Neutral Citation Number: [2021] EWHC 2773 (Ch)

Case No: BL-2018-000628

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2021

Before :

MRS JUSTICE JOANNA SMITH DBE

Between :

TMO Renewables Limited (In Liquidation)	**Claimant**
- and –	
(1) Timothy Stephen Kenneth Yeo **(2) David William Weaver** **(3) Desmond George Reeves** **(4) Michael Peter McBraida** **(5) Maxwell Charles Audley**	**Defendants**

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Mr Andrew Sutcliffe QC and Mr George McPherson (instructed by **Hewlett Swanson Limited**) for the **Claimant**
Mr Yeo, who is unrepresented and the **First Defendant**

Mr Weaver, who is unrepresented and the **Second Defendant**

Mr Matthew Collings QC and Mr Ted Loveday (instructed by **Blake Morgan LLP**) for the **Third and Fifth Defendants**

Mr Richard Morgan QC (instructed by **Alius Law**) for the **Fourth Defendant**

Hearing dates: 29 September 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 18 October 2021.

MRS JUSTICE JOANNA SMITH:

1. Further to my judgment in the trial of this matter ("**the Main Judgment**"), handed down on 20 July 2021 (neutral citation number [2021] EWHC 2033 (Ch)), I must now deal with the issue of costs.

2. In the Main Judgment I found that the First to Fourth Defendants had acted in breach of their statutory and fiduciary duties as directors of TMO and that they had done so recklessly and in bad faith. I also found that the Fifth Defendant had breached his contractual and fiduciary duties owed to TMO as its legal adviser and that he had done so in bad faith. However, on the issues of causation and loss, I found against TMO and so dismissed its claim. This judgment proceeds on the assumption that its readers will be familiar with the detail of the Main Judgment and that the definitions and abbreviations used therein will also be applied here.

3. Against that background, the parties are at logger heads on the question of costs. It is uncontroversial that the Defendants are the successful parties, but TMO says that their proven dishonesty should have the effect of displacing the ordinary rule that costs should follow the event and that, in circumstances where the case on liability took up a very substantial proportion of the trial, justice requires that the Defendants should pay 40% of its costs (a percentage which it has arrived at by setting off proposed issue-based costs orders going each way - of two thirds TMO/one third to the Defendants, a proposed award to TMO of roughly 30% of its costs - and then adding a penal uplift of roughly 10% on account of the dishonesty). The Defendants reject this analysis, saying in general terms that as the overall winning parties they are entitled to an order that TMO should pay all of their costs, or at least a very significant part of those costs.

4. Insofar as Mr McBraida is concerned, TMO seeks indemnity costs in respect of a discrete issue raised by him only (and abandoned at trial), namely that TMO's value was lost by the Joint Administrators selling TMO's assets to Rebio at a substantial undervalue in breach of their fiduciary duties ("**the Undervalue Allegation**"). Mr McBraida opposes any such order but in turn seeks to recover all of his costs of the action from TMO on an indemnity basis, relying upon the circumstances surrounding TMO's refusal to accept his early offer to settle, together with the unsatisfactory way in which he says that TMO's expert evidence was obtained and deployed.

5. Before I turn to look in detail at the respective arguments of the parties, I should set out the law.

The Law

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.

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".

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 165 at [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 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.

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".

My Decision

16. In circumstances where this claim was brought to obtain monetary compensation and not to vindicate rights or uncover breaches of duty, my judgment represents a defeat for TMO (see *Marathon Asset management LLP v Seddon* [2017] 2 Costs LR 255 at [3]-[4] (per Leggatt J)). Accordingly, the Defendants are plainly the "successful parties" for the purposes of CPR 44.2(2)(a). As I have already said, this, at least, was uncontroversial at the hearing.

17. Mr Sutcliffe QC, on behalf of TMO, submits that having determined the identity of the successful party, it is then necessary for the court to consider "whether this is a case in which an issue-based costs order is appropriate" and, if so, "whether for reasons of practicality a proportionate order should be made". Only once the court has dealt with those issues does he submit that it should consider the matters set out in CPR 44.2(4).

18. In my judgment this submission is not consistent with the approach set out in CPR 44.2. As is clear from the words of the rule itself, I must have regard to the circumstances set forth in CPR 44.2(4) "in deciding what order (if any) to make about costs". I cannot determine that the case is suitable for an issue-based costs order before I have considered the relevant circumstances (which of course include whether a party has succeeded on part of its case even if it has not been wholly successful). I therefore intend to start by considering the circumstances identified as relevant to the exercise of my discretion by each of the parties during the hearing.

