to be a complete answer to the abuse of process argument: see para 93. However, there has not been an application to strike out that part of the defence as pleads the abuse of process. The court hesitates to conclude at this stage that the matters set out in the preceding two paragraphs are incapable of fuelling an abuse of process argument. In my judgment, it would not be out of the norm to allow a party to plead or pursue a very weak argument. Generally indemnity costs would come not only where the argument was weak, but where it was obviously misconceived and ought to be appreciated to have been misconceived. The court does not go that far at this stage.

36. There is a further reason not to order indemnity costs that operates in tandem with the above argument. That is that the costs incurred in relation to the summary judgment application and the abuse of process application are so closely connected that it is difficult to separate them other than by making an artificial apportionment. The two applications were very closely connected particularly in the central points relating to the change in case from the case presented in the *Musst v Astra* action, the evidence given by Mr Reeves in the first action, the contradictions between that evidence and the case in this action. Added to all of this is the repeated refrain of the absence of evidence of Mr Reeves in this action to explain the contradictions. In circumstances where the summary judgment application is to be the subject of a standard costs order, it would be very difficult to separate the strike out application for the purpose of the basis of assessment of costs. Those difficulties are avoided by having the same basis of assessment for both applications.

VII Amended claim

37. As regards the amendment, particularly to plead concealment, it is conceded by MRL that it must bear the costs of and occasioned by the amendment in the usual way. Those costs do not include the costs in relation to proceeding with the application. In that regard there was a delay point that was pursued. There has been significant delay on the part of MRL in the application to amend which has been intimated over a period of years.

38. In the event the court found that it was not a late amendment in that it would not affect the progress of the action to trial. The application has been brought before disclosure and witness statements: see J/126.

39. I have come to the conclusion that it was not unreasonable of Musst to oppose the application. However, the application was granted in circumstances where there was no indulgence to MRL. It is most sensible to treat the application itself as a case management decision, as was recognised by Lewison LJ in paragraph 7 of the order he made on 24 July 2024. Bearing in mind the result of the application (a factor in favour of MRL), the criticism for delay and the absence of criticism of Musst for refusing to consent (factors in favour of Musst), the factors are largely self-cancelling. This being so, the case management nature of the decision is such that the Court, in the exercise of its discretion, orders that this part of the hearing shall be costs in the case.

VIII Other directions

40. Time did not permit making any further directions. There is to be a CCMC before Master Brightwell on 13 September 2024. If there are any further directions that are required before then, it would be sensible for the Court to deal with that in writing. That is only appropriate if it is in respect of a matter which is either agreed or is so short that it can be dealt with in a one or two page document from either side.

IX Conclusion on costs

41. The costs orders are therefore as follows:

    (i) no orders to costs in respect of the informal application for collateral abuse;

    (ii) the costs of the filleting will be costs in the case;

    (iii) the costs of the summary judgment application and the costs of the abuse of process applications are to be paid by Musst to MRL, such costs to be assessed on the standard basis if not agreed.

42. In the normal way there will be a payment on account of costs. In view of the large cost schedules, I have not gone on to state what payment should be made. It is agreed that there should be short submissions made as to what is appropriate. I shall order that they be sequential and that the first submissions are made by MRL and the responsive submissions by Musst shall be no longer than 3 pages each. Since this is a holiday season and I am aware that Counsel will be abroad, I shall leave it to the parties to agree timings but I wish to conclude this matter in August and require all submissions to be lodged by not later than Friday 23 August 2024. The parties should fix the sequential timetable around that.

43. The parties are requested to provide a draft order to reflect the orders made in this case.