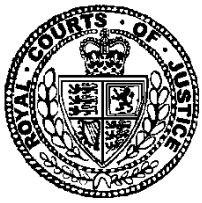

Neutral Citation Number [2020] EWHC 1323 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No: BL-2018-002267**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

MR ANDREW HOCHHAUSER QC

(Sitting as a Deputy Judge of the High Court)

7, Rolls Building,
Fetter Lane, London
Date: 22 May 2020

B E T W E E N:

(1) EUROPEAN FILM BONDS A/S
(2) ALLIANZ GLOBAL CORPORATE & SPECIALTY SE
(3) ERGO VERSICHERUNG AG
(4) KRAVAG-LOGISTIC VERSICHERUNGS-AG
(5) BASLER SACHVERSICHERUNGS AG
(6) AXA VERSICHERUNG AG
(7) BAYERISCHER VERSICHERUNGSVERBAND VERSICHERUNGSAKTIENGESELLSCHAFT
(8) SV SPARKASSEN-VERSICHERUNG GEBÄUDEVERSICHERUNG AG

Claimants

and

(1) LOTUS HOLDINGS LLC
(2) LOTUS MEDIA LLC
(3) LARKHARK FILMS LIMITED
(4) LIP SYNC PRODUCTIONS LLP

Defendants

RULINGS ON APPLICATIONS CONSEQUENT TO THE HANDING DOWN OF JUDGMENT

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1. Following the handing down of my judgment in this claim on 11 May 2020, the parties have been able to agree the terms of a draft Order, save for three outstanding matters: (a) the amount of the interim payment of costs to be paid to the Claimants by the First to Third Defendants;(b) the rate and period of interest on those costs and (c) an application for permission to appeal by the First to Third Defendants on each one of the three defences advanced, which I rejected.

2. I shall take each in turn.

The amount of the interim payment to the Claimants on account to the Claimants

3. There is no dispute that Claimants are entitled to an interim payment. The amount of any payment on account should be an estimate of the likely level of recovery subject to an appropriate margin to allow for error in the estimate: see *Excalibur Ventures LLP v Texas Keystone Inc* [2015] EWHC 566 (Comm) and the commentary in *The White Book 2020* para 44.2.12.

4. The Claimants have submitted a basic Schedule of Costs, lacking in detail, claiming £494,844.50 in costs, £100,000 of which has been paid, pursuant to this Court's Order dated 17 September 2019. They seek a payment of £250,000 as an interim basis on the basis that represents about 70% of the outstanding costs claimed. They rely on the factors set out at paragraph 9 of their skeleton argument.

5. The First to Third Defendants submit this sum is excessive and contend that an appropriate figure should be £100.000, which is about 40% of the costs claimed. They point to the lack of particularity in the Schedule, and further rely upon the factors set out at paragraph 8 of their skeleton. They had not produced their own Schedule of Costs in the event they were successful. I invited them to do so with the equivalent of detail (or lack of it) to that of the Claimants, in order to give me some form of comparison. They did so. Their figure is just over £290,000, considerably less than that claimed by the Claimants. The Claimants are sceptical about this.

6. Having considered the respective submissions of the parties, in my judgment, the appropriate figure for an interim payment is £175,000, to be paid by 5 June 2020.

The rate and period of interest on those costs

7. It is common ground that pursuant to CPR 44.2(6)(g) the Claimants are entitled to interest on costs before judgment, the dispute is as to the rate. It is accepted that I have a wide discretion. The Claimants seek a rate of 2% over base rate, relying on *Involnert Management Inc v. Aprilgrange Ltd* [2015] EWHC 2834; [2015] 5 Costs LR 813, a rate of 2% over base rate was awarded. The First to Third Defendants contend that the appropriate figure should be the "ordinary commercial rate" of base rate plus 1%, particularly so where the Claimants are large insurance companies and there is no evidence that they needed to borrow in order to fund the litigation. In the *Involnert* case, Leggatt J (as the then was) at [9] described 2% over base as the "*commercial rate of interest…generally taken in the Commercial Court*." That figure was once again referred to as the rate generally taken in the Commercial Court by Nugee J at [19] in *Hollyoake v Candey* [2018] EWHC 502 (Ch), referring to *Involnert.* I see no reason here to depart from that approach. I order the rate should be 2% over base rate.