Consideration of the CPR 44.2(4) and (5) factors

19. In my judgment it is clear from the authorities to which I have referred that I must have proper regard to the scope and extent of the Defendants' dishonest conduct as summarised in paragraph 139 of the Main Judgment in making my decision. Whilst there were 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. TMO was successful in establishing that the Director Defendants issued thousands of shares for improper purposes, then concealed and dishonestly misrepresented the nature of those share issues to shareholders. This conduct (guided by the advice of Mr Audley) was an egregious form of corporate wrongdoing.

20. Whilst I accept that TMO did not succeed in establishing every aspect of its case on liability, 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). This was obviously not a reasonable approach for the Defendants to take in their defence of the claim.

21. In those circumstances (and subject to the points I make below), the starting point must be that it would not be fair or just for the Defendants to recover the costs they spent in advancing their dishonest case on liability. Furthermore, I accept TMO's submission that the parties have wasted a very substantial amount of time on allegations relating to the Defendants' wrongdoing. Indeed, Mr Collings QC (on behalf of the Third and Fifth Defendants) frankly accepted during submissions that the issue of "fraud on a power" was a "very very big issue at trial" and that a percentage deduction to the Defendants' costs to reflect their loss on liability was plainly one possible outcome of the balancing exercise to be undertaken by the court in arriving at an appropriate order for costs.

22. As to the amount of time spent in addressing liability (and more specifically in dealing with those elements of the liability case on which TMO succeeded), Mr Sutcliffe relied upon a Schedule of Issues which identified TMO as the successful party on each of the four liability issues set out at paragraph [100] of the Main Judgment (issues which were dealt with over paragraphs 178-557 of the Main Judgment – i.e. 380 paragraphs of 702 paragraphs or approximately 54% of the judgment). In addition, he submitted that the three "other" defences to those issues together with the Counterclaim should be included in this analysis. Whilst I accept that he is right about the three "other defences", namely the "would have done it anyway" defence, the section 1157 exoneration and Mr Audley's limitation defence, together these defences (which of course did not each involve every Defendant) added only an additional four paragraphs to the Main Judgment taking the total number of paragraphs in the Main Judgment dealing with liability in circumstances where the Defendants defended dishonestly and TMO succeeded to 384, or nearly 55%. As for the Counterclaim, I intend to deal with that separately in due course.

23. Mr Sutcliffe submits, and I agree, that in a large and complex case such as this, perhaps the best yardstick of the time spent on, and the significance of, each issue is the Main Judgment. As Waksman J said in *PCP* at [31] "[o]ne guide, though not an exhaustive or necessarily authoritative guide, as to the relative importance or significance of the issues is the way in which and the extent to which" those issues were dealt with in the judgment. However, the mere recitation by TMO of paragraph

numbers dealing with the four main liability issues does not, in this case, tell the complete story. The position is more nuanced than that, as I pointed out during the hearing; within the liability issues there were substantive sub-issues pursued by TMO on which it did not ultimately succeed at trial.

24. Thus the Defendants point to the court's rejection of TMO's case as to (i) the existence of an Inner Board (paragraphs 200-201, 258-261), (ii) breach of duty in removing Messrs Glen and Andenaes from the Board (paragraphs 196-277); (iii) the existence of a long-running strategy designed to ensure victory at the EGM (paragraphs 271, 288 and 294-295); (iv) the alleged bribery of Mr Kerr by the Board (359); and (v) breach of duty in relation to the October Circular (paragraphs 394-420). Focussing purely on the Main Judgment, removing these paragraphs from the 384 that were concerned with liability leaves 271 paragraphs dealing with liability in respect of which TMO was successful (and in respect of which the Defendants ran a dishonest defence), or just under 40%.

25. Absent anything more, it would seem that as a matter of principle the Defendants should be deprived of their costs to this extent at least. However, in light of the submissions made by all parties, a number of additional questions now arise:

    i) Given my findings above, what is the correct approach to adopt? Should the court simply disallow 40% of the Defendants' costs or does the Defendants' conduct justify an order for costs in favour of TMO (as Mr Sutcliffe contends) together with some form of additional penal uplift;

    ii) Does the fact that TMO won on other issues at trial (beyond the issues of liability that I have identified) affect the analysis?

    iii) How should any conduct on the part of TMO both prior to and during the run up to trial (including its failure to accept admissible offers to settle) be weighed in the balance? Assuming that the Defendants' submissions as to TMO's conduct are correct, does such conduct (which primarily concerns the conduct of the litigation and the failure properly to engage with what the Defendants say were fatal flaws in TMO's case) affect the justice of the case and any view the court might take as to the relative success of the parties so as to neutralise, or even outweigh, the Defendants' dishonest conduct, as the Defendants contend.

