Neutral Citation Number: [2021] EWHC 2196 (Ch)

Case No: E31BS029

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 3 August 2021

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

ROBERT SOFER	**Claimant/ Applicant**
- and –	
SWISSINDEPENDENT TRUSTEES SA	**Defendant/ Respondent**

- -
- -

Leslie Blohm QC (instructed by **Burges Salmon LLP**) for the **Applicant**
Richard Wilson QC and James Weale (instructed by **RadcliffesLeBrasseur LLP**) for the **Respondent**

Hearing dates: 29 July 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.

....

HHJ Paul Matthews :

Introduction

1. This is my judgment on an application by the claimant, made by notice dated 26 July 2021, for "An order for permission to re-amend the Claimant's Amended Reply and Defence to Counterclaim, in the form set out in the attached draft". It is supported by the evidence of Genna Hancock, the claimant's solicitor, set out in box 10 of the application notice. It was argued before me, remotely by use of the MS Teams videoconferencing platform, on 29 July 2021, at the first case management conference in this matter. The applicant was represented by Leslie Blohm QC, and the respondent by Richard Wilson QC and James Weale.

2. This application is made in the context of a claim for breach of trust commenced by Part 7 claim form issued on 25 September 2018 by the claimant, who lives in the state of Victoria, in Australia, against the defendant, a Swiss incorporated and resident company carrying on business as a professional trustee. The orders sought by the claimant are (1) that the defendant be replaced as trustee of a trust called the Puyol Trust, (2) that the defendant pay compensation into the trust fund subject to that trust, (3) for declarations as to the nature of payments made out of the trust fund, (4) for further or other relief, and (5) for costs.

3. The claim arises out of (i) the defendant's trusteeship of the Puyol Trust following its creation by a settlement dated 25 July 2006 by the claimant's father, Hyman Sofer, and (ii) what is alleged by the claimant to be the defendant's breach of trust. The value of the claim is estimated to be in the region of AU$30 million. The main breach of trust alleged is the payment of monies out of the trust to Hyman Sofer. The defendant alleges they were loans. The claimant denies this.

Procedure

4. Although the claim form was issued nearly 3 years ago, it is only now that the first case management conference has been held. This is because in December 2018, before any defence had been filed, the defendant applied for an order to strike out the claim, which was heard by me in May 2019 and in which I gave judgment in August 2019, acceding to the application, and striking out the claim.

5. As part of his opposition to that application, the claimant had made a witness statement of 11 April 2019. This statement was in evidence both before me and before the Court of Appeal. In paragraph 17 of that statement, the claimant said this:

> "17. The first time that I had any knowledge of the trust structure was after my father died in 2016 and only after my lawyers examined what limited documentation that was available to them. I had never heard of the names of the four trusts before that time."

6. A week later, on 18 April 2019, the claimant made a corrective witness statement, in which he referred to paragraph 17 of the earlier statement, and said:

"2. I appreciate that this wording may be slightly misleading. To clarify, I first heard of the names of the four trusts in 2012, in the circumstances of the signing of the Deeds of Indemnity, as set out in paragraphs 42 to 52 of my witness statement. However, at the time I did not appreciate what the names referred to as I associated them with the names of famous football players. As trust names they meant nothing to me and I was not aware that any of them were intended to be 'my trust'. It was not until after my father's death and the involvement of the lawyers in 2016 that I was able to appreciate the meaning of the names Gabri, Xavi, and Puyol in the context of the trusts."

7. The claimant then appealed successfully to the Court of Appeal, which handed down judgment on 5 June 2020, setting aside my order striking out the claim. The claim accordingly proceeded, and further statements of case were served and filed. I shall come back to aspects of these shortly. However, in late January 2021 the defendant applied for permission to make a committal application against the claimant in respect of allegedly false statements contained in the evidence before both this court and the Court of Appeal in relation to the application to strike out. In early March 2021 I refused permission for the committal application to be made, for reasons given at the time.

8. On 6 July 2021, on the application of the parties, I dispensed with cost budgeting in the claim, on the basis that the sums claimed exceeded £10 million in value and the parties consented. On the same date, notice of the hearing of the case management conference was sent out to the parties. However, it was not until 26 July 2021 that the claimant issued his application to re-amend his Reply and Defence to Counterclaim. The application is resisted by the defendant.

9. That application seeks to amend paragraph 11(2) of the claimant's amended reply by adding in the words which are underlined below:

"11. As to paragraph 33:
[…]
(2) The Claimant first heard of the names of the four trusts when he signed the said Deeds of Indemnity, but at the time he did not appreciate what the names referred to; he merely associated them with the names of famous football players. Save as aforesaid, the first time that the Claimant had any knowledge of the trust structure – that is, awareness of the essential terms of the trusts (including in particular clauses M1(1), D3(3), F4 and L1(1)), the corpus of the trusts, and how the trusts related to each other – was after Hyman Sofer died on 8 July 2016 and then only after the Claimant's lawyers examined what limited documentation was available to them."

