Neutral Citation Number: [2022] EWCA Civ 1409

Case No: CA-2021-000236

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTIES COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
Mrs Justice Joanna Smith
[2021] EWHC 2773 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2022

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE MALES
and
LADY JUSTICE ELISABETH LAING

- -

Between:

TMO RENEWABLES LIMITED (In Liquidation)	**Respondent /Claimant**
- and -	
1)TIMOTHY STEPHEN KENNETH YEO **2)DAVID WILLIAM WEAVER** **3)DESMOND GEORGE REEVES**	**Defendants**
4)MICHAEL PETER McBRAIDA	**Appellant/ Defendant**
5)MAXWELL CHARLES AUDLEY	**Defendant**

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Richard Morgan KC and **Gabriella McNicholas** (instructed by **Alius Law**) for the **Appellant/Fourth Defendant**
Andrew Sutcliffe KC and **George McPherson** (instructed by **Hewlett Swanson Limited**) for the **Respondent**

The First to Third and Fifth Defendants took no part in the appeal

Hearing date: 6 October 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 28 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Males:

1. This is an appeal on costs.

2. At the conclusion of a lengthy trial, Mrs Justice Joanna Smith found that the defendants had acted in breach of fiduciary duties owed to the claimant company and that they had done so in bad faith. Those who are interested can read the whole sorry story in her careful and comprehensive judgment on the merits ([2021] EWHC 2033 (Ch)). In a nutshell, she found that the defendants had gerrymandered a vote at an extraordinary general meeting of the claimant with a view to defeating resolutions presented by a major shareholder aimed at changing control of the claimant's board of directors. The gerrymandering consisted principally of the issue of 75 million ordinary shares to a new investor on terms which (1) permitted payment to be deferred for up to two years notwithstanding that the claimant was in financial straits and (2) enabled that new investor to vote against the resolution, thereby ensuring its defeat.

3. But the judge also found that the defendants' breaches caused the claimant no loss, principally because it was insolvent and would have gone into administration anyway. So she dismissed the claim against all of the defendants. She ordered that the claimant should pay 30% of the defendants' costs of the claim, to be assessed on the standard basis.

4. The claimant sought permission to appeal against the dismissal of its claim, but that application was refused by Lord Justice Lewison. An appeal against the judge's costs order by the 3rd and 5th defendants has been compromised. What is left is an appeal on costs by the 4th defendant, Mr Michael McBraida. Mr Richard Morgan KC, who appears for Mr McBraida, submits that as the successful party Mr McBraida should have been awarded all of his costs, and that because he did better than an offer to settle which he made at the outset, those costs should be assessed on the indemnity basis.

5. The height of the hurdle which an appellant faces in challenging a trial judge's assessment of the appropriate order to make on costs is too well known to require extensive citation. One description of this was given by Lord Justice Davis in *F & C Alternative Investments (Holdings) Ltd v Barthelemy (No. 3)* [2012] EWCA Civ 843, [2013] 1 WLR 548 at [42]:

> "Decisions on costs after a trial are pre-eminently matters of discretion and evaluation. Further, it is particularly important to bear in mind that a trial judge – especially after a trial such as this one – will have a knowledge of and feel for a case which an appellate court cannot begin to replicate. The ultimate test, of course, for the purposes of an appeal of this kind is whether the decision challenged is wrong. But it is well established that an appellate court may only interfere if the decision on costs is wrong in principle; or if it involves taking into account a matter which should not have been taken into account or failing to take into account a matter which should have been taken into account; or if it is plainly unsustainable."

6. For reasons which I will endeavour to explain briefly, the appellant's submissions in this case do not come close to clearing this hurdle.