26. Only once I have considered these questions can I determine the most appropriate form of order.

27. As to the first question, TMO contends that there are a number of factors which militate in favour of the Defendants being ordered to pay the costs of the liability issues in respect of which TMO was successful. In brief, these factors were (i) that the work undertaken by the parties pre-trial was dominated by liability issues; (ii) that the liability issues occupied at least two thirds of the court's time at trial; (iii) that the parties incurred costs are substantial and that TMO estimates that at least two thirds of the parties' total costs have been incurred in relation to liability issues only and (iv) that the Defendants have taken an unreasonable approach to liability issues.

28. Viewing these factors against the *Hutchinson* principles to which I have referred above, there can be no doubt, as I have already said, that the Defendants' conduct was serious in that they advanced a dishonest and misleading case on liability; I have set out examples in the Main Judgment relating to the conduct of each Defendant, which I need not rehearse again here. This conduct was directly relevant to liability issues which lay at the heart of TMO's case. Had the Defendants conceded liability on the issues in respect of which they were ultimately unsuccessful (as they should have done), the costs of the action would inevitably have been very significantly reduced; indeed I tend to agree with TMO that a trial on causation and loss issues only (with a commensurately smaller volume of documentation) could have been comfortably accommodated within about 8 days and that an early concession on liability might well have reduced the overall costs by at least 50%.

29. I accept in this context that it is clear from the pleadings, disclosure and witness statements that much of the focus was on liability (although, as I have said, TMO was not wholly successful on liability issues). As for the amount of time actually spent on liability during the trial, whilst any views I express on this question can only be very broad brush, my recollection of the trial (which is broadly consistent with the table set out in paragraph 86.2 of TMO's skeleton argument for this hearing) is that liability issues generally took up perhaps 60% of the time, with no more than perhaps 15-20% of the time being taken up with issues of liability on which TMO lost, i.e. approximately the result arrived at by my analysis of the Main Judgment.

30. Before I assess the impact of these points on the ultimate order for costs, including whether they should point me towards making an issue-based costs order, I must first turn to consider the second and third questions.

31. As to the fact that TMO won on other issues (the second question), the Schedule of Issues produced by Mr Sutcliffe for the hearing showed that (leaving aside the Undervalue Allegation involving Mr McBraida only, and leaving aside the Counterclaim which I shall address separately) TMO prevailed on an additional 2 issues (both relating to causation), with the Defendants winning on three. However, this straight comparison is again insufficiently nuanced. It is true that TMO succeeded on the questions of whether the EGM Resolutions would have been passed, and whether the Andbell Loan Offer would have been accepted, but these issues were dealt with in approximately 20 paragraphs of the Main Judgment.

32. I remind myself that I must give real weight to the overall success of the winning party and that in almost every case the winning party will lose in relation to some of the issues. In the circumstances, it does not seem to me that the justice of the case requires me to reflect these losses (which are unrelated to the dishonest defence of the case by the Defendants and thus their unreasonable conduct) in the costs order and I shall not do so.

33. As to the third question, the focus of the submissions made by Mr Collings (supported by Mr Yeo and Mr Weaver) and by Mr Morgan QC on behalf of Mr McBraida was not entirely on all fours. However, the key points were that:

    (i) TMO unreasonably persisted in a claim whose flaws (in relation to causation and quantum) were obvious and had been pointed out in correspondence from the outset;

(ii) TMO's expert evidence on loss was flawed, that Mr Patel failed to comply with his duties as an expert in liaising directly with Mr Glen in the preparation of his report and that problems identified in the Main Judgment with TMO's expert evidence were problems that had been pointed out to TMO by the Defendants but ignored until the last week of trial;

(iii) TMO unreasonably failed to carry out its obligations in relation to disclosure, causing substantial sums to be expended unnecessarily by the Defendants in chasing for proper disclosure;

(iv) The scope of the factual enquiry at trial was significantly wider than it needed to be by reason of the unreasonable conduct of TMO;

(v) TMO's unreasonable conduct at trial had the effect of elongating the trial timetable; and

(vi) TMO rejected admissible offers made by the Defendants and should not, in the circumstances, recover any of its own costs.

34. Having regard to the submissions made by all parties at the hearing, I consider there to be merit in some, but not all, of these six points which I take in turn below.

