Neutral Citation Number: [2017] EWHC 310 (Comm)

Case No: CL-2015-000610

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2017

Before :

MR JUSTICE KNOWLES CBE

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Between :

(1) Robert Tchenguiz	**Claimants**
(2) Rawlinson and Hunter Trustees S.A.	
-and-	
(1) Grant Thornton UK LLP	**Defendants**
(2) Stephen John Akers	
(3) Hossein Hamedani	
(5) Johannes Runar Johannsson	

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Charles Hollander QC and John Robb (instructed by Stephenson Harwood LLP) for the **Claimants**
Adrian Beltrami QC, James MacDonald and Andrew McIntyre (instructed by **Simmons & Simmons LLP**) for the **First, Second and Third Defendants**
Jeremy Goldring QC and Tom Gentleman (instructed by **Travers Smith LLP**) for the **Fifth Defendant**

Hearing dates: 10 Feb 2017

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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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MR JUSTICE KNOWLES

Mr Justice Knowles :

Introduction

1. The current proceedings include allegations by the Claimants of conspiracy. The sums claimed are substantial, the reputational implications are considerable, and at least some aspects of the proceedings are complex.

2. The collapse of Kaupthing Bank gave rise to a large volume of litigation in this and other jurisdictions. Documents were disclosed and witness statements served in the course of that litigation and are in the possession or control of one or more Defendants to these current proceedings.

3. Some will likely be relevant in the current proceedings. However they are subject to what have been termed the collateral use protections imposed when they were disclosed and served in other litigation. Some can be separated from other documents but, given the volume and the way in which they are held, others realistically cannot.

Disclosure

4. The cost and complexity of the disclosure of documents in large-scale commercial litigation continues to attract attention and thought. As a result of the major review undertaken by Sir Rupert Jackson the Civil Procedure Rules now provide, by CPR 31.5(7), a calibrated "menu" of forms of order that can be made in relation to disclosure. This allows disclosure to be tailored to the case or issue in the case. It is a signal development, but awareness and use of it needs to increase so that the opportunities it offers can be made the most of.

5. The overriding objective, at the apex of the reforms led by Lord Woolf, is now found in other parts of the world too. It guides disclosure as it guides the rest of the CPR. Thus the selection from the "menu" at CPR 31.5(7) is to be made "having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly". And strides continue to be made in relation to how the disclosure that is ordered, including disclosure of electronic documents, can best be carried out: see further CPR 31.5(8) and (9). But again, more could be made of the opportunities here.

6. For all the challenges just summarised, "[f]ew if any common lawyers would doubt the importance of documentary discovery [disclosure] in achieving the fair disposal and trial of civil actions". Lord Bingham (as Bingham LJ) so observed in Davies v Eli Lilly & Co and Others [1987] 1 WLR 428 at 445D, itself also a piece of large-scale litigation. Lord Donaldson (as Sir John Donaldson MR) described the right of discovery available in litigation in England & Wales as part of what enabled the court to achieve "real justice between opposing parties" (in the same case, at 431H). Lord Bingham (as Sir Thomas Bingham MR) went on to identify the promotion of the administration of justice as the underlying principle (Process Development Ltd v

Hogg [1996] FSR 45, 52). Rose and Hobhouse LJJ agreed, and the principle continues to be referenced: see for example IG Index v Cloete [2015] ICR 254; [2014] EWCA 1128 at [28] by Christopher Clarke LJ, with whom Barling J and Arden LJ agreed.

7. These fundamentals have not dimmed: disclosure exists as a feature of litigation because "there is a public interest in ensuring that all relevant evidence is provided to the court" in litigation (Tchenguiz v SFO [2014] EWCA 1409 at [56] per Jackson LJ, with whom Sharp and Vos LJJ agreed).

Collateral use protections

8. As the obligation to give disclosure serves the public interest, it is important "to promote compliance" with it (Tchenguiz v SFO (above) at [56] per Jackson LJ). At the same time it is important to recognise that it is "an invasion of the litigant's right to privacy and confidentiality" (Tchenguiz v SFO (above) at [56] per Jackson LJ). For these reasons the Court has controlled the purpose for which the party receiving disclosure may use the documents disclosed unless and until they come into a public hearing.

9. Collateral use protections in relation to disclosed documents are imposed by CPR 31.22. Witness statements are subject to similar collateral use protections under CPR 32.12. The collateral use protections are in these terms, in CPR 31.22 and 32.12:

> "31.22(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
>
> the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> the court gives permission; or
>
> the party who disclosed the document and the person to whom the document belongs agree.
>
> …
>
> 32.12(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.
>
> (2) Paragraph (1) does not apply if and to the extent that –
>
> (a) the witness gives consent in writing to some other use of it;
>
> (b) the court gives permission for some other use; or
>
> (c) the witness statement has been put in evidence at a hearing held in public."

10. The common law implied an undertaking, to the court, not to use a disclosed document for a purpose other than for the purpose of the proceedings in which it was disclosed. Before that undertaking came to be implied, Bray spoke of the court requiring an express undertaking as a condition of granting an order for production of documents (Bray on Discovery, 1st edition (1884) at 238, referred to in Matthews and Malek, Disclosure, 5th edn at 1.01).

