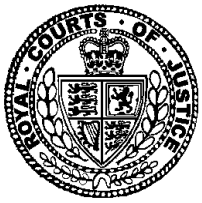

Neutral Citation Number: [2019] EWHC 191 (Comm)

Claim No CL-2015-000884

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 06/02/2019

Before :

THE HONOURABLE MR JUSTICE BRYAN

- -

Between :

ASSETCO PLC **Claimant**

- and –

GRANT THORNTON UK LLP **Defendant**

- -

Mark Templeman QC, Richard Blakeley and Tom Pascoe
(instructed by **Mishcon de Reya LLP** for the **Claimant**
David Wolfson QC, Simon Colton QC and Stephanie Wood
(instructed by **Clyde & Co LLP**) for the **Defendant**

- -

Approved Quantum 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.

Written Submissions on Quantum: 1 February 2019

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THE HONOURABLE MR JUSTICE BRYAN:

1. In my judgment handed down on 31 January 2019 ([2019] EWHC 150 (Comm)) (the "Judgment") I found that AssetCo's claim against GT succeeded in the respects found in that judgment and indicated that if quantum could not be agreed I would hear further argument on any issues that remained at or following the handing-down of my judgment. On 30 January 2019 I was informed that the parties had been unable to agree certain issues in relation to quantum, but that the parties were in agreement that they were content for those issues to be determined on the basis of written submissions to be provided on 1 February 2019, in anticipation of a quantum judgment in advance of a further oral hearing that is scheduled to tale place later in February to address, amongst other matters, interest and costs.

2. This judgment accordingly addresses the outstanding issues of quantum based on the written submissions that were duly lodged by the parties on 1 February 2019.

3. AssetCo's calculation of the total amount of damages (exclusive of interest and costs) to which it claims it is entitled under the judgment is as follows:

Head of loss	**Amount**	**Deduction for contributory negligence**	**Net amount awarded**
Jaras	£1,500,000 ([1225])	25% ([1190(2)])	£1,125,000.00
Dividends	-	100% ([1190(4)])	-
Wasted expenditure on subsidiaries	£23,348,675 ([1244])	25% ([1190(1)])	£17,511,506.25
Plc-Level Expenditure	£3,533,206 ([1252])	25% ([1190(1)])	£2,649,904.50
AS Fire and Todd wasted profits	£1,435,817 ([1258])	25% ([1190(1)])	£1,076,862.75
TOTAL			**£22,363,273.50**

4. I do not understand there to be any dispute as to the composition of the sums themselves or the arithmetic as to the calculation of AssetCo's damages. However, in the event, two disputes have emerged from the parties' written submissions on quantum each of which relates to AssetCo's contributory fault:-

(1) GT submits that the appropriate level of deduction for contributory fault from that part of the wasted expenditure claim which overlaps with the PSA claim should be 35% and not 25% (as submitted by AssetCo) (the "First Quantum Issue"), and

(2) GT submits that the appropriate level of deduction for contributory fault from the Jaras claim, which overlaps entirely with the PSA claim, should be at least 35% and not 25% (as submitted by AssetCo) (the "Second Quantum Issue).

5. GT submits that on the basis of its submissions the amount of damages recoverable should be as follows:-

Head of loss	**Amount**	**Deduction for contributory negligence**	**Net amount awarded**
Jaras	£1,500,000	35%	£975.000 or less
Dividends	-	100%	-
Wasted expenditure (Plc-level and subsidiaries) from PSA monies	£10,141,339	35%	£6,591,870.35
Wasted expenditure (Plc-level and subsidiaries) not from PSA monies	£16,740,542	25%	£12,555,406.50
AS Fire and Todd wasted profits	£1,435,817	25%	£1,076,862.75
TOTAL			**£21,199,139.60** or less

The Applicable Legal Principles in relation to Contributory Fault

6. I have already set out the applicable principles in relation to contributory fault, so far as they are relevant to the issues arising, at [1095]-[1097] of the Judgment, which are either

common ground, or supported by existing authority. I will repeat them here for ease of reference:-