(i) TMO's conduct of the litigation

35. Mr Morgan took me in detail to the correspondence between the parties, which he submitted evidenced a failure on the part of TMO to provide adequate information of its loss and damage together with continuing (fruitless) attempts on the part of the Defendants to understand how TMO put its case. Mr Morgan submits that TMO's failure to engage, particularly on the subject of the quantification of its loss claim, added considerably to the work undertaken by the Defendants' legal teams. He also submits that the very points the Defendants were raising in correspondence as to the flaws in TMO's case on causation and loss were ultimately the points which found favour with the court in dismissing TMO's claim and that, if TMO had engaged with the points being raised, it might have identified the serious issues surrounding its case on quantum and loss.

36. Having had careful regard to the correspondence to which I was referred, I consider that while there is a real and substantial basis for Mr Morgan's criticisms of TMO's conduct, the evidence is not all one way. It is true that, by way of example, in letters dated 23 February 2016, 26 February 2016, 27 November 2017, 7 February 2018, 13 July 2018 and 27 January 2020 and 13 November 2020, the solicitors for the Defendants raised serious concerns over the flaws in the Claimant's case on causation and loss, including pointing out that the loss claim (which was originally quantified in the letter of claim as £27 million and subsequently revised down to £19.1 million) was unexplained and that there had been a failure to comply with the Practice Direction on Pre-Action Conduct and Protocols. Indeed, Fladgate LLP (solicitors for Mr McBraida) went so far as to describe the quantum as set out in the Particulars of Claim both in correspondence and in the second witness statement of Bree Taylor dated 17 July 2018 as a "made up figure". Furthermore, some of the points that Fladgate LLP was making on causation ultimately found favour in the Main Judgment (see in particular the letter of 13 November 2020).

37. Hewlett Swanson's consistent response to these complaints (see by way of example letters of 14 December 2017 and 14 February 2018 from Hewlett Swanson and the second witness statement of Mr Duffy dated 5 October 2018) was that it would rely on expert evidence at trial, that it had obtained a preliminary report already from Ernst & Young ("**EY**") and that the figure of £19.1 million in the Particulars of Claim was "derived" from that report. Owing to the privileged nature of the preliminary EY report, it was not disclosed and TMO chose not to provide any additional details at this early stage as to the underlying rationale for the calculation of the quantum, albeit that it did point out that the figure would need to be determined as at the date of the trial.

38. As I shall return to below, the failure to provide further details was unreasonable on the part of TMO; but I reject any suggestion that TMO acted improperly in refusing to disclose the preliminary EY reports (which it disclosed for the purposes of this hearing) and, having now seen those reports, there is certainly no basis for me to find that the claim being advanced by TMO was "made up". That was a very serious allegation against officers of the court in the form of the Joint Liquidators, but it was, and is, without foundation. TMO did obtain preliminary reports from EY which, in my judgment, permitted a claim of £19.1 million to be asserted, subject to ensuring that evidence was available to support the information that had been provided to EY, together with the assumptions that EY was making; it seems to me to have been this latter point that was overlooked.

39. Mr Sutcliffe observed during his submissions that the Defendants did not serve a formal Request for Further Information until 7 January 2021 (at which point the Third and Fifth Defendants sought information in relation to the allegation that Rebio had successfully developed the TMO Business and Assets). Furthermore, there was never a formal request from the Defendants in relation to quantum specifically. However, from 7 February 2020, Hewlett Swanson began to offer more detailed discussions about quantum on a without prejudice basis, which the Defendants chose to reject (see Hewlett Swanson's letters of 7 and 21 February 2020), albeit they say in circumstances which were justified – including a complete failure on the part of TMO to indicate the level of its costs.

40. Weighing up the competing arguments, whilst various of the Defendants' criticisms appear unfounded, I agree that in the early stages of this case (and certainly prior to February 2020), TMO was distinctly unforthcoming in the provision of information about the quantum of its claim and that it made no real effort to engage with the Defendants with a view to providing a full explanation of the underlying rationale for that claim. This was neither reasonable and nor was it consistent with the "cards on the table" approach that is encouraged by the Practice Direction on Pre-Action Conduct and Protocols. This was a very substantial claim (identified as being worth £19.1 million in the Particulars of Claim) made against individuals who were entitled to know how the figure claimed against them had been arrived at (even if it was a figure that might change at trial). The complete failure to provide any such information meant that it was simply not possible for there to be any discussion around that figure or indeed any narrowing of the issues on quantum. It is difficult to see how any sensible mediation could have been conducted absent the provision of such information. Furthermore, in my judgment, TMO's failure to articulate the basis

for its quantum claim may very well have contributed to its failure adequately to consider the evidence that would be required in order to establish that case at trial.

