



Neutral Citation Number: [2014] EWHC 2602 (QB)

Case No: HQ10D02643
QB/2014/0126

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 2014

Before :

SIR DAVID EADY
Sitting as a High Court Judge

Between :

(1) MICHAEL RADFORD
(2) THE MICHAEL RADFORD
PARTNERSHIP (A FIRM)

Claimants

- and -

(1) ALEJANDRA FRADE
(2) BRUCE ST CLAIR
(3) JOSE FRADE
(4) GHEKO FILMS SL
(5) GHEKO SUR
(6) WORKHORSE ENTERTAINMENT
LIMITED
(7) INTEGRAL FILMS GmbH
(8) SUBOTICA LIMITED
(9) VALENTINA FILM PRODUCTIONS
LIMITED

Defendants

Martin Westgate QC (instructed by Direct Access) for the **Claimants**
Augustus Ullstein QC (instructed by Taylor Hampton Solicitors) for the 4th and 5th
Defendants

Hearing date: 20 June 2014

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.

.....
SIR DAVID EADY

Sir David Eady :

1. On 20 June 2014 I heard an application by the Claimants for permission to appeal against an order of Master Eye dated 14 January 2014, whereby he granted the Fourth and Fifth Defendants summary judgment on the claim and refused to permit a very late amendment, of which a draft was produced on the second day of the hearing before him, for the purpose of relying upon a new case based on alleged breach of contract. He also set aside a default judgment on the Fourth and Fifth Defendants' counterclaim and they do not seek to challenge that ruling. The Claimants also seek permission to appeal in respect of the costs order. The Master gave written reasons in respect of the strike-out on 7 February of this year.
2. It is now common ground that the First to Third Defendants were never served with these proceedings (a concession made in May 2012) and it has always been accepted that the Sixth to Ninth Defendants were never served either. Accordingly I am only concerned with the position of the Fourth and Fifth Defendants (the Gheko companies).
3. As a matter of first impression, the Master's ruling on the strike-out would appear to be a robust case management decision of the kind which an appellate court would be slow to overturn. Furthermore, it is generally recognised that there is a wide discretion so far as the awarding of costs is concerned. On the other hand, the background to the matter needs to be considered in rather more detail, not least since it is suggested by the Claimants that the Master made errors of law.
4. A number of agreements came into existence with a view to the making of a Spanish film entitled *La Mula* based upon a novel about the Spanish Civil War. Michael Radford, the First Claimant, is a well known film director and the second Claimant is a partnership between him and his wife. It was a special purpose vehicle created with a view to exploiting Mr Radford's talents and services. The First and Second Defendants (also husband and wife) are shareholders in the Fourth Defendant, of which the Fifth Defendant is a wholly owned subsidiary. The Sixth Defendant was a company incorporated and wholly owned by Mr Radford.
5. The screenplay was to be partially written by Mr Radford and the film directed by him. The intention was that it should be a European co-production. With that in mind, a co-production agreement was signed on 18 November 2008, which was expressed to be "within the framework of the European Convention on Cinematographic Co-production". The parties to that agreement were the Fourth Defendant (described as "the Spanish co-producer"), the Seventh Defendant, Integral Film GmbH (described as "the German co-producer"), the Sixth Defendant ("the British co-producer") and the Eighth Defendant, Subotica Ltd ("the Irish co-producer"). The parties were collectively referred to as "the co-producers". Mr Radford signed that agreement on behalf of the Sixth Defendant. As is already apparent, however, neither he nor the Second Claimant were parties to that agreement.
6. Clause 3.1.3 sets out the obligations of the Sixth Defendant. It was to undertake on behalf of the co-producers to procure and/or facilitate the procurement of the services of the British personnel within the terms of the budget and, specifically and without limitation, the services of Mr Radford as director of the film.

7. It was provided in clause 4, under the heading “Creative Business Control”, that *inter alia* the final decision on such matters was to rest with the Fourth Defendant as Spanish co-producer. Specifically, it was provided that in the event that the co-producers were unable to resolve any disagreement between them, the decision of the Fourth Defendant was to be final (subject to certain express qualifications). Clause 4.1 also contained the following words:

“In this sense, the Spanish Co-producer shall retain, as accorded with the director, the final decision on establishing the cut of the Film, however allowing always such changes in the Film as are expressly required by a distributor or broadcaster on account of any existence within the Film of material that may be deemed obscene or defamatory as per the applicable laws, and always subject to the moral rights of the authors of the Film.”

