Neutral Citation Number: [2017] EWHC 2965 (Ch)

Case No: HC-2016-003663

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/11/2017

Before:

CATHERINE NEWMAN QC

- -

Between:

(1) OBEX SECURITIES LLC	**Applicants**
(2) RANDALL KATZENSTEIN	
- and -	
ED&F MAN CAPITAL MARKETS LLP	**Respondent**

- -
- -

Alec Haydon (instructed by **Signature Litigation LLP**) for the **Applicants**
Sarah Harman (instructed by **Rosenblatt**) for the **Respondent**

Hearing dates: 9 May 2017

- -

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.

.....

CATHERINE NEWMAN QC

Miss Catherine Newman QC :

1. By an application dated 15 March 2017 I am asked to set aside an order made by Master Teverson ex parte on 3 February 2017 giving leave to serve an application for pre-action disclosure out of the jurisdiction in New York. I shall call that order 'the Master's order'.

2. To avoid confusion between the Applicants and Respondents on the application for leave to serve out and on the application to set aside that leave I shall refer to the parties when mentioning them separately as 'Man' and 'Obex/RK'.

3. By way of background, the basic facts are that Man, a broker, took on clients on the introduction of Obex, acting by RK, on terms of a written Introducing Broker Agreement between Obex Securities LLC and Man dated 25 November 2016, which included a jurisdiction clause providing for proceedings to be brought in the courts of England and Wales.

4. Obex/RK introduced two clients, Platinum Partners Value Arbitrage Fund LP ('Platinum'), and Prime Capital (Bermuda) Limited ('Prime').

5. Man brokered a number of CFD trades for Platinum but in August 2016 Platinum failed to meet a margin call and was insolvent, leaving Man with losses.

6. Man asserts that Obex/RK knew that Platinum was insolvent when Obex introduced Platinum as a client and that they made false representations to Man about its solvency and worth. Man suspects that these representations were made fraudulently.

7. I was told that Platinum's CEO, Mark Nordlicht, is under investigation in the USA for fraud.

8. The parties are agreed that the test to be applied in considering an application to serve out of the jurisdiction is set out at the notes at CPR 6.37.15 of the White Book namely:

    i) A serious issue to be tried on the merits of the claim against a foreign defendant;

    ii) A good arguable case that the claim falls within one or more of the gateways provided under paragraph 3.1 of PD6B and

    iii) England and Wales is clearly and distinctly the appropriate forum for the trial of the dispute and that in all the circumstances the court ought to exercise its discretion to permit service out of the jurisdiction.

9. The serious issue to be tried on the merits and the good arguable case refer to the application for pre-action disclosure and not, at this stage, to the underlying substantive claim.

10. Obex/RK's primary case is that that the court has no jurisdiction to serve an application for pre-action disclosure out of the jurisdiction. Obex/RK accept that if the substantive proceedings were to be brought then the courts of England and Wales are the appropriate forum. However as a secondary argument they say that there was a

serious non-disclosure before the Master which means that the court should not have exercised its discretion to permit service out.

11. I agree with Obex/RK that since their primary case turns on an interpretation of the law I must resolve it and not simply ask myself whether there is a good arguable case to the effect that there is jurisdiction.

Jurisdiction

12. Plainly the court has a well-known jurisdiction to grant disclosure before action in certain circumstances, and equally plainly it has a well-known jurisdiction to permit service of claims outside the jurisdiction in certain circumstances. Does the court have jurisdiction to permit the service out of applications for pre-action disclosure?

13. Starting first with the jurisdiction to serve out, does the word 'claim' in CPR 6.2 (c) include an application for pre-action disclosure? The answer to that question is in the affirmative. 'Claim' encompasses many forms of application to the court and extends to petitions and applications made before action. CPR 6.2 (c) includes 'any' applications made before action.

14. Next, one turns to CPR 6.36 and in order to see whether the court has jurisdiction to grant an application to serve a claim form (in its extended meaning which includes applications before actions) out of the jurisdiction, one finds that one or more of the grounds listed in PD6B paragraph 3.1 must apply and the ground relied upon must be stated (amongst other things) in the permission application: CPR 6.37.