(ii) TMO's expert evidence

41. Mr Patel's expert report on behalf of TMO was served on 2 October 2020 and on this issue, I have considerable sympathy with the Defendants' submissions. The report (which prompted an amendment to the Particulars of Claim to seek up to £38.5 million) relied heavily (as it made clear in paragraph 1.7.3) upon conversations between Mr Patel and Mr Glen conducted by video conference on 17 June 2020 and 11 September 2020 (see Mr Glen's fourth statement), notwithstanding that the substance of those conversations was not disclosed and the information obtained by Mr Patel had not been included in Mr Glen's first statement and had not been covered in TMO's disclosure. There appears to have been no solicitor involvement in these discussions and there was no detailed record of their content. Mr Patel had not kept a note of what was discussed.

42. In my judgment this was not an appropriate or reasonable way to go about the production of an expert report. Not only did it undermine the independence of Mr Patel as an expert witness, but it also failed to ensure that the Defendants were on a level playing field. Ultimately, it necessitated the service of several further witness statements on Mr Glen's behalf out of time (Mr Glen's second statement on 5 November 2020 seeking to set out the information provided to Mr Patel, Mr Glen's third statement on 20 January 2021 seeking, amongst other things, to address "incorrect assumptions" made by the Defendant's expert Mr Hall in his report, and Mr Glen's fourth statement on 9 February 2021 addressing yet again - further to an Order made on 26 and 27 January 2021 - the information he had provided to Mr Patel) together with the late disclosure of new documents. As Mr Collings submitted, this all had the effect that significant aspects of TMO's case were conducted in reverse.

43. Whilst I accept Mr Sutcliffe's submission that ultimately nothing was deliberately or secretly held back from the Defendants, nevertheless this episode appears to me to be a clear illustration of TMO's failure to identify the evidence it required on quantum in order to prove its case prior to serving its witness statements, resulting in the need to try to regularise the position in the immediate lead up to trial. If he was to be on a level playing field in preparing his report, Mr Hall should have had access to all of the evidence that had been available to Mr Patel. Yet, as at the date of service of Mr Hall's report in December 2020, there remained doubt around the precise scope of the information provided to Mr Patel – doubt which was only finally resolved upon service of Mr Glen's fourth statement several weeks after Mr Hall's report was served. This did not represent a fair playing field.

44. Furthermore, from October 2020 onwards, the Defendants repeatedly sought details as to the basis of Mr Patel's valuation, including crucial information about the forecasts on which it relied (as set out in detail in the statement of Mr Daly dated 18 January 2021). On 23 December 2020 the Defendants served Mr Hall's report which exposed the flaws in Mr Patel's valuation in detail; for example, it noted that Mr Patel had made no distinction between the Rebio Group and Rebio (section 1.3), that Mr Patel had relied on projections provided by management without having carried out any due diligence (paragraph 2.6.1) and it identified an issue with the metadata for the Key Forecast. When serving Mr Hall's report, the Third and Fifth Defendant's solicitors,

Blake Morgan LLP, invited TMO to re-consider its position in light of its contents and the flaws in Mr Patel's report were subsequently pointed out in the Experts' Joint Statement and by the Defendants at both PTRs and during the trial. However, TMO appears to have paid no attention and it certainly does not appear to have recognised that Mr Patel's approach was inadequately supported by the factual evidence. Only in the final week of trial did TMO accept the problems with the approach that Mr Patel had taken to the Rebio forecasts and effectively invited me instead to pluck a figure out of thin air.

45. I agree with the Defendants that this was unacceptable. Had TMO and its legal team reviewed Mr Patel's report in detail and by reference to Mr Hall's report in advance of trial, its flaws should have become obvious. It is extremely surprising to say the least that in a case purportedly worth many millions of pounds, TMO should find itself in such complete disarray on its quantum case at trial that Mr Sutcliffe was forced to try to resurrect the position on the forecasts by informing Mr Patel in re-examination that he was mistaken as to the date of the Key Forecast on which he had relied.

(iii) TMO's Disclosure Exercise

46. I accept the Third and Fifth Defendants' submission in their skeleton argument that it appears from Mr Daly's statement and the correspondence referred to therein that the Defendants were forced to chase repeatedly for proper disclosure in relation to causation and quantum and that that disclosure arrived in dribs and drabs only in late 2020 and early 2021 (another indicator that TMO was not sufficiently focussed on these issues). This was justified by TMO on the grounds that it was only once its expert report was complete that it was in a position to determine the full extent of its supplemental disclosure.