8. As to production financing, clause 5 provided that each of the co-producers was required to contribute a particular percentage of the budget. The largest share was that of the Fourth Defendant at 59.62%. Clause 10(b) vested copyright in the film in the co-producers, again according to specified percentages.
9. In clause 13, provision was made for each of the co-producers to have access to the film materials and also that no film materials were to be removed from the mutually approved laboratory without prior written consent of all co-producers. They were each also to be guaranteed access to an internegative of the film.
10. By virtue of clause 16, none of the parties was entitled to replace itself with a third party; nor was any party permitted to assign its obligations without express written agreement from the other parties.
11. Clause 26 provided that the agreement was to be interpreted and construed in accordance with Spanish law and it was recorded that the parties had irrevocably agreed to submit to the exclusive jurisdiction of the Spanish courts (specifically in Madrid).
12. There was also an “entire agreement” provision in clause 27. The presence of such a clause, in any of the relevant agreements, would *inter alia* make it difficult to sustain the Claimants’ argument to the effect that they “incorporated each other”.
13. In June 2007 a “Writer’s Agreement” had been entered into between Michael Radford and the Fourth Defendant, in which it was recorded that Mr Radford had agreed to write and deliver to the Fourth Defendant a rewrite of the screenplay in the Spanish language. It was provided, in clause 4, that all rights in the screenplay were to belong to the Fourth Defendant. Of particular relevance is clause 4.3(d)-(f):

“Without limitation to any other provision hereof, the foregoing transfer and/or assignment includes those exploitation rights set out in Article 17 of the Act [certain specified Spanish legislation] including, without limitation:

...

- (d) the rights to all means of transformation or adaptation of the Work and/or the Film including into those works identified in Articles 10, 11 and 12 of the Act.
- (e) the rights to authorise or prohibit the inclusion of the Work and/or the Film and/or any part thereof in other works.
- (f) all rights in or to the adaptation and/or incorporation into another work of the Work and/or the Film and/or any part thereof, and of the adaptation and/or incorporation of all such resulting works into other works, including each of the rights set out in this Clause in all of such works.”

For reasons which will shortly emerge, Mr Ullstein QC for the Defendants placed emphasis upon these provisions in support of the proposition that Mr Radford could have no claim for breach of contract on the basis that his screenplay, or any rewrite or revision thereof, might be utilised in a film different to that originally envisaged.

14. The Writer’s Agreement also contained, at clause 16, an “entire agreement” clause.
15. It was again provided, in clause 15, that the agreement was to be construed and to take effect in accordance with Spanish law and that the courts of Madrid were to have exclusive jurisdiction.
16. It is to be noted that this was the only relevant agreement to which Mr Radford was personally a party.
17. I turn next to the Director’s Agreement dated 1 April 2009. The parties to this agreement were the Second Claimant and the Fourth, Sixth and Ninth Defendants.
18. By clauses 5.1 and 5.2 of the Director’s Agreement, the Second Claimant assigned copyright and all other rights to the products of Mr Radford’s services and, by clause 5.2, the Second Claimant also waived on behalf of Mr Radford all his moral rights. Although clause 5 is headed “Copyright”, it is clear from clause 28 that the headings of the various clauses were not to form part of, and were not to be read into, the construction of the Director’s Agreement. Accordingly, any assignment or waiver of rights under clause 5 cannot be confined to copyright.
19. Clause 26 provided that the Director’s Agreement, and any non-contractual obligations arising out of or in connection with it, were to be governed by English law and the courts of England were to have jurisdiction.
20. It is to be noted that the purported assignment by the Second Claimant of any rights of Mr Radford was to the Sixth Defendant and, likewise, the Second Claimant’s purported waiver on behalf of Mr Radford of his rights under sections 77 to 85 of the Copyright, Designs and Patents Act 1988, and/or in respect of moral rights, was expressed to be in favour of the Sixth Defendant.
21. So far as the Fourth Defendant is concerned, it merely agreed pursuant to clause 7.4 to use its best endeavours to procure certain payments to Mr Radford – provided certain

conditions were fulfilled. That obligation was to be triggered in the event of a certain target of box office receipts being reached but, as things turned out, this was never achieved. Mr Ullstein submits, in the light of the overall contractual position, that in the event of any breach of the Director's Agreement or the Co-Production Agreement, the only legal persona having a potential cause of action against either the Fourth or Fifth Defendants would be the Sixth Defendant (as the assignee of the Second Claimant's rights).