15. Man relied on Para 20(a) of PD6B para 3.1, that is to say, "*a claim made under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other grounds referred to in this paragraph"*. The enactment upon which Man relied is the Senior Courts Act 1981 s33, which confers on the High Court certain powers exerciseable before commencement of action. Man relied on s33(2) which provides as follows:

> *"(2) On the application, in accordance with rules of court, of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court […] the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim—*
> *(a) to disclose whether those documents are in his possession, custody or power; and*
> *(b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order—*
> *(i) to the applicant's legal advisers"*

16. Obex/RK argue that an application for disclosure in advance of action is not itself a form of 'proceedings': indeed, they say, no pre-action applications are themselves

'proceedings'. They make reference to CPR 7.2, and argue that 'proceedings' require the issue of a claim form. I do not accept that submission.

17. In oral submissions, Obex/RK drew my attention to the following authorities: **Towergate Underwriting Group Limited v Albaco Insurance Brokers Limited [2015] EWHC 2874 (Ch); AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2011] EWCA Civ 647**.

18. **Towergate** is not a decision which provides support for Obex/RK's argument that an application for pre-action disclosure is not a 'proceeding'. Master Matthews acknowledged, in that case, that applications for pre-action disclosure were required, by the CPR, to be begun by Part 23 application. He did not rule on the interaction of that requirement and the meaning of the word 'proceedings'. **Towergate** is not an authority for the meaning of the word 'proceedings' when used in the context of pre-action disclosure. Instead it provides a very helpful guidance ruling on how to commence Norwich Pharmacal proceedings.

19. In **AES,** the Court of Appeal, without deciding the matter, commented *obiter* (with varying force in each of the judgments) that there had to be a serious argument that s37 of the SCA 1981 was not an enactment which allowed proceedings to be brought, but which provided for a particular remedy within proceedings whose basis had to be found elsewhere [126],[192],[207]. As Stanley Burnton LJ said, at [207], s37 "*confers power to grant injunctions in proceedings properly brought within the jurisdiction"*. In other words, in deciding whether s37 fell within Para 20(a) of PD6B para 3.1, the Court of Appeal looked carefully at s37 itself to see what its purpose and effect was. Thus **AES** is not authority for a proposition that, say, an application for an injunction before the commencement of action would not itself be a 'proceeding', still less is it authority for the proposition that an application for pre-action disclosure is not a 'proceeding'.

20. Pre-action injunctions differ from applications for pre-action disclosure in many ways, not least this: when the court grants a pre-action injunction it will require the applicant to commence substantive proceedings by Part 7 or 8 proceedings, or by petition as appropriate. In contrast, when it makes an order for pre-action disclosure it does not as a matter of general practice require the commencement of any further proceedings by the applicant against the respondent. It may turn out that the pre-action disclosure obviates the need for further, substantive proceedings: see CPR 31.16 (3) (d) (i) and (ii). Before moving on from reference to that sub-rule I would add that the fact that the word 'proceedings' is not used in the sub-heading or in the text of sub-rule (1) is in my judgment a matter of linguistic clarity, and does not carry with it any implication that pre-action disclosure is not itself a form of 'proceeding'.

21. Obex/RK also relied on the fact that Mr Charles Hollander QC's book, **Documentary Evidence 12th Edn**, states, at paragraph 1-27, that there is no power to serve a claim for pre-action disclosure out of the jurisdiction. The book cites no authority for that proposition, and does not refer to SCA s33 (2).

22. Finally, Obex/RK relied upon the fact that the 2009 version of CPR6.20 (18) and associated Practice Direction listed 18 statutes specifically referred to as being those which contained provisions enabling proceedings to be brought in the High Court. The point made was that these were all substantive actions and the rule was amended

to avoid the need to change the list when primary legislation was passed giving new substantive rights. They argue that the Senior Courts Act 1981 was not among those listed statutes. The argument runs that the court must construe the rules and Practice Direction as limiting the right to bring proceedings so as to exclude applications for pre-action disclosure. In my judgment the removal of that list does not mean that the rules must be construed as restrictively as Obex/RK suggest. The rules must be construed as they stand now.