The costs judgment

7. The judge reserved her decision on costs and produced a judgment extending to 70 paragraphs. She set out the law in terms which Mr Morgan did not challenge:

> "6. The court's discretion is a wide one and is regulated by CPR Part 44.2, which is well known and which I do not need to set out in full in this judgment. It is common ground that the general rule (in CPR 44.2(2)) is that the unsuccessful party will be ordered to pay the costs of the successful party, but that the court may make a different order.
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> 7. As Gloster J emphasised in *HLB Kidsons v Lloyds Underwriters* [2008] 3 Costs LR 427, '[t]he aim always is to "make an order that reflects the overall justice of the case"…', a point also emphasised by Briggs J in *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS* [2010] 5 Costs LR 657 at [4] by reference to the overriding objective: 'Besides taking due account of the specific provisions of Part 44, the court must in framing an appropriate order for costs bear constantly in mind the need to comply with the overriding objective, that is to deal with cases justly'.
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> 8. The general rule set out in CPR 44.2(2) was described by Lord Woolf MR in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 (at 1522-1523) as a 'starting point from which the court can readily depart'. However, the Defendants emphasise that whilst the court may depart from the general rule, 'it remains appropriate to give "real weight" to the overall success of the winning party' (per Gloster J in *HLB Kidsons* at [10]) and they draw my attention to the warning given by Jackson LJ in *Fox v Foundation Piling* [2011] 6 Costs LR 961 at [62] to the effect that '[t]here has been a growing and unwelcome tendency by first instance courts and, dare I say it, this court as well to depart from the starting point set out in CPR r. 44.3(2)(a) too far and too often. Such an approach may strive for perfect justice in the individual case, but at huge additional cost to the parties and at huge costs to other litigants because of the uncertainty which such an approach generates…'. In addition, the Defendants remind me that commercial litigation is complex and that, in almost every case, the winner is likely to have failed on some issues, as Nugee J recognised in *R (Viridor Waste Management Ltd) v HMRC* [2016] 4 WLR 165at [9]. There is no automatic rule requiring reduction of a successful party's costs if he loses on one or more issues (see *HLB Kidsons* at [11]).

9. In deciding whether to depart from the general rule, the court must have regard to all the circumstances of the case, 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 which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply' (CPR 44.2(4)). Insofar as relevant for the purposes of this judgment, conduct of the parties includes conduct before and during the proceedings, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue, and the manner in which a party has pursued or defended its case or a particular allegation or issue (CPR 44.2(5)(a)-(c)).

10. The various orders which the court may make are set forth in CPR 44.2(6), and I note the terms of CPR 44.2(7) to the effect that before the court considers making an order for costs relating only to a distinct part of the proceedings (i.e. an issue-based order) it will consider whether it is practical to make an order for a proportion of another party's costs or for costs from, or until, a certain date only. As was pointed out by Jackson J in *Multiplex Constructions v Cleveland Bridge* [2009] EWHC 1696 at 72(iv)-(v), the court will hesitate before making an issue-based order 'because of the practical difficulties which this causes' (amongst other things the additional time and expense that may then be spent on assessment) and because of the steer provided in CPR 44.2(7). In many cases 'the judge can and should reflect the relative success of the parties on different issues by making a proportionate costs order'.

11. In circumstances where it is appropriate to make an issue-based order 'there is…no exceptionality principle or threshold that has to be applied before deciding in any given case, whether the winner of a particular issue should not only be deprived of his own costs, but should pay the other side's costs' (see *PCP v Barclays* [2021] EWHC 1852 (Comm) per Waksman J at [21] and also *Summit Property Ltd v Pitmans* [2001] EWCA Civ 2020, per Longmore LJ at [16]-[17]. In *Summit*, a case on which TMO places considerable reliance, the Court of Appeal upheld the decision of the Judge at first instance (described as an 'exceptional order') who approached the costs on an issue by issue basis, ordering the unsuccessful claimant to pay 30% of the successful defendant's costs and the successful defendant to pay 65% of the unsuccessful claimant's costs.