> "1095 Firstly, the contribution is to the "damage" suffered, and not to the occurrence inflicting the damage – see Clerk and Lindsell on Torts (22nd edn). at 3-58 – the classic illustration often given is a failure to wear a seatbelt – this in no way contributes to the accident occurring but it can contribute to the extent of the damage (see also what Lord Reed JSC said in *Jackson v Murray* [2015] UKSC 5, [2015] 2 All ER 808 at [20] which is quoted below).
>
> 1096 Secondly, any contributory negligence on the part of the claimant, however imprudent the behaviour, must be shown to be a cause of the relevant damage – see Clerk and Lindsell at 3-58 and 3-59 Lord Atkin in *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] A.C. 152 at 165: *"If the [claimant] were negligent but his negligence was not a cause operating to produce the damage there would be no defence. I find it impossible to divorce any theory of contributory negligence from the concept of causation.*"
>
> 1097 Thirdly, a key point (which is common ground) is that it is necessary when applying section 1(1) of the 1945 Act, to take account *"both of the blameworthiness of the parties and the causative potency of their acts"* (*Jackson v Murray*, supra at [40]). The consequence of this is that *"[f]ault not causally contributing to the damage cannot be taken into account in the first place"* for the purposes of assessing apportionment (see McGregor on Damages (20th edn.) at 7-009)."

7. Thus, in relation to any particular head of loss the question is whether AssetCo's own fault contributed to the damage suffered ([1095]), in the sense of being a cause of that damage [1096], and in determining the appropriate deduction the key point is that it is necessary to take into account *"the blameworthiness of the parties*" and *"the causative potency of their acts"* [1097].

The First Quantum Issue

8. I have, in fact, already determined the first issue in favour of AssetCo, and AssetCo's position is in any event correct as a matter of principle applying the principles I have identified above.

9. Thus at [1190(1)] of the Judgment I found that, in relation to the wasted expenditure claim, the appropriate deduction, having regard to the relative causal potency of GT's and AssetCo's acts and relative blameworthiness was 25%:-

> "(1) Wasted expenditure - all the above matters and findings apply in relation to the loss in respect of wasted expenditure by AssetCo plc in and on behalf of its subsidiaries and Plc-Level Expenditure, as well as profits made by AS Fire and Todd expended on other subsidiaries that would have been available to AssetCo on the Counterfactuals. Having regard to the relative causal potency of their acts and relative blameworthiness of GT and AssetCo as identified above, I consider and find that it is just and equitable to reduce the damages recoverable by AssetCo in respect of wasted expenditure (save the PSA monies) by 25%."

10. The reference to "save the PSA monies" was a reference to the discrete subsequent finding at [1190(3)] of contributory fault in relation to PSA claim (also addressed at [1155]). That finding (at [1190(3)] related to the alternative PSA claim (identified at [29(4)]), **not** the claim for wasted expenditure (AssetCo's primary claim) to which a deduction of 25% was appropriate. As I made clear (at [1259]-1261] in circumstances in which AssetCo's primary claim (that for wasted expenditure) succeeded, AssetCo had no need for its alternative PSA claim (to which the 35% deduction would have applied).

11. However, in any event, and applying the principles that I have identified above, the question is whether AssetCo's own fault contributed to the damage suffered [1095], in the sense of being a cause of that damage [1096]. The key factors in determining the appropriate deduction for contributory negligence are the *"blameworthiness of the parties"* and the *"causative potency"* of their acts [1097].

12. The claim under consideration is AssetCo's primary claim – that is the wasted expenditure claim. At [996] I found that the GT's breaches were the legal, as well as the factual, cause of the trading losses i.e. that the legal cause of AssetCo's trading losses was GT's negligence in failing to detect a pattern of dishonest trading. To that claim, a deduction of 25% for contributory fault is to be applied ([1190(1)]) having regard to the (relative) "blameworthiness of the parties" and the "causative potency" of the acts of GT and AssetCo. AssetCo's contributory fault in relation to the PSA claim did not contribute to the loss caused by GT's negligence in failing to detect dishonest trading.