22. Against that background, I must now briefly consider the history of this litigation. The Claimants launched these proceedings as long ago as 13 July 2010. After a two month gap, on 17 September 2010, particulars of claim were served which were long and prolix (or, in the Master's description, "gigantic"). (I hasten to add that the pleading was not drafted by Mr Westgate QC, who represented the Claimants before me.) Although reference was made to breach of contract, it is fair to say that at that stage tortious claims were placed in the forefront of the Claimants' case. Indeed, such was the emphasis placed on the non-contractual element that, at [22] of the particulars of claim, the Claimants actually alleged that "these claims arise because the Spanish Defendants conspired unlawfully ...". It is reasonable to suppose that this strategy was adopted in order to avoid points being taken on jurisdiction and/or proper law of the contract.
23. The first clouds appeared on the horizon in October 2009, shooting having begun the previous month. It seems that the Sixth and Eighth Defendants wished to discount the monies which they had raised from their respective government bodies. They accordingly requested the Fourth and Fifth Defendants to sign documents in that connection, but they were advised by their Spanish lawyers that this would be contrary to the provisions of Spanish law. Accordingly, they declined to do so. I was shown an email from a partner in the firm Eversheds Lupicinio setting out the reasons, which do not matter for present purposes. The Defendants maintain that the Claimants have never disclosed the documents which it is alleged they wrongfully refused to sign. At all events, they deny that they refused to sign documentation required to obtain loans from the government bodies. They contend that the problem arose purely over the documents which were forwarded by the banks who were prepared to discount the loans at the request of the other Defendants.
24. At all events, on 28 October 2009, Mr Radford decided to stop shooting the film. The parties thereafter clearly fell out. The Defendants claim that he made an unsuccessful attempt to remove all the costumes. He and his lawyers purported to justify his actions on the basis that he could no longer continue without running the risk of wrongful trading. The Defendants contend that this was plainly wrong as a matter of law, since Mr Radford was aware that finance was available on completion of the film and that only one week of shooting remained. There was thus no basis, they submit, for suggesting that there was no reasonable prospect of the company avoiding insolvent liquidation. That is not issue I need to determine, for present purposes, and it seems to me that these issues need only be noted by way of background in explaining the *casus belli*.
25. Faced with Mr Radford's decision, these Defendants decided to complete the film using a different director. It is not accepted by the Claimants that they were permitted to do so under the contractual arrangements but, again, that is not an issue I have to determine. I should make clear, however, that some time after the film was

completed these Defendants applied to the Spanish authorities for a certificate to permit them to distribute the film in Spain. This was refused on 18 October 2010, but they were successful on appeal. Nevertheless, on 3 December 2010, the Spanish Department of Culture sought a declaration from a Spanish court that it would be detrimental to the public interest for a certificate to be granted. It was accordingly suspended pending the outcome. In due course, on 14 November 2012, the Spanish Administrative Court dismissed an appeal by the Department of Culture and ruled that the modifications to the film, following Mr Radford's departure, should not prevent the film being granted a certificate. The Department of Culture had unsuccessfully argued that the film in its final version should no longer be regarded as the original film. In the event, in the light of the Spanish judicial determination, these Defendants argue that the film was entirely legitimate and should not be regarded in any sense, as the Claimants contend, as being a "rogue film". Yet there is no doubt that the quality of the film materials was criticised (not so much its artistic content) because these Defendants did not have access to an original negative. As a result, it was not a box office success, or at least to the extent originally anticipated.