12. On the specific issue of the effect on costs of dishonesty being established against the winning party, TMO drew my attention to *Bank of Tokyo-Mitsubishi Ufi Ltd v Baskn Gida Sanayi Va Pazarlama AS* [2009] EWHC 1696, where Briggs J

identified the principles derived from the cases to which he had been referred at paragraph [19]:

> '(i) There is no general principle that where an otherwise successful party has put forward a dishonest case in relation to an issue in the litigation, the general rule that costs follow the event is thereby wholly displaced. I leave on one side cases such as *Molloy* and *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167, where the conduct in question is so grave that the entire case of the party can properly be described as amounting to an abuse of process. In such cases it is difficult to conceive how that party would ever be the successful party in the litigation…
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> (ii) The court's powers in relation to the putting forward of a dishonest case include (a) disallowance of that party's costs in advancing that case, (b) an order that he pay the other party's costs attributable to proving that dishonesty, and (c) the imposition of an additional penalty which, while it must be proportionate to the gravity of the misconduct, may in an appropriate case extend to a disallowance of the whole of the successful party's costs, or an order that he pay all or part of the unsuccessful party's costs.
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> (iii) In framing an appropriate response to such misconduct, the trial judge must constantly bear in mind the effect of his order upon the process of detailed assessment which will follow, in the absence of agreement, in particular to avoid unintended double jeopardy: see per Waller LJ in *Ultraframe* at paras 33 to 34.
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> (iv) 'There is no general rule that a losing party who can establish dishonesty must receive all his costs of establishing that dishonesty, however disproportionate they may be': per Waller LJ in *Ultraframe* at para 36.'

13. Thus, a finding of dishonest conduct by the successful party is not a 'trump card' and there is no general rule that such a finding replaces the usual starting point (see *PCP* at [26] and at [29]: 'there is no principle that says dishonesty in any particular form must trump all other considerations, or that it must lead in any given case to an order on a net basis where the winning party, who has been found guilty of dishonesty, must end up paying a proportion, or all, of the costs of the other side'). In *PCP*, a case in which the defendant lost on liability and was found guilty of deceit but successfully defended the claim on the grounds of causation and loss, Waksman J made no order as to costs.

14. Every case will, inevitably, turn on its own facts and I remind myself that, accordingly, there is only limited assistance

> to be gained from looking at the findings made in other cases on different facts.
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> 15. In *Hutchinson v Neale* [2012] EWCA Civ 345 Pitchford LJ formulated the guiding principle informing which (if any) of the range of orders available to the court should be made in a case involving dishonest conduct at [28]: 'What is required is [1] an evaluation of the nature and degree of the misconduct, [2] its relevance to and effect upon the issues arising in the trial, and [3] its tendency to create an unwarranted increase in the costs of the action'. He went on to note that, as Briggs J observed at [19] of his judgment in *Bank of Tokyo* 'the full range of measures is available to ensure that a dishonest but successful party does not gain, and an honest but unsuccessful party does not lose, in consequence of the wrongdoing established'. On the facts of that case, Pitchford LJ observed at [31] that '…the judge's starting point should have been an order for costs in the [successful] defendants' favour subject to adjustments to ensure that they did not recover any costs which may have been incurred in advancing a dishonest case."

8. Mr Justice Briggs' reference in *Bank of Tokyo* to "the imposition of an additional penalty" should not be understood as suggesting that the purpose of an order for costs is punishment. Rather, it is a convenient shorthand, recognising that it may be appropriate to mark the court's disapproval of the conduct of a dishonest case and acknowledging that putting forward a dishonest case will often lead to an increase in costs for one or both parties. As well as producing a just order in an individual case, such an approach serves the interests of justice generally by deterring dishonest conduct.

9. The judge then sought to apply these principles.

10. First, she addressed the question whether it was appropriate to make an issue-based order. She recognised that the defendants, including Mr McBraida, were the successful parties for the purpose of CPR 44.2(2)(a) and worked systematically through the various factors set out in CPR 44.2(4) and (5). She said that she had to have regard to the scope and extent of the defendants' dishonest conduct, and that although there had been some differences between the approach and evidence of each of the defendants at trial, "I have found that they each deliberately pursued a case on liability that they knew to be false and, as Mr Sutcliffe pointed out, this appeared to be a collective endeavour in the sense that they had 'learned their lines' in advance of trial". She described their conduct as "an egregious form of corporate wrongdoing". She recognised that the claimant did not succeed in establishing every aspect of its case on liability, but nevertheless the conduct which it did establish was serious and was denied by all defendants up to and throughout the trial "notwithstanding the strong evidence of wrongdoing contained in the contemporaneous documents". She said that this "was obviously not a reasonable approach for the Defendants to take in their defence of the claim". Accordingly "it would not be fair or just for the Defendants to recover the costs they spent in advancing their dishonest case on liability".