23. Therefore nothing cited to me binds me to find that a claim for pre-action disclosure is not a 'proceeding' at all, or is not a proceeding '*under an enactment which allows proceedings to be brought'* within the meaning of Para 20(a) of PD6B para 3.1. In my judgment the enactment which allows proceedings for pre-action disclosure to be brought is s 33(2) SCA 1981. All conditions set out by that section and by the rules must of course be satisfied, but it is that section which provides the court's jurisdiction to make the order.

24. In my judgment if the rules were to be construed as Obex/RK suggest, the result would be a lacuna which is not explained in the notes to the White Book or referred to in the cases cited to me, and would disadvantage litigants who are in dispute with certain classes of foreign defendant because of a restricted application of language not specifically required to be adopted.

25. It follows that I accept the submissions of Man to the effect that an application for pre-action disclosure is itself a free-standing set of proceedings despite the fact that it is begun by application notice, and that the court has jurisdisction to order service of such an application out of the jurisdiction, provided the rules are satisfied.

Non-Disclosure

26. I now turn to the secondary case made by Obex/RK, which is that the permission to serve out given by the Master's Order should not have been given, and should be set aside, because of material non-disclosure by Man. The categories of documents sought by Man in the underlying application for pre-action disclosure were deposed to be in Obex/RK's possession and control and to go to Obex/RK's knowledge of the financial position of Platinum. It is alleged by Man, among other things, that Obex/RK represented that Platinum was solvent and wealthy when it was not, and that Obex/RK knew that the representations were false. The allegation is that Obex/RK, as agent for Platinum, urged Man to invest in illiquid investments and to make and move trades through Platinum at a time when they knew that Platinum was in financial difficulties. The documents sought include documents providing evidence of the identity of the ultimate owners of Prime and its shareholder, a Cayman company called Flat Rock Prime Limited ('Flat Rock'). Prime is a company which, it is alleged, received assets of Platinum in an attempt by RK to put assets of Platinum out of the reach of creditors.

27. Obex/RK's witness is Mr Graham Huntley of Signature Litigation LLP, Obex/RK's solicitors. By his first witness statement dated 15 March 2017 he set out the material non-disclosure alleged. The grounds he refers to are the failure to tell the Master that:

    i) What are described as "*materially similar"* documents were being sought from Platinum in proceedings brought in the court of the Southern District of New York;

    ii) It is said that Man did not explain to the Master why it had brought such proceedings against Platinum but not against Obex/RK;

    iii) It is said that the Master was not told that the documents being sought in England were confidential to Platinum and that confidentiality issues would increase the cost of conducting the review;

    iv) It is said that the Master was not told that Man had not asked Obex/RK who owned Flat Rock, nor that it was a matter of public record in the Cayman Islands that Flat Rock owned shares in Prime.

28. Mr Huntley's evidence is answered by the second witness statement of Julian Courtney, the Global Head of Compliance and Legal for Man, dated 28 March 2017. In that witness statement he points out:

    i) that it was at all times clear that the purpose of seeking documents from Obex/RK would be to demonstrate the knowledge of Obex/RK of the financial problems of Platinum at the time when they introduced Platinum to Man and when they represented that Platinum was not in financial difficulties. Such documents are, he deposes, and in my judgment rightly, more likely to be in Obex/RK's possession than in the possession of Platinum. The possibility of Platinum having some documents going to the knowledge of Obex/RK cannot be ruled out, but it would not be the primary source. In contrast Obex/RK would be the most obvious source. In oral argument it was accepted on behalf of Man that it would have been better to disclose this application in the USA courts to the Master, but it was also argued, and I accept, that the documents being sought there and the documents to be sought here would not be a matching set and even success in the US application was never going to dispose fully of the application here. I was also told that the application in the USA against Platinum was being opposed by the SEC on the ground that it would interfere with their investigations;