8. Pursuant to CPR r40.8(1)(b), the First to Third Defendants further seek a postponement of the date from which interest should run on the Judgments Act 1838 at the rate of 8% to three months after the costs order is made. This time it is Ms John who relies on the *Involnert* case, where the court ordered that interest should run from three months after the date of the costs order. There Leggatt J held that the rule in *Hunt v RM Douglas (Roofing) Ltd* [1990] 1 AC 398 was clear: the default date from which interest payable begins to run is the date the judgment is given, if the Court does not order otherwise. However, there was no need for the default position to be the usual position. The Court has the power to order otherwise under CPR r.40.8(1)(b), and it should exercise its discretion in accordance with the overriding objective. At [24] Leggatt J considered that it was important to provide certainty and clarity on the date from which interest begins to run. A reasonable objective benchmark was the three-month period for commencing detailed assessment under CPR r.47.7. By this date, the paying party should have received a detailed bill of costs and will be able to take an informed view of its liability before it begins to incur interest.

9. Ms John submits that the circumstances of the present case justify the deferral of the imposition of the Judgments Act 1838 rate for three months as:

   (1) The Claimants' costs bill is large given this is a Part 8 Claim with a short trial and little/no factual dispute (see further below on payment on account);

   (2) The Court and the First to Third Defendants have no visibility as to proportionality and reasonableness[1];

   (3) In three months' time, the Claimants would have submitted their bill of costs for detailed assessment such that the Judgments Act rate would apply from the date on which the First to Third Defendants as the paying parties would know what they were being asked to pay;

   (4) Given the current very low interest rate climate, to order otherwise would be a significant and disproportionate benefit to the Claimants; and

   (5) The Claimants are large insurance companies such that their costs of funds are likely to be negligible (i.e. no need to borrow to fund litigation).

10. The Claimants argue for the default position. Mr Cullen submits that there must be a reason to depart from the default position. Any postponement is not a matter of routine. In this case, there is no reason to depart from the default position. There is not, for example, any serious question as to the proportionality of the Claimants' costs. Moreover, the fact that the Claimants have been deprived of the use of their money by the delays caused by the First to Third Defendants militates against any postponement.

11. I am persuaded by Ms John's submissions set out above that the approach adopted by Leggatt J in the *Involnert* case should be adopted here, as indeed it was by Nugee J in the *Hollyoake* case, where an award of indemnity costs was awarded. I order that interest under the Judgment Act 1838 should run from three months after the date of this costs order and pre-judgment interest will run to that date.

The First to Third Defendants application for permission to appeal

[1] See White Book Vol 1 Note 40.8.2 at p.1310 and the decision of Mann J in *Sycamore Bidco Ltd v Breslin and Anor* [2013] EWHC 583 Ch at [75]-[77]

12. Having read the draft Grounds of Appeal, I refuse the First to Third Defendants' application for permission to appeal on the grounds that there is no real prospect of success in relation to any of the three defences advanced.

13. Taking each in turn, in relation to the proper interpretation of the word "return" in paragraph 5 of Schedule 2 to the CGA, I refer to the points made in paragraph 81 of my judgment, and in particular sub-paragraphs (4) and (7) thereof. For the word "return" to have the meaning advanced by the First to Third Defendants, it would be necessary to imply not one, but two terms, one of which, the obligation of notification, was clearly not complied with by Lotus, despite apparently being necessary and obvious.

14. As far as the second defence is concerned, namely the application of Exhibit 1 to the Interparty Agreement in preference to Schedule 2 to the CGA, because of a conflict between the two, in my view there is no merit in this defence for the reasons set out in paragraph 144. I would refer in particular to sub-paragraphs (4), (5) and (7) thereof. I cannot see the Court of Appeal taking a different view.

15. In relation to the third defence, namely that clause 9.2 of Schedule 2 to the CGA is a penalty, my finding that, even were it to be regarded as subject to the penalty doctrine, its provisions are not penal, for the reasons set out at paragraph 167(5), is unlikely to be reversed by the Court of Appeal.

16. Ms John, when submitting the First to Third Defendants' Schedule of Costs, requested that time to renew the application for permission to the Court of Appeal, if unsuccessful before me, should run from the date of this ruling, rather than the date of the handing down of the judgment on 11 May 2020. That was opposed by Mr Cullen on the basis that further time was unnecessary, draft Grounds of Appeal having already been prepared. Whilst there is some force in this point, I am willing to extend time for a short period, until 4pm on Friday 5 June 2020.