11. The judge then made a broad assessment of the percentage of costs attributable to this liability case, which she assessed as 40% of the overall costs. She said that, without anything more, this would lead to the conclusion that the defendants should be deprived of 40% of their costs of the action.

12. But she identified three further questions which arose in the light of the parties' submissions.

13. The first was whether the defendants' conduct should not merely deprive them of a percentage of their costs, but would justify an order for costs in favour of the claimant. The judge deferred her conclusion on this question until she had dealt with the other two questions.

14. The second question was whether the fact that the claimant won on some other issues at trial (beyond the issues of liability) affected the analysis. As to this, the judge concluded that it did not: in almost every case the winning party would lose in relation to some issues.

15. The third question concerned the claimant's own conduct. This included its failure to engage with correspondence in which the defendants' solicitors pointed out the flaws in its case on causation and loss, defects in its expert evidence and in the disclosure which it had given, and in particular the claimant's failure to accept admissible offers to settle.

16. There had been two such offers. The first was an offer by Mr McBraida alone to pay £100,000 in full and final settlement. This offer was made on receipt of draft Particulars of Claim, before proceedings were issued. It was accompanied by a detailed explanation of the flaws in the claimant's case on causation and loss. However, it included a requirement that the claimant indemnify Mr McBraida, up to a maximum of £100,000, in the event of contribution proceedings being brought against him by any of the other defendants. The claimant rejected the offer. The second offer, to settle for £515,000 inclusive of interest and costs, was made jointly by all the defendants on 27th January 2020. The claimant rejected the offer, but did propose mediation and said that it was open to discussing the provision of additional information about its claim. The defendants, however, including Mr McBraida, took the view that a mediation would be "an expensive waste of time" due to the claimant's conduct (see the final paragraph of Fladgate's letter dated 18th February 2020).

17. The judge considered all of these criticisms of the claimant's conduct in detail over 27 paragraphs of her judgment. She accepted that there was force in them and that aspects of this conduct were unacceptable. She accepted that, even though the offers to settle were not made under CPR 36 and therefore would not carry the costs consequences which would have applied if they had been, nevertheless some weight should be given to them in assessing the overall order to be made on costs; they represented at the very least an attempt to open up a dialogue on the merits of the case, including the real value of the claim.

18. The judge then returned to the question whether an order for costs should be made in favour of the claimant. She reiterated "that the Defendants' conduct was serious in that they advanced a dishonest and misleading case on liability", without which the

costs of the action would inevitably have been very significantly reduced, and declined to draw any distinction between Mr McBraida and the other defendants in this regard. Nevertheless, she concluded that it would not be in the interest of justice to order the defendants to pay that element of the claimant's costs which was referable to liability:

> "64. … Any such order would, in my judgment, fail to give proper weight to the unreasonable conduct on the part of TMO in the general conduct of the litigation to which I have referred *together with (albeit to a lesser extent) the existence of the admissible offers*."

19. I have emphasised the judge's reference to the admissible offers, and will do so again when I quote the judge's ultimate conclusion, because Mr Morgan submitted that she gave little or no weight to those offers.

20. Accordingly, the judge's discretion fell to be exercised on the basis that the defendants were the successful parties, but that they had advanced a dishonest case; and that there were (as she put it) "genuine and serious grounds for concern over some aspects of TMO's conduct of the proceedings".