13. The fact that a higher deduction might have been appropriate to a discrete loss caused by GT's negligence in failing to detect breach of the PSA is not relevant to the wasted expenditure claim and does not lead to an increase in the appropriate deduction in relation to the primary claim for wasted expenditure by reason of the fact that part of the wasted

expenditure was from PSA monies – that is no more than the source of the monies not the cause of the loss claimed. The PSA claim was an alternative claim, which did not, in the event, form part of AssetCo's recovery from GT [1261]. The fact that it might have attracted a higher deduction for contributory negligence (because AssetCo itself was more culpable in relation to the fault which was the operative cause of the alternative claim) is irrelevant.

14. Accordingly I confirm and find that the appropriate deduction in respect of contributory fault in relation to the wasted expenditure claim is (regardless of the source of the monies expended) 25%.

The Second Quantum Issue

15. On the basis that the Jaras payment was made from PSA monies (as was part of the wasted expenditure as addressed above) GT submits that the applicable contributory fault should be "at least" 35%. GT refers to [1150]-[1151] of the Judgment where it is noted that GT relied on allegations of embezzlement, but that *"save in relation to Jaras which is considered separately below"* AssetCo did not seek to recover embezzled funds, and refers to [1041] where I found that the Jaras payment was a *"self-evidently dishonest payment"*. It is said that I appeared to have accepted that embezzlement could increase the causative potency of AssetCo's own fault, and that since the Jaras payment involved embezzlement by Mr Shannon in a self-evidently dishonest transaction, the damages recoverable in respect of such payment should be "reduced further to some extent" (the "Further Reduction Submission").

16. The Further Reduction Submission is advanced on a false premise as it is contrary to the findings I made in the Judgment. I did not accept that embezzlement increased the causative potency of AssetCo's own fault. On the contrary I found at [1190(2)] that, *"I do not consider that AssetCo's fault in relation to allowing this fraud [i.e the Jaras transaction] is of any greater potency or relative blameworthiness than identified above in the context of trading losses/wasted expenditure generally"*.

17. As I found (at [1190](1)), and for the further reasons given herein, the appropriate deduction in respect of "trading losses/wasted expenditure generally" was 25%. As I did not consider that AssetCo's fault was any greater in relation to the Jaras transaction the appropriate

deduction was, prima facie, also 25%. However, as I had not heard full argument on the feature that the Jaras payment was made out of PSA monies I required the parties to address me further absent agreement.

18. Having now heard from the parties further in their written submissions, I am satisfied that the appropriate deduction in respect of the Jaras claim is indeed 25% and not 35% still less "at least" 35%. As in relation to the wasted expenditure claim, the key factors in determining the appropriate discount for contributory negligence are the *"blameworthiness of the parties"* and the *"causative potency"* of their acts [1097]. The blameworthiness of AssetCo in permitting the Jaras transaction to occur was the same as the company's blameworthiness in allowing the wasted expenditure to be incurred. There is no reason in principle to apply different deductions to the two heads of loss.

19. In addition, contrary to GT's submission, and as with the wasted expenditure claim (as identified above), it is apparent, on analysis, that it is irrelevant that the Jaras payment happened to be funded by the PSA monies. As AssetCo rightly points out, the precise source of the funds says nothing about the *"blameworthiness of the parties"* or the *"causative potency"* of their acts in relation to the loss that occurred when the Jaras monies were paid away. AssetCo's loss in relation to the Jaras claim was not caused by GT's negligence in failing to identify breach of the PSA, but by GT's negligence in failing (in May 2009) to detect a pattern of dishonest trading, of which the Jaras transaction was simply one subsequent example (as I addressed at [997]-[1001] of the Judgment).

20. In addition, AssetCo's claim in respect of the PSA funds was advanced on the basis that GT committed specific breaches of duty in failing to detect that the funds constituted restricted cash, and that they had been dissipated (partially by the time of the 2009 Audit, and in their entirety by the time of the 2010 Audit), in breach of the PSA. This claim did not in the event arise, because AssetCo succeeded in its main claim for wasted expenditure [1261]. The 35% discount that would have applied to the PSA claim is accordingly not relevant for this further reason.

21. Accordingly I find that the appropriate deduction in respect of contributory fault in relation to the Jaras claim is 25%.

22. In the above circumstances I find that AssetCo is entitled to damages in the amounts set out in its table at paragraph 3 above, totalling £22,363,273.50, exclusive of questions of interest and costs which are to be addressed, if not agreed, at the further hearing that has been fixed.