47. Whilst the Defendants' points on disclosure may well be accurate, and whilst I am able to see that late disclosure appears to have been provided, particularly in relation to causation and quantum, and that this may well have been a consequence of the way in which TMO approached the litigation (to which I have already referred), nevertheless, I accept Mr Sutcliffe's submission that I cannot possibly determine any granular points about disclosure at this stage, and do not do so. I obviously appreciate that there may well have been challenges for the Claimant in obtaining documents from Rebio, and indeed from other third parties to the proceedings. Further, I note that the point was not pursued during oral submissions at the hearing and so struck me as being somewhat peripheral to the Defendants' main submissions.

(iv) The scope of the enquiry at trial

48. As for the scope of the enquiry at trial, Mr Collings submits that the court rejected TMO's case on liability at trial to the effect that the Defendants had breached their duties prior to 22 October 2013. Indeed, the main sub-issues on liability in respect of which TMO failed arose in respect of the period early September through to mid-October 2013 (i.e. issues relating to the resignation of Messrs Andenaes and Glen and the October Circular). Thus, say the Defendants, the scope of the factual enquiry at trial was significantly wider than it needed to be, the disclosure was unnecessarily broad, the trial bundles unnecessarily voluminous and the real factual enquiry should have turned on approximately a week or so of behaviour in the run up to the EGM

together with one significant event in the form of the Andbell Loan Offer a few weeks later. It should not have involved the sinister, longer running conspiracy that TMO sought to prove and which had to be addressed at some length in the Main Judgment.

49. I consider that it certainly should have been possible for TMO to present a more focussed, stream-lined (and thus cost effective) case, notwithstanding that, as Mr Sutcliffe contends, some of the background to the Market Place Transaction would inevitably have had to be traversed during the trial in any event in circumstances where liability in respect of the conduct in the week leading up to the EGM was in issue. There is a considerable difference between presenting the background to an issue and cross-examining witnesses on a live issue with a view to establishing dishonest conduct, and in my view this is reflected by the lengths to which I had to go in the Main Judgment to address the liability allegations on which TMO did not succeed. However, insofar as TMO lost on the liability issues relating to the period prior to mid-October 2013, I have already factored that into my assessment of the percentage time spent on liability and accordingly, I do not consider that this particular point takes matters any further.

(v) TMO's conduct at trial

50. It is true that Mr Sutcliffe did engage in extended cross examination of the Defendants and that this had the effect of elongating the trial (see Main Judgment at paragraph 17). However, given that Mr Sutcliffe was running a very serious case against each of the Defendants and needed properly to put that case in cross-examination by reference to the numerous documents, I do not consider this conduct to be in any way unreasonable. As I said in paragraph 17, the parties should have ensured that a more realistic time estimate was provided to the court, but there is no basis for the suggestion that this should weigh in the balance on costs.

(vi) Admissible Offers

51. Mr McBraida made an admissible offer to settle without prejudice save as to costs on 27 November 2017 in the sum of £100,000 in full and final settlement of any and all claims that TMO or its Joint Liquidators had against him. The offer included any claim for interest or costs and also stipulated that Mr McBraida required an indemnity from TMO, up to a limit of £100,000, in the event that any other party were to bring a claim against him for contribution or indemnity. TMO rejected this offer. Mr Morgan submits that, not only should this offer be given substantial weight in the exercise of my discretion on costs, but also that it justifies an award of indemnity costs on the grounds that whilst TMO's refusal of the offer *per se* was not unreasonable, TMO's conduct in failing properly to engage with the flaws in its case as identified in correspondence by Fladgate LLP (i.e. the circumstances surrounding that refusal) <u>was</u> unreasonable. Accordingly, he says that TMO's failure to engage with the points that Fladgate LLP were making in correspondence was "out of the norm" and that a reasonable litigant might have been expected to see the problems with the Rebio causation case and with its case on quantum if it had paid appropriate attention to these points.

52. All of the Defendants (including Mr McBraida) made a joint admissible offer to settle without prejudice save as to costs on 27 January 2020 in the sum of £515,000 in full and final settlement of any and all claims that TMO or its Joint Liquidators had

against them. The offer included the whole of the claim together with the First, Second and Third Defendants' Counterclaim. It was to be inclusive of any and all of the parties' costs, expenses, disbursements and interest. The Third and Fifth Defendants say that this offer (which was again rejected by TMO) is to be treated as a factor (to be given very significant weight) as part of an overall award of costs. Mr McBraida contends, however, that once again TMO's general conduct surrounding the refusal of this offer justifies an award in his favour of indemnity costs.