21. The judge set out her conclusion as follows:

> "65. In the exercise of my discretion and having regard to the justice of the case, the wording of CPR 44.2, together with the authorities to which I have referred, I have formed the view that:
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> i) The conduct of TMO on which the Defendants rely, *including the admissible offers*, taken in the round is insufficient to neutralise the effect of the Defendants' dishonest pursuit of their case on liability;
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> ii) Accordingly, there is no reason to deviate from my preliminary view that the principle that costs should follow the event should be displaced such that the Defendants should not recover their costs incurred in advancing a dishonest case on liability. In light of my analysis earlier in this judgment, the Defendants should be deprived of 40% of their costs to reflect that dishonest defence;
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> iii) In addition, and bearing in mind the seriousness of their conduct, the Defendants should be deprived of a further 30% of their costs to reflect an element of the costs incurred by TMO in dealing with those issues at trial. Albeit an inevitably imprecise measure, I consider this to be a fair and proportionate additional deduction having regard to the gravity of the misconduct of the Defendants.
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> iv) However, in light of TMO's conduct as set forth above, it would not be consistent with the overall justice of the case to

require the Defendants to pay 40% of TMO's costs (or more – Mr Sutcliffe suggested two thirds) reflective of the time spent in dealing with the liability issues on which TMO succeeded at trial (or indeed therefore to engage in the exercise for which Mr Sutcliffe advocated, of identifying issue-based orders on costs going in both directions and then setting those orders off against each other so as to arrive at a proportionate order). The Defendants were the overall winners, a consideration to which I can and do attach real weight, and the key points on which they were successful had been identified in correspondence almost from the outset. In my judgment, TMO failed properly to engage with those points. Had it engaged in a more constructive way (as it should have done), and/or had it got to grips with its own case on quantum, it might have appreciated the difficulties that were inherent in its case and thereby avoided (at least some of) the very considerable costs that it ultimately expended in fighting this case. Further and in any event, I consider that TMO's conduct of the expert elements of its case was deserving of serious censure and certainly supports a refusal on the part of the court to make an order in TMO's favour of any part of its costs.

v) I do not consider that I need to address the rights and wrongs of the PTRs in any detail; my impression was that the Defendants had the better of the majority of the arguments, but in any event it seems to me to be fair in all the circumstances for the costs of the PTRs to be swept up and dealt with together with the other costs of the action.

vi) Standing back, I consider that an award in the Defendants' favour of 30% of their costs is broadly reflective both of the relative success of the parties and of their separate submissions on additional factors relevant to the exercise of my discretion, *including the admissible offers*. I do not consider that such an award could be seen in any way to condone egregious conduct on the part of the Defendants, or their subsequent denial of such conduct and nor do I think that it could be said that it might deter claimants from bringing to court properly founded fraud claims, as Mr Sutcliffe suggested. As I hope will be clear from the analysis set out above, I have arrived at my conclusion in this case by reference to its own very particular facts and I consider that conclusion to reflect the overall justice of the case.

vii) I do not consider that I should treat Mr McBraida's Undervalue Allegation as a separate issue in respect of which a separate costs order should be made. In my judgment it does not merit indemnity costs and where it was

> dropped in advance of the trial, it should simply be swept up in the overall costs order that I have made.
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> viii) In all the circumstances, TMO must pay 30% of the Defendants' costs of the action (excluding the Counterclaim), such costs to be subject to a detailed assessment on the standard basis if not agreed. I add that on a detailed assessment of the Defendants' costs, there shall be no further deductions or disallowances by the costs judge solely or mainly on the ground of misconduct of the Defendants in pursuing a dishonest defence to the claim."

The grounds of appeal

22. As many as seven grounds of appeal are advanced, which I can summarise as follows:

(1) The judge erred in principle by giving no weight or insufficient weight to the two admissible offers to settle made by Mr McBraida, both of which were beaten at the trial. In particular, although the judge said that she would give weight to the offer made at the outset by Mr McBraida alone, she did not in fact do so, as demonstrated by the fact that the same order was made in respect of Mr McBraida as in respect of the other defendants who had not made such an offer.