11. In SmithKline Beecham plc v Generics (UK) Ltd [2003] EWCA Civ 1109 at [28-29] Aldous LJ agreed with a submission that CPR 31.22 introduced a "complete code" replacing the implied undertaking. Notwithstanding, in other recent appellate authority the implied undertaking is treated as still current, albeit "now contained in CPR 31.22" (Tchenguiz v SFO (above) at [56] and [66(i)] per Jackson LJ). The question of the common law implying an undertaking in tribunal proceedings where the rules do not provide in terms as do the CPR was recently addressed in IG Index v Cloete (above) at [28].

Practicalities in the present proceedings

12. In the present proceedings it is not practical, at least at this stage, for agreement to be sought from the party disclosing each document in the other litigation and from the person to whom each such document belongs (and for consent to be sought from the person giving each witness statement in the other litigation). This conclusion as to what is practical follows conscientious testing by the parties. It also reflects the fact that for electronic searches to make a worthwhile contribution they will need to run across some data pools that cannot reliably be separated out first.

13. The Defendants ask the Court to decide whether it is a collateral use for a party in their position to review documents and witness statements for relevance (step (a)), to list that material in order to give disclosure to the Claimants (step (b)), and to provide that material to the Claimants for inspection (step (c)).

14. All parties also need to know whether it is a collateral use for them to inspect (review) the documents and witness statements provided on inspection with a view to a party deciding whether it actually wishes to rely on or otherwise actively make use of particular documents or witness statements in advancing its case or meeting the case against it in these current proceedings (step (d)). If any of steps (a) to (d) is a collateral use then permission is sought for that use.

15. Case management arrangements ("the forward case management arrangements") have been discussed that would enable agreement to be sought after step (d). In this way they can be confined to those relevant documents which a party to these proceedings wishes, from an informed position, actually to rely on or otherwise actively make use of in advancing its case or meeting the case against it in these current proceedings. No use beyond step (d) will happen without permission, and step (a) to (d) will not cause the documents to enter the public domain.

"Use"

16. For the Defendants, Mr Adrian Beltrami QC (with Mr James MacDonald and Mr Andrew McIntyre) and Mr Jeremy Goldring QC (with Mr Tom Gentleman) submit that steps (a) to (d) do not comprise collateral use. They analyse with skill the nature of the disclosure process, the rationale for the collateral use protections, and the pragmatic concerns that would follow if steps (a) to (d) are treated as collateral uses.

17. "In short", concludes Mr Beltrami QC, "a document is used [only] when a party seeks to rely on it, e.g. by referring to it in a statement of case or witness statement, or placing it in the trial bundle [in new proceedings]". Disclosure in those new proceedings is, he submits, a "process that is preliminary to use: it makes documents available for use by all the parties, but does not itself entail a use". The word "use", he submits, "involves a requirement of deployment of (or reliance on) the documents or statements in question".

18. There is no clear authority in England & Wales on the question. It is one on which has attracted comment and opinion in the leading commentaries on disclosure and documentary evidence. I have also been informed that similar issues are to come before the courts that are dealing with the earlier litigation in other jurisdictions. I make no decision in relation to those jurisdictions of course, but I hope it may be helpful to them if I express shortly the way in which I see the matter.

"Use" and "purpose"

19. In my view it is possible to answer the matter simply, by applying the words of the relevant rules. It is also important to take this approach. Parties need to be able to rely on the words of the rules themselves to tell them what is expected, especially where (as here) the consequences of breach can be very serious, and may be treated as a contempt of court.

20. The rules refer to "use" and to "purpose". Use for any purpose other than the proceedings in which the documents were disclosed (or the witness statement served) is the subject of the rules. This admits no room for the argument that use for a purpose is not "use" because the purpose is, for example, benign or inspired by practicality or not what should be prevented. All of those situations may of course lead the court (or party or owner or witness) readily to grant permission for or agree or consent to the use, but that is a separate matter.

21. The rules treat "purpose" separately from "use" and not as part of the definition of "use" itself. This does allow a wide meaning for the word "use", and one that accords with that observed by Lord Justice Christopher Clarke (with whom Barling J and Arden LJ agreed) in IG Index v Cloete (above) at [40]:

> "What the rule precludes is the use of the document(s) disclosed. "Use" is a wide word. It extends to (a) use of the document itself eg by reading it, copying it, showing it to somebody else (such as the judge); and (b) use of the information contained in it. I would also regard "use" as extending to referring to the documents and any of the characteristics of the document, which include its provenance."

It is possible, as Mr Beltrami QC points out, to find a dictionary definition of the word "use" that speaks of "deploying". However that is but one form of use, and the rule does not suggest that one form rather than another or others is its focus.

22. It is useful to examine step (a) (review) alone. Mr Beltrami QC argues that one of the reasons why that should not be treated as "use" is because "the mere review of documents by a party and its legal representative represents a negligible interference with the privacy of the creators or owners of the documents/statements". In the present case that is true, but that is because of the purpose of the review sought. The interference represented by the review in another case might be far greater. What, for example, of a review designed materially to inform the commercial conduct of the reviewer in a market in which reviewer and owner both participated? If review is not "use" then a review for that purpose would be outside the collateral use protections, and I do not think that can have been the intention.