26. The history of these proceedings, following their launch in July 2010, has been a sorry one. Much expense has been incurred and little, so far, achieved.
27. Before the particulars of claim were served, or any witness statement produced, the Claimants made a without notice application for an injunction based upon a claim in defamation. It came before Sweeney J during the long vacation, on 2 August 2010, in circumstances which were far from satisfactory. The Defendants contend that the Claimants did not comply with their duty to make complete disclosure to the court on that occasion, in that no explanation was offered as to the events of October 2009 or the nature of the dispute between the parties over the film. Also, inexplicably, they failed to draw the attention of the judge to the provisions of s.12(3) of the Human Rights Act 1998. As a result, the Defendants say that the judge was misled as to the appropriate test to apply when an injunction is sought which would have the effect of restraining freedom of speech.
28. Not surprisingly, therefore, when the matter came before Sharp J (as she then was) on 17 September 2010, she was critical of what had taken place and directed that, when the matter next came before the court, a note should be made available of what had passed at the hearing, together with a transcript. The Claimants did not comply with that order.
29. On 29 September 2010, the matter came before Stadlen J. While he continued the injunction, he directed that transcripts should be prepared (at public expense) of what had taken place before Sweeney J, Sharp J and himself.
30. Eventually, after considerable delay, the matter came before Tugendhat J on 24 May 2012. It was on that occasion that the Claimants accepted that the three individual Defendants had not been served and that, correspondingly, the claim against them had lapsed. Moreover, all the injunctions which had been obtained in the circumstances I have described were at that point discharged. The Fourth and Fifth Defendants filed and served their defence, together with a counterclaim, on 2 October 2012. The reply and defence to counterclaim had been due on 30 October of that year but was served slightly late and, in the meantime, these Defendants had obtained judgment in default. As I have already recorded, the Master set that aside on 14 January of this year.

31. As was almost inevitable, the tortious claims introduced by the Claimants have gradually dwindled. There had been allegations of fraud, conspiracy and defamation. They are no longer being pursued, but they will no doubt have cost a great deal of money to resist.

32. The Master summarised the position in his written reasons as follows:

“16. The action so far as based on defamation has not been pursued, so that only the allegations of conspiracy are to be considered.

17. The action in conspiracy faces these obstacles:

(a) Even at this late stage in the life of the action, there is no real material put forward by the Claimants to support the contention that there was a conspiracy or anything whatever amounting to any intentional tortious act on the part of these Defendants.

(b) Even if there was a conspiracy to breach the Agreements, the First Claimant was not a party to the Director’s Agreement or intended to be a beneficiary under it, so has no right of action, whether in tort or in contract, in relation to it; the Second Claimant, which was a party, has divested itself absolutely of benefit under that agreement; and the Sixth Defendant, which is entitled to sue, does not care to do so, doubtless because of the likelihood of an order that it must give security for costs, but in any event by a decision on the part of the First Claimant.

18. It follows that the action as it is at present constituted is hopeless.”

33. It is in these circumstances that the Claimants through counsel, on the second day of the hearing before the Master, came up with the idea of seeking an amendment. This would effectively put the action on a quite different footing from that originally contemplated some three and a half years after it was first launched. It was thus not simply a tidying up exercise, in any sense, or a means of clarifying the Claimants’ case. It may reasonably be characterised as a last ditch attempt to salvage the claim against these Defendants after the original causes of action had been shown to be baseless. This was also against the background of the way in which the defamation injunctions were obtained.

34. The Master summarised the effect of the proposed amendment in this way:

“19. ... This advances the contentions (in summary) that:

(a) These Defendants infringed the First Claimant’s moral rights in relation to what apparently proved to be an unsatisfactory film by causing or permitting his

name to be associated with the film eventually produced by them.

(b) There was a term to be implied in the Director's Agreement that the Fourth Defendant would do nothing unreasonably to obstruct the production of the film or the Second Claimant's performance of its obligations under that agreement."