(2) The judge gave no or insufficient weight to the fact that it was the unreasonable failure of the claimant to engage properly with the correspondence which identified the obvious and ultimately fatal flaws in its case on causation and loss which was the real cause of all the costs incurred.

(3) The judge failed to address whether a reasonable claimant would have concluded that its case on causation and loss was so speculative, weak or thin that it would have concluded that it should not be pursued.

(4) The judge was wrong to say that Mr McBraida's conduct of his defence was dishonest. Although she had found in the main judgment that he had acted dishonestly at the time of the breaches of duty, she had not found him to be a dishonest witness, but on the contrary had said that his recollection of events was "extremely hazy and often non-existent" and that he was "by and large doing his best to assist the Court in his oral evidence". She should, therefore, have distinguished between Mr McBraida and the other defendants.

(5) Having disallowed MrMcBraida's costs attributable to defending the allegations of breach of duty, and having held that the unreasonable conduct of the claimant meant that no order for costs should be made in the claimant's favour, the judge erred in principle by making the additional deduction of 30% to Mr McBraida's recoverable costs "to reflect an element of the costs incurred by [the claimant]". In so doing, the judge made in effect the very order which she had earlier found to be unjustified and/or double counted Mr McBraida's conduct.

(6) The judge wrongly failed to distinguish Mr McBraida from the other defendants: he had not conducted a dishonest defence; he had not relied on a number of points run by the other defendants; he had made an offer to settle at the outset; and he

had pointed out at the outset several fundamental flaws in the claimant's case on causation and loss.

(7) It was wrong in principle not to deal separately with costs which had been reserved at the hearing of the pre-trial review, where four largely unsuccessful interim applications had been made by the claimants.

23. Mr Morgan submitted that the order which the judge should have made was to award Mr McBraida 100% of his costs on the indemnity basis.

24. There is considerable overlap between these grounds of appeal. I accept the submission of Mr Andrew Sutcliffe KC for the claimant that they can conveniently be grouped as follows. As will appear, I largely accept Mr Sutcliffe's submissions in response to them.

Dishonest conduct of the case

25. It was fundamental to Mr Morgan's submissions that the judge was wrong to say in her costs judgment that Mr McBraida had conducted a dishonest defence. Mr Morgan submitted that this was a mischaracterisation of what the judge had actually found in the main judgment. In the main judgment, when giving her assessment of the witnesses, the judge said this of Mr McBraida:

> "158. Mr McBraida is a self-made man who rose from humble beginnings to become Managing Director of McBraida Ltd, originally a small Bristol engineering company which he took into the field of aerospace with very considerable success. He remained a Managing Director of McBraida Plc (formerly McBraida Ltd) until the early 2000s when he became Executive Chairman. His son and grandson work for the business which is now a preferred supplier to Rolls Royce. McBraida Plc is not a listed company and the shareholders are members of Mr McBraida's family. He remains a director.
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> 159. Mr McBraida is 82 years of age, frail and hard of hearing. His recollection of events was extremely hazy and often non-existent and his reading was slow, which affected the scope of the possible cross examination. His answers were occasionally confusing or not responsive to the questions put to him, but I accept that this was largely the product of old age and genuine confusion rather than an attempt to avoid answering specific questions.
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> 160. I formed the view that Mr McBraida was by and large doing his best to assist the Court in his oral evidence in so far as he could, and I agree with TMO that, like Mr Reeves, he appears to have made a number of realistic concessions, including that no reasonable person would have believed in a million years that the Market Place Subscription was legitimate (albeit he continued to maintain that it was).

> 161. Mr McBraida undoubtedly had a lesser involvement than the other Director Defendants in the fund raising efforts in advance of the EGM and, as an investor, he was plainly genuinely interested in seeking to make a success of TMO. He had not previously been involved in a company with outside shareholders and had no experience of a public style meeting with a lot of independent shareholders. Mr Morgan submitted on his behalf that his lack of any real involvement in the essential events surrounding the EGM exonerated him from any wrongdoing, that his motives were never improper, that he relied (as he was entitled to do) upon the advice of Mr Audley and the insolvency specialist Mr Hussain, and that he certainly did not engage in any dishonest conduct. These submissions will require me to look closely at the contemporaneous evidence in considering each of the allegations against the Director Defendants to determine Mr McBraida's involvement and individual motivations.
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> 162. For present purposes, however, I should say that it would appear from the contemporaneous documents that at the time of the events with which we are concerned, Mr McBraida was a great deal less frail and far more able to articulate his views and objectives than he is now."