23. Mr Beltrami QC and Mr Goldring QC emphasise that the Defendants are under an obligation to give disclosure in the present proceedings, and that steps (a) to (d) are not therefore voluntary. I see the presence of obligation as a relevant consideration when permission is considered, but not as something that itself provides an answer to the question whether the rule engages. It does not affect the nature or quality of the "use"; it goes to its circumstances and purpose.

24. In Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10 at 33, in the High Court of Australia, Mason CJ added the following observation when discussing the implied undertaking:

> "No doubt the implied obligation must yield to inconsistent statutory provisions and to the requirements of curial process in other litigation, eg discovery and inspection, but that circumstance is not a reason for denying the existence of the implied obligation."

I do not understand Mason CJ to be saying that the curial process in other litigation automatically overrides the (formerly implied, but now express) obligation that was engaged when disclosure was given in earlier litigation. The curial process is designed to allow for the release of the obligation to be controlled by the Court. The Court can decide where and when the implied undertaking should yield. A different approach may apply if statutory provisions override the implied undertaking: see Australian Securities Commission v Ampolex Ltd [1995] 38 NSWLR 504 at 529-530 per Sheller JA). And Mason CJ's point even there was, as he says, that "that circumstance is not a reason for denying the existence of the implied obligation".

Keeping costs proportionate

25. Mr Beltrami QC argued to the effect that it was undesirable to adopt an interpretation that would lead to the incurring of substantial legal costs. I do not see that that need be the outcome. Here as elsewhere the costs should and can be proportionate.

26. Thus it is important that parties are vigilant to the possibility of asking the Court to deal with applications "on the papers" and without a hearing in a straightforward case. In another case the opportunity might be taken to deal with the matter whilst other matters are already being considered at a case management conference. And if a significant hearing is required because of the nature of the documents or statements and the use and purpose for which permission is being sought and opposed, then the incurring of greater costs will be necessary but for an appropriate end. The subject matter is serious because it concerns part of the foundations of the disclosure process.

Implied permission

27. Mr Goldring QC submitted that it was inherent in the structure of CPR 31.22 itself that a document obtained on disclosure can be read for certain purposes without first obtaining permission.

28. I agree that the rules themselves do envisage the use of the document (i) for the purpose of assessing whether "the document has been read to or by the court, or referred to, at a hearing which has been held in public", (ii) seeking permission of the court under the rule or (iii) seeking agreement under the rule. I am prepared to hold that the rules impliedly permit this very limited activity, because it is part of the working of those rules.

29. The ambit of this implied permission may not be as wide as some parties would wish. In a complex case where a party did not already know (from its involvement in the litigation in which the documents had been disclosed) what document or documents it wished to use for a collateral purpose, the implied permission would not extend to allowing a review of the documents with a view to deciding (for example) whether the party wished actually to rely on or otherwise actively make use of any of those documents in advancing its case or meeting the case against it in other proceedings. For that, permission or agreement would be required.

30. My view of the limits does not go quite as far as would perhaps the author of Hollander, Documentary Evidence (12th edition) at 27-06:

> "It is surely inherent within CPR r.31.22 that a party's existing legal advisers must, without making any application under CPR 31.22, be able to read disclosed documents and advise on potential collateral proceedings (criminal or civil) which might arise from those documents. That advice surely does not constitute collateral use – indeed that was the conclusion reached by Eder J [in Tchenguiz v SFO [2014] EWHC 1315]. It would constitute collateral use (for which permission would be required) if steps were taken to commence such proceedings, for example, by passing the documents to a relevant prosecutor. Were it otherwise, a party which wished to make an application under CPR r. 31.22 to deploy disclosed documents in collateral proceedings would already be in breach of CPR r. 31.22 by virtue of having advised on such use prior to the making of the application."

(See also Gee, Commercial Injunctions (6th edition) at 25-012 footnote 42).

31. In my judgment if the purpose of a review of documents that were disclosed in litigation is in order to advise on whether other proceedings would be possible or would be further informed, then the review would be a use for a collateral purpose. Permission or agreement would be required unless the document had been "read to or by the court, or referred to, at a hearing which has been held in public". If however the purpose of the review of documents disclosed in litigation was to advise on that litigation, but when undertaken the review showed that other proceedings would be possible or would be further informed, then (i) the review would not have been for a collateral purpose, (ii) a further step would be a use for a collateral purpose, but (iii) the use of the document for the purpose of seeking permission or agreement to take that further step would be impliedly permitted.

Conclusion

32. I should not therefore grant declarations, as the Defendants ask, to the effect that steps (a) to (d) are not a collateral use.

33. However I am entirely satisfied that I should grant permission for steps (a) to (d). On this, in the present case and context, I can limit what I say to saying that I do so on the evidence and in the circumstances of the case, and in light of the forward case management arrangements. These will in due course enable the Court to consider carefully any use beyond step (d) where that use is not the subject of agreement or consent.