35. He then proceeded to identify what he perceived to be the "obstacles" to the draft amendment. He noted that the First Claimant was unable, even after this long lapse of time, to identify anything that these Defendants had done which caused or permitted the First Claimant's name to be associated with the film. He characterised it as "a complete mystery". As to the draft relating to the implied term in the Director's Agreement, he referred back to the points already noted at paragraph [17] of his reasons. In other words, there was the fact that the First Claimant was not a party to the agreement, or intended to be a beneficiary under it, and also the fact that the Second Claimant had divested itself absolutely of any benefit under the agreement. He might have added that the Director's Agreement was, by virtue of clause 27, an "entire agreement". This further underlines the futility of this newly discovered cause of action.
36. I must, therefore, now consider the errors which the Master is alleged to have made in coming to his conclusions. Although the point has been made by Mr Westgate that moral rights cannot be assigned under Spanish law, the fact remains that they were waived under clause 5.2 of the Director's Agreement. Other rights had clearly been assigned.
37. As to the implied term, no explanation has been offered as to why this cause of action was "dreamt up" so late in the day. In any event, I see no answer to the points that Mr Radford was not a party to the agreement in question and that it was an entire agreement, in which there was no room for implication. Moreover, even where a point is "arguable", it may simply come too late. A party's case should be brought forward at the earliest opportunity. The court is not obliged indefinitely to permit litigants to introduce new ways of presenting or prolonging a claim (whether for tactical or other reasons).
38. I am unable to identify any error of law on the part of the Master and see no reason to overturn his decision in relation to the strike-out. He was fully entitled to conclude that these proceedings had gone on long enough and that the Defendants were entitled to a *quietus*.
39. I turn now to the question of costs. It is said, first, that similar issues arise by way of the defence to counterclaim and that, therefore, the Master should have allowed the question of costs to be determined later – when it would be possible to see how much of the costs had been attributable to the claim itself and how much to defending the counterclaim. This is unreal in the particular circumstances of this case. As Mr Ullstein pointed out, the parlous state of these Defendants renders it questionable, to say the least, whether the counterclaim will ever be pressed on to trial. That is a matter for speculation. On the other hand, their costs in defending the claim have already been incurred – much of them on time wasting claims which have fallen by

the wayside. The Master was fully entitled to have regard to the general practice in civil litigation, since the introduction of the CPR, that costs will generally be assessed from time to time on a “pay as you go” basis. In any event, the fact that certain arguments may be relied upon by way of defence to a counterclaim by no means entails that they should also be permitted to survive in support of a claim which deserves for other reasons to be struck out.

40. Another criticism of the Master is that he ordered an interim payment of £120,000. Reference was made to *Mars UK Ltd v Teknowledge Ltd* [1999] 2 Costs LR 44 and *Samsung Electronics (UK) Ltd v Apple Inc* [2012] EWHC 2047 (Pat). Mr Westgate argued that there would be no prejudice arising for these Defendants because they will not be out of funds: their solicitors have been acting only under a CFA within very strict limits. They, on the other hand, would be unable to reimburse the Claimants if they are successful on a detailed assessment. It is said that there is a strong argument to the effect that the CFA does not cover any proceedings beyond the application to have the claim dismissed for want of service. If this argument were to prevail, it is submitted that there would have been no retainer going beyond 24 May 2012 (when it was conceded that these Defendants *had* been served). Accordingly, there would have been no exposure to costs from then onwards. Mr Westgate refers, dismissively, to the “high point” of the Defendants’ interpretation of the scope of the CFA as resting on its wording “... your claims against Michael Radford and The Michael Radford Partnership in Claim number HQ103026433 to have the claims against you dismissed, to set aside the interim injunction, any assessment of damages under the cross-undertaking and any ancillary applications ...”. Mr Westgate argues that this retainer came to an end in May 2012 and, in any event, such wording would not be apt to cover the hearing before the Master in January 2014. It is natural, he says, to construe “your claims” as referring to those in existence at the time the CFA was entered into (July 2011). Furthermore, it was only to those claims that the risk assessment related. Mr Ullstein responds that, even if this is so, it would be unrealistic for the court to proceed on the basis that his clients have no obligation to pay their solicitor for work done after May 2012. That seems to me to be right.
41. Mr Ullstein points out that the figure selected amounts only to something like 40% of the Claimants’ base costs. Nowadays, the presumption is that the court will order a payment on account unless there is good reason not to do so. Looking at the matter realistically, it seems to me that the Master was entitled to conclude on the material before him that there is no realistic chance that these Defendants’ liability for the costs so far incurred would, following a detailed assessment, fall below £120,000.
42. In the result, permission is refused.