26. While to some extent the judge exonerated Mr McBraida from the allegation that his answers in cross examination were untruthful, her finding in the costs judgment that each of the defendants "deliberately pursued a case on liability that they knew to be false and, as Mr Sutcliffe pointed out, this appeared to be a collective endeavour in the sense that they had 'learned their lines' in advance of trial" must be seen in the context of the judge's understanding and obvious grasp of the case as a whole. This was not a case (as Mr Morgan seemed at times to imply) of an elderly and frail defendant with no recollection of the events in question, who could do nothing more than put the claimant to proof of its case on liability. On the contrary, Mr McBraida pleaded a positive case that he "voted in favour of the Market Place Subscription because he believed that Mr Kerr would be able to secure significant investment in TMO from his clients and Market Place would pay for the shares within a matter of weeks". That case was supported by his witness statement. As the judge pointed out in an earlier passage which applied to all the defendants, including Mr McBraida:

> "138. The statements of the Director Defendants were clear and consistent in asserting that they had been seeking to raise money at all times for the sole purpose of funding TMO, that they had not acted with any improper purpose and that they had not sought to mislead anyone. Mr Audley's statement was to the same effect. Many of them continued staunchly to maintain this position under fierce cross examination from Mr Sutcliffe. However, as I shall explain, on a close examination of the documents, their evidence does not ring true in a number of respects and there were moments in the cross examination of

> each of them when Mr Sutcliffe exposed the flaws in that evidence."

27. When Mr McBraida's evidence was tested by cross-examination, he turned out to have little or no recollection of the events in question. If that was so, he should have said so, rather than pleading a dishonest case and relying on an untrue witness statement. The judge was entitled to conclude that Mr McBraida, like the other defendants, had advanced a dishonest case, albeit a case which he was unable fully to support in cross examination. Moreover, he had done so in the face of contemporary documents which made the positive case advanced clearly untenable.

The claimant's conduct

28. Although Mr Morgan submitted that the judge failed to give any or sufficient weight to the unreasonable conduct of the claimant, it seems to me that this submission is untenable. The judge plainly took into account all aspects of the claimant's conduct of which criticism was made. She dealt with them at length and explained in her conclusion which I have quoted above how that conduct impacted on her ultimate decision. There is no scope here for an appellate court to intervene.

Double counting

29. Mr Morgan submitted that there was an inconsistency, or an element of double counting, in the judge's reasoning. She held at [65(ii)] that the claimant should not recover its costs, contrary to the submission then advanced by Mr Sutcliffe, and that the right approach was for the defendant to be deprived of its costs incurred in advancing a dishonest case on liability. But she had then applied a further reduction of 30% of the defendants' costs at [65(iii)] "to reflect an element of the costs incurred by [the claimant] in dealing with those issues at trial". The effect of this, said Mr Morgan, was to do precisely what the judge had said that she would not do, that is to say to award the claimant part of its costs of dealing with the liability issue.

30. In my judgment this submission misunderstands what the judge was doing at [65(iii)]. It is clear that she was in fact following the approach set out in the *Bank of Tokyo* case at [19(ii)] which she had cited earlier in her judgment. This was to disallow the defendants' costs in advancing a dishonest case (which she assessed at 40% of their total costs) and, in addition, to mark the court's disapproval of this conduct by "the imposition of an additional penalty" (as to which, see [8] above), thus reducing the defendants' recovery by a further 30%. It is clear from the judge's reference to "a fair and proportionate additional deduction having regard to the gravity of the misconduct of the Defendants" that this is what she was doing: the language echoes what Mr Justice Briggs said in *Bank of Tokyo*.