53. In contending that (whilst they are relevant) the admissible offers should not materially affect the exercise of my discretion and certainly should have no impact on any issue-based order that I might make, Mr Sutcliffe points out that neither of the offers was made under the CPR Part 36 regime and that if the Defendants had wished to gain the protection of CPR Part 36, they could have made a compliant offer. Furthermore, he submits that in assessing the reasonableness of TMO's conduct in rejecting the offers, it is necessary to judge the position at the time of the offer "not only by reference to the maker of the offer but also by reference to the recipient", and not by the application of hindsight (see *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2013] 1 WLR 548, per Davis LJ at [69]).

54. Mr Sutcliffe says that TMO could not reasonably have accepted Mr McBraida's offer where the claim was plainly being advanced against the Board of TMO collectively, there was no admission of liability (in other words no acknowledgement of his wrongdoing) and any such acceptance would have undermined the collective claim. He also points to the specific terms of the offer, which (owing to the request for an indemnity) involved (he submits) an offer by Mr McBraida on the one hand and a "taking away" on the other. As for the joint offer made by all Defendants, Mr Sutcliffe points out that the offer did not seek to compensate for costs incurred to date, that it was open only for a limited number of days and that in circumstances where the parties had not yet served their expert evidence it was reasonable for TMO to take the view (on the basis of the preliminary reports from EY) that it had a valuable claim. Mr Sutcliffe also says that TMO's response to the joint offer is important, owing to the fact that it proposed mediation and made it clear that TMO was open to discussing the provision of additional information (see Hewlett Swanson's letter of 7 February 2020).

55. I agree with Mr Sutcliffe that the admissible offers certainly should not carry the costs consequences that would have been applicable had they been made under CPR Part 36, for the reasons he gives; whilst making these offers, the Defendants at no stage acknowledged their own dishonest defences. On balance, however, I accept Mr Collings' submission that some weight should nevertheless be attached to them in assessing the overall order to be made on costs. They do appear to me to represent genuine attempts by the Defendants (at the very least) to open up a proper dialogue on the merits of the case, including the real value of the claim.

56. I reject Mr Morgan's submissions that the circumstances surrounding the rejection of these offers justify an award of indemnity costs in favour of Mr McBraida. Where TMO had expert evidence in the form of a preliminary report apparently justifying a substantial claim (albeit based on numerous assumptions as to the evidence that would be available in relation to that claim), TMO's rejection of the offers was not so unreasonable as to be out of the norm. I have already found that TMO's conduct prior to February 2020 and its conduct in relation to its expert evidence plainly merits a

substantial degree of censure, but I reject the suggestion that (in addition) it justifies an award of indemnity costs, and I note in this regard the (to my mind) more realistic approach adopted by Mr Collings on behalf of the Third and Fifth Defendants.

57. Standing back, and given the conduct of all of the Defendants, including Mr McBraida, in running a dishonest defence on liability, I cannot see that the overall justice of the case militates in favour of an award of indemnity costs to any of the Defendants. Mr Morgan contends that Mr McBraida's conduct was not as reprehensible as that of the other Defendants (see paragraph 161 of the Main Judgment), that he took points that were open to him on the documents and having regard to his limited recollection of events, and that his defence was not extravagant. He also says that Mr McBraida was not involved in the Counterclaim or in some of the other discrete defences advanced by the other Defendants and he ties the early offer of settlement (with which TMO unreasonably failed to engage) into these submissions. However as the Main Judgment makes clear at paragraph 162, I formed the view that Mr McBraida was a great deal less frail at the time of the Market Place Subscription than he was when he gave evidence, that he was involved in key decisions made by the Board, that he approved the Market Place Subscription and that various contemporary documents gave the lie to his defence. I note in particular that for the purposes of liability, I expressly rejected Mr Morgan's submissions that Mr McBraida was to be treated as being in a separate category from the rest of the Director Defendants (see for example the Main Judgment at paragraphs 364 and 383(vi)).

58. Furthermore, Mr McBraida made an allegation against TMO which was not adopted by any of the other Defendants, namely the Undervalue Allegation. Mr Morgan explained that, in circumstances where insufficient information had been provided by TMO as to its claim on causation and loss, this allegation was made as an alternative to the proposition that Rebio (even assuming it was a suitable proxy for TMO) was in fact worth nothing. He submitted that absent proper information of the type that should have been available, this was a reasonable stance to take and he pointed out that the Undervalue Allegation was dropped at trial once Mr McBraida was clear about the case that was being run and confident in his defence on causation and loss.