Background

10. In order for the significance of this change and for the reasons for the opposition to it on the part of the defendant to be understood, it is necessary to look at aspects of the statements of case more closely. In his original particulars of claim, after pleading allegations of breach of trust, the claimant pleaded as follows:

> "33. The Defendant is in the premises obliged to reinstate the trust fund the sums paid to Hyman Sofer, together with interest thereon from the date of each payment to the date of reinstatement."

11. In its original defence, filed and served on 21 August 2020, the defendant pleaded to this paragraph in part as follows:

> "33. In the premises, paragraph 33 is denied. Without prejudice to the aforesaid, it is not open to [the claimant] to dispute the validity and propriety of the loans referred to in the Deed of Indemnity on which [the defendant] will rely for its full terms, meaning and effect:
>
> […]
>
> 33.2. At the time he executed the Deed of Indemnity, [the claimant] had knowledge of the trusts and his interests under them, Hyman's financial circumstances (including his ability to repay loans made to him) and Hyman's mental capacity."

12. At the same time, an application for summary judgment was issued by the defendant, on the basis that aspects of the particulars of claim were considered

> "to be demonstrably false and/or unsustainable and/or inconsistent with Mr Sofer's evidence."

This application was ultimately disposed of by an order by consent in January 2021, after the claimant had produced draft re-amended particulars of claim.

13. In the original reply to the defence, served and filed on 16 October 2020, the claimant pleaded to paragraph 33 of the defence in part as follows:

> "11. As to paragraph 33:
>
> […]
>
> (2) the first time that the Claimant had any knowledge of the trust structure was after Hyman Sofer died on 8 July 2016 and then only after the Claimant's lawyers examined what limited documentation was available to them."

14. The claimant amended his particulars of claim, and then re-amended them on 1 December 2020. However, paragraph 33 (paragraph 9 above) remained unchanged on both occasions. The defendant on 4 December 2020 amended its defence, but without altering its own paragraph 33 (set out so far as relevant in paragraph 10 above). In turn, the claimant amended his reply on 10 December 2020, but also making no alteration to paragraph 11(2), as set out in paragraph 12 above. This prompted a letter from the defendant's solicitors on 22 December 2020, threatening to apply to strike out this paragraph., on the basis that the claimant had already qualified this statement as misleading when it appeared in his first witness statement.

15. On 5 January 2021, the claimant served a *draft* re-amended reply. Paragraph 11(2) of this draft said:

> "The Claimant first heard of the names of the four trusts when he signed the said Deeds of Indemnity, but at the time he did not appreciate what the names referred to; he merely associated them with the names of famous football players. Save as aforesaid, the first time that the Claimant had any knowledge of the trust structure was after Hyman Sofer died on 8 July 2016 and then only after the Claimant's lawyers examined what limited documentation was available to them."

This would have added words corresponding, but not identical, to the terms of paragraph 2 of the claimant's corrective witness statement of 18 April 2019. But it would have left the existing wording in paragraph 11(2) otherwise intact.

16. Following this, on 28 January 2021 the defendant made an application for permission to make a committal application against the claimant "on the basis that he had knowingly made false statements in documents verified by a statement of truth and had interfered and/or sought to interfere with the due administration of justice". In his affidavit dated 28 January 2021, Nigel West, the defendant's solicitor, asserted (at [20], [22]) that both (i) paragraph 17 of the claimant's witness statement of 11 April 2019, and (ii) the latter part of the second paragraph of his witness statement of 18 April 2019 ("As trust names they meant nothing to me and I was not aware that any of them were intended to be 'my trust'. It was not until after my father's death and the involvement of the lawyers in 2016 that I was able to appreciate the meaning of the names Gabri, Xavi, and Puyol in the context of the trusts") were false and were known by the claimant to be false.

17. Mr West went on to say that the state of the claimant's knowledge had been a live issue both at first instance and on appeal. He also noted that the original reply of 16 October 2020 at paragraph 11(2) was identical to the first sentence of paragraph 17 of the claimant's first witness statement. In support of his assertion that the claimant had lied in his evidence and in his statements of case, Mr West relied on some eight documents as demonstrating the state of the claimant's knowledge on this question. I refer to these briefly below. Although sent to others, they were all copied to the claimant by email at his own email address.

18. The eight documents are as follows:

(1) The Deed of Indemnity, signed in 2012 by the claimant personally, referring in the recitals to the existence of three of the trusts (including the Puyol Trust) and the loans made to Hyman Sofer.

(2) An attendance note of a meeting of Hyman Sofer's advisers in October 2014, prepared by a solicitor who took part, recording the attendance there of the claimant, and also that there was a detailed discussion about various aspects of the trust structure, the corpus of the trusts and the loans that had been made to Hyman Sofer.

(3) A letter from Hyman Sofer's family solicitors, Barkus Doolan, and copied to the claimant, dated 14 October 2014, setting out the trust structure in detail.