31. This was an orthodox and appropriate course to take.

The offers to settle

32. It is common ground that the offers to settle were not offers made under CPR 36 and therefore did not carry the costs consequences of such offers. They were, therefore, offers to be taken into account pursuant to CPR 44.2(4)(c), but the weight to be given to them depended on all the circumstances of the case and was pre-eminently a matter

for the judge to determine. As the judge said in terms that she would give some weight to the offers to settle, made first by Mr McBraida alone and then by all of the defendants, and as she clearly did so in the passages from her costs judgment which I have set out above, the submission that she failed to do so is ambitious.

33. Mr Morgan submitted, however, that the judge cannot in fact have done so because the same order was made in respect of Mr McBraida as in respect of the other defendants who had not made an offer at the outset before proceedings commenced. Mr Morgan submitted that this showed that Mr McBraida had in fact received no credit at all for this early offer which, if it had been accepted, would have avoided the whole claim against him. I do not accept this submission. While Mr McBraida was the only defendant to have made an offer to settle at the outset, he was also the only defendant to have made what was described as the "Undervalue Allegation". This was an allegation, relevant to quantum, that the claimant's sale of the business to a third party was a sale at an undervalue. The allegation was the subject of expert evidence, but in the event was dropped shortly before the trial. The judge decided not to make a separate costs order in respect of this allegation. However, she was entitled to weigh this in the balance when considering what weight to give to the offer made by Mr McBraida. Moreover, it was too simple to say that acceptance of Mr McBraida's offer would have avoided the need for proceedings against him. It was an offer which came with strings attached, namely the requirement for an indemnity in the event of a contribution claim against Mr McBraida by the other defendants.

34. Overall, therefore, the judge was entitled to take the view that Mr McBraida should not be treated differently from the other defendants and I see no reason to doubt that she did take into account the offers to settle when reaching her conclusion as to what was required by the overall justice of the case.

Indemnity costs

35. I need say next to nothing about indemnity costs. The submission that it was an error of principle not to award costs on the indemnity basis in favour of a defendant who had conducted a dishonest case is hopeless.

The reserved costs

36. Finally, there is no error of principle in the judge's decision not to make a separate order in respect of the costs which were reserved at the pre-trial reviews.

Conclusion

37. For the reasons which she explained with clarity in her admirable judgment, the judge was entitled to make the costs order which she made. I would dismiss the appeal.

Postscript

38. I cannot leave this case without observing that it is a great pity that the suggestion of a mediation was not taken up. Far from being a case for which mediation was not suitable, this was in my judgment just the kind of case where a skilled and independent mediator would have been able to help both parties to a realistic assessment of their prospects and to achieve a settlement. That would have benefited

all parties. It would have avoided the trashing of the defendants' reputations which has occurred despite their success in resisting the claim. It would have forced the claimant to focus on the flaws in its case on causation and quantum and to adopt a more realistic approach to what was clearly a grossly exaggerated claim. It would have avoided for all parties the stress and expense of heavy commercial litigation and a lengthy trial. Instead, because none of the parties was prepared to be reasonable, they marched on with colours flying to the disaster which the trial proved to be for them all.

Lady Justice Elisabeth Laing:

39. I agree.

Lady Justice Asplin:

40. I agree that the appeal should be dismissed for all of the reasons which Lord Justice Males has set out. I also endorse his postscript in relation to mediation. It is particularly unfortunate that the defendants took the view that mediation would be "an expensive waste of time." On the contrary, this case was ideally suited to mediation, especially in the light of the fact that reputations were at stake, the defendants contended that the claim was deeply flawed and the claimant was open to discussing the provision of additional information about its claim. Rather than being an expensive waste of time, it would have forced both sides to take a more realistic approach to the litigation. It would have been likely to have saved much of the very considerable amount of time and costs which were ultimately expended. In the end, the negative attitude towards an attempt at negotiated dispute resolution which was adopted, cost everyone dear. In future, both parties and their advisers should approach the possibility of mediation in a more positive light.