59. I have given careful consideration to the question of whether this one issue should be carved out and treated separately, as Mr Sutcliffe contends, but on balance I do not consider that it would be appropriate to do so and nor do I consider that it warrants an award of indemnity costs in favour of TMO. Mr McBraida did not plead fraud as against the Joint Liquidators (contrary to the submissions made by Mr Sutcliffe during the hearing) and whilst I have no doubt that Mr Duffy took Mr McBraida's Undervalue Allegation very seriously and was required to prepare a detailed witness statement to address it, the allegation was, quite properly, abandoned at trial and Mr Duffy was not subjected to cross examination on the point.

The Reserved Costs

60. Before turning to my final decision, I should mention that it was the First, Second, Third and Fifth Defendants' contention that the costs of the two pre-trial reviews in this case (which I reserved) should not be dealt with separately but should be swept up in my overall order on the case on the basis that the Defendants were the winning parties overall. Mr Collings made the point that the success enjoyed by the

Defendants at the PTRs was "another consideration" which provides support to the proposition that, having regard to all the circumstances of the case, there should be no derogation from the primary position that the winning party should recover its costs.

61. In circumstances where Mr Morgan seeks an award of costs on an indemnity basis for Mr McBraida, he took a different approach, submitting that the costs of the PTRs should effectively be treated separately and that Mr McBraida should have his costs of those hearings on a standard basis. He accepted that TMO's conduct at those hearings was not "out of the norm".

The Exercise of my Discretion

62. Having now considered the submissions made on all sides as to the circumstances which I am invited to take into account in determining the order for costs, and always bearing in mind the overall justice of the case, I am satisfied that there are genuine and serious grounds for concern over some aspects of TMO's conduct of the proceedings, including in particular its failure to engage with the Defendants from an early stage over the nature of its case on quantum and its approach to its expert evidence. I am also satisfied that this should be reflected in my order for costs.

63. Whilst I accept Mr Sutcliffe's submissions that there is a qualitative distinction to be made between complaints about procedural tasks (the conduct of the litigation and so forth) and complaints about the approach to issues in the litigation (running a dishonest defence, for example) which are likely to carry more weight in the balancing exercise, I am bound to say that I consider that if TMO had engaged with the Defendants in a reasonable manner on the issues of causation and quantum (including the expert evidence), it is very possible that TMO would have appreciated the flaws in its case and that substantial costs would thereby have been saved.

64. In all the circumstances set out above, I have decided that this is not a case where success or failure on particular issues provides a complete answer to the question of costs. Instead, I consider that justice can be done by taking a rather more broad brush approach which reflects (i) the Defendants' success in what was a very hard fought, high stakes action, (ii) TMO's success on liability (including the dishonest conduct of the Defendants) and (iii) the conduct on the part of TMO which I have found to be unreasonable together with the existence of the admissible offers. I do not consider that it is in the interests of justice that I should make an order requiring the Defendants to pay that element of TMO's costs that is referable to liability, as TMO contends, or indeed that element of TMO's costs that is referable to those aspects of liability in respect of which TMO was successful. 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.

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:

    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;

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;

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.

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.

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 Counterclaim

66. I dismissed the Counterclaim in paragraph 701 of the Main Judgment. The Defendants contend that the costs will follow the event.

67. Mr Sutcliffe sought to persuade me that the Counterclaim cannot be hived off as a separate issue in this way on the basis that it failed by reason of my findings of dishonesty and so is inextricably interrelated with the liability issues. However, I disagree.

68. The Counterclaim concerned the discrete issue of whether TMO had failed to maintain appropriate D&O insurance with respect to any claims arising during the tenure of the First, Second and Third Defendants as directors. A small amount of evidence was directed to this question (as recorded in the Main Judgment at paragraphs 692-697) and I found that TMO had acted in breach of its contractual obligation. However, in circumstances where TMO had not established its case on causation or loss, I noted that there was no need to take the matter further (paragraph 700) and I observed that if a potential insurer had become aware of the First, Second and Third Defendants' conduct, cover would have been refused or avoided (paragraph 701). That seemed to be the consequence of my decision on dishonesty, but it was not a point that lay at the heart of the Counterclaim and I cannot see that the two issues are linked for the purposes of assessing costs.

69. In all the circumstances, the First, Second and Third Defendants must pay the Claimant's costs of the Counterclaim, such costs to be subject to a detailed assessment on the standard basis if not agreed.

70. I invite the parties to try to agree upon an Order reflecting this judgment together with any additional consequential orders that may be appropriate. If that proves impossible, my present view is that I should decide any outstanding issues on paper following receipt of short written submissions from the parties to be provided to the court within 7 days of the hand down of this judgment.