    ii) Man argued that Platinum could not be sued in the courts of England and Wales but it was common ground that Obex/RK would properly be sued here if at all. Equally, Obex/RK would not be amenable to suit in the Southern District of New York as the agreed proper forum for disputes between Man and Obex/RK was England and Wales. I accept that is correct, indeed, it was not contested;

    iii) There might be an allegation of confidentiality obligations owed to Platinum respect of documents in the possession of Obex/RK, but that is not obvious. Again I agree. Quite apart from communications between Obex, RK and/or Platinum which might turn up in response to the disclosure application being

made in the US courts, it is obvious that communications between Obex and RK might or might not contain material which Platinum might consider confidential, but not obvious that all the material would be confidential, or that such a claim of confidence would be a bar to its disclosure;

iv) Mr Courtney points out that in his first witness statement dated 22 December 2016, which was before the Master, he had disclosed that Man had asked RK for KYC documents on Prime by email dated 9 March 2016 for the express purpose of establishing ultimate beneficial ownership. His evidence was that Obex had set up Prime, which was incorporated in June 2015, with one beneficial owner called Obex Commercial LLC ('Obex Commercial'). Man believes that Platinum, or one of its affiliates, possibly Mr Nordlicht, is one of Prime's ultimate owners. Man had asked Obex, in early 2016, for information identifying the ultimate beneficial owner ('UBO') of Prime. In late February 2016 RK sent certain information identifying those who had interests in Prime as Obex Commercial, a 'Bermuda Purpose Trust', (without more) and Flat Rock (again, without saying who was behind Flat Rock). This revealed the connection with Flat Rock but not, Man argues, the ultimate beneficial ownership of Prime. What Man had asked for and what it had not asked for is plain from Mr Courtney's first witness statement. It is likewise plain from Mr Courtney's first witness statement that Man is now asking for all the documents which provide evidence of all the legal and beneficial owners of Prime and Flat Rock. In his first witness statement dated 15 March 2017, Mr Huntley pointed out that a search in the Cayman Islands would have disclosed that Platinum owned Prime. In his second witness statement dated 28 March 2017, Mr Courtney explains that whilst RK did disclose that Platinum had an interest in Prime, he did not disclose, despite enquiry about Prime's ('UBO'), full information about the ownership of Prime.

29. Mr Huntley returned to the fray with his second witness statement dated 6 April 2017. I have considered that witness statement carefully and consider it to be very largely argument, and to contain no absolute knock out blows.

i) Further information given by Mr Huntley in his second witness statement about the ownership of Prime and about the Bermuda Trust will doubtless be considered by Man before it actually decides to make its pre-action disclosure application. However the information is being drip fed and no explanation has been given of why a full and clear answer was not given to Man's inquiries in 2016;

ii) The suggestion that Man's 2016 requests had a special meaning derived from the rubric of their account opening forms is one for argument on the application itself;

iii) Other complaints made by Mr Huntley in his evidence are disputed points of fact such as whether or not misrepresentations were made.

iv) In my judgment there were not such failures of disclosure as to cast doubt on the safety of the Master's Order and the evidence of Mr Courtney in his first witness statement was adequate for the exercise which the Master had to perform.

No reasonable prospect of success

30. The third argument raised by Obex/RK, which took up least time in oral argument but was dealt with in skeletons, is that Man's application for pre-action disclosure stood no reasonable prospects of success.

31. The first way in which this argument was put was that Man stood no reasonable chance of satisfying the court that it had jurisdiction to order pre-action disclosure against RK. Since the human agent by which Obex perpetrated any frauds upon Man was RK, I disagree. The explanations and arguments raised by Man have the degree of specificity and conviction required by Rix LJ in **Black v Sumitomo [2002] 1 WLR 1562 CA** at [54]. If Man were then to commence proceedings for fraud against RK as well as against Obex, the documents sought would arguably be likely to be disclosable on standard disclosure.

32. The second way in which it is put is that once the matters complained of as not having been disclosed are taken into account, Man has no serious case for obtaining relief by way of pre-action disclosure. Again, for the reasons given above in this judgment I do not accept that submission. Having read all of the evidence I do consider that there remains (i) a serious issue to be tried and (ii) a good arguable case for pre-action disclosure to be granted in this case and along the lines requested in Man's application.

33. I am not suggesting that the application for pre-action disclosure will inevitably be granted in full nor am I in any way purporting to tie the hands of the tribunal which hears that application. That is not my function. It may turn out that on closer examination some or all of the classes of documents sought will not pass muster when considered against the background of the requirements laid down in **Black v Sumitomo** and in particular by Rix LJ at [76]. All the points made by Obex/RK in their skeleton about the documents can be made on the hearing of the application.

Conclusion

34. Before the Master, there was no difficulty for Man in satisfying him that should proceedings be commenced, they had to be here as the courts of England and Wales were the proper forum for the resolution of the substantive dispute. Man would of course be a party as would Obex and it was acknowledged that Man would seek to join RK also. I appreciate that no concession was made on behalf of Obex/RK that Man would be successful in seeking to join RK, in my view Man satisfied the "*likely to be*" test. The close connection between what Obex did or did not do and RK was not seriously challenged. Whether RK acted on behalf of Obex was likewise not seriously challenged. Mr Huntley asserted that at trial Man would fail to find him personally liable. But that is not the test. That is an argument on the ultimate merits, and it is not so obviously right as to carry the day at this stage.

35. The Master was perfectly entitled to find, and in my view right to proceed on the basis, that there was a serious issue to be tried on the merits of the pre-action disclosure application and that Man had shown a good arguable case for the making of a pre-action disclosure order in relation to the classes of documents sought by it. I consider that there is at the least a sufficiently focussed and well explained case to satisfy the serious issue to be tried and good arguable case tests taking fully into

account the comments of the Court of Appeal in **Black v Sumitomo,** and in particular those of Rix LJ at [78,95] to the effect that such applications need to be tightly drafted and clearly explained. I do not accept that it is necessarily a criticism that Man had not drafted Particulars of Claim. This is because the disclosure sought will go to the prospective fraud claim which Man depose and argue they cannot properly plead at this stage in their inquiries.

36. There was no real challenge to the submission that pre-action disclosure might assist in disposing of the anticipated proceedings, maybe even by obviating a need for them or by assisting in their resolution. So the jurisdictional gateway of CPR 31.16 (3) was sailed through.

37. The arguments about non-disclosure go to discretion. It was common ground that Man did owe a duty of full and frank disclosure and the dispute centred on whether they had fulfilled that duty and if not whether the respects in which they had failed to do so were material or such as to have made any difference. Man acknowledged that their compliance was not perfect, but I do not consider that any of the complaints raised by Obex/RK on this head of the appeal were sufficiently material to make a difference to the Master's Order.

38. Accordingly in my judgment on the proper construction of the rules as they are now, the Master was not only entitled to find, but rightly found, that the proposed application for pre-action disclosure raised a serious issue to be tried and stood a reasonable prospect of success within CPR 6.37(1)(b).

39. I find that the court does have jurisdiction to permit service of the application on Obex/RK out of the jurisdiction in New York.

40. I should add that the fact that it was and remains common ground that these courts are the proper forum for the resolution of the substantive dispute between Man and Obex is not the basis for the conclusion which I have reached on construction of the rules and the SCA 1981. However I would consider it odd if the court before which the underlying claim is plainly justiciable as the result of a contract between the parties did not have jurisdiction to order pre-action disclosure just because the prospective defendants are outside the jurisdiction.

41. Equally, although one of the points raised is that pre-action disclosure can save costs, that was not a reason urged upon me in argument and I have not paid any attention to it in reaching my conclusion, save of course to note that one possible outcome of a pre-action disclosure exercise may be that no fraud action proceeds against one or other of Obex/RK, and that itself would result in some cost saving. But that is an obvious potential consequence of a successful application, no more.