(4) A further letter from Barkus Doolan, and copied to the claimant, dated 16 October 2014, referring to the trusts, their assets and liabilities, and enclosing a memorandum from a barrister referring to the meeting on 9 October 2014, the loans to Hyman Sofer and to a suggestion that the loan liabilities would be extinguished on the latter's death.

(5) A further letter from Barkus Doolan, and copied to the claimant, dated 21 October 2014, explaining amendments to Hyman Sofer's will, which dealt with shares in corporate trustees and appointors of one of the trusts, and enclosing a copy of the amended will, referring to the Puyol trust and a gift of the shares in its corporate trustee.

(6) A further letter from Barkus Doolan, and copied to the claimant, dated 23 October 2014, enclosing a "Group Consolidation … of the Sofer group of trusts and entitles", which recorded the loans to Hyman Sofer from the trusts.

(7) A further letter from Barkus Doolan, and copied to the claimant, dated 27 October 2014, enclosing Hyman Sofer's memorandum of wishes and a letter from a barrister setting out matters relating to the trust structure.

(8) A letter from a barrister, and copied to the claimant, dated 10 November 2014, attaching a draft letter of advice from PKF Lawler Partners Tax Pty Ltd, concerning the tax affairs of Hyman Sofer in relation to the trust structure.

19. Mr West, on behalf of the defendant, said that these documents showed that the claimant was aware of the trusts, their corpus and structure, and the loans made from them to Hyman Sofer, well before the latter's death, and yet the claimant waited until after the death to make any complaint. And so the statements more recently made, in both witness statements and statements of case, that he did not know these things until after the death, were false, and moreover known to the claimant to be false.

This application

20. As I have said, the defendant's application to make a committal application against the claimant was refused. I made clear that this was not because the application had no merits. On the contrary, I considered that the claimant had a case to answer. But I also considered that for other reasons it was not right to proceed with such an application in the circumstances. However that may be, the claimant now, at the first case management conference, seeks to amend the amended reply to bring the statements of case into line with his (corrected) witness evidence.

21. The defendant opposes this, essentially on two linked grounds. First, the defendant says that the amendment has no real prospect of success. Second, the defendant says that, because, as demonstrated by the claimant's own evidence, the allegation is not true, it would be an abuse of process to permit the amendment to be made. I need to consider each of these matters in turn. But before I deal with the question of the test to apply, I will first consider the effect of the proposed amendments..

22. The changes now sought to paragraph 11(2) of the amended reply would make two averments which were not previously expressed in that reply. The first is

> "The Claimant first heard of the names of the four trusts when he signed the said Deeds of Indemnity, but at the time he did not appreciate what the names referred to; he merely associated them with the names of famous football players. Save as aforesaid…"

This is the same change as was first proposed by the claimant in the draft re-amended reply of 5 January 2021, referred to above.

23. The second averment is

> "that is, awareness of the essential terms of the trusts (including in particular clauses M1(1), D3(3), F4 and L1(1)), the corpus of the trusts, and how the trusts related to each other."

This is new, in the sense that it had no express equivalent in the draft re-amended reply of 5 January 2021.

24.

25. However, it is important to notice that these two averments have been grafted onto the *existing* statement that

> "the first time that the Claimant had any knowledge of the trust structure was after Hyman Sofer died on 8 July 2016 and then only after the Claimant's lawyers examined what limited documentation was available to them."

26. The effects of the grafting of the new onto the old in substance are twofold. The first effect is for the claimant to accept that which was not previously accepted in the claimant's statements of case, that is, that he first heard of the names of the trusts when he signed the deeds of indemnity. The second effect is to *redefine* the words "knowledge of the trust structure" to mean "awareness of the essential terms of the trusts [including some particular numbered clauses], the corpus of the trust, and how the trusts related to each other". It will be noted that both of these averments represent an apparent *retreat* from what was previously alleged by the claimant in his statements of case. Neither of these averments adds a new claim or part of claim. Instead, they accept more of the allegations in the defence to which they are directed. So the substantive effect of these averments, if permitted, would be to *reduce* the issues between the parties rather than to increase them.

The legal test

27. As to the test to be applied, I was referred to paragraph 17.3.6 of the White Book, which in turn referred to the decision of Andrew Hochhauser QC, sitting as a deputy judge, in *SPI North Ltd v Swiss Post International (UK) Ltd* [2019] EWHC 2004(Ch). In that case, the claimant applied to amend its existing statement of case so as to plead further implied terms in a contract between the parties. The judge said this:

> "5. The test to be applied in an opposed application to amend a statement of case is the same as the test applied to an application for summary judgment. The question is whether the proposed new claim has a real prospect of success. A real prospect of success is to be contrasted with a 'fanciful' prospect of success: see *Swain v Hillman* [2001] 1 All ER 91. A 'realistic' claim is one that carries some

degree of conviction. This means a claim that is more than merely arguable see: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8], applied and approved in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]."

28. I was also referred in paragraph 17.3.6 to the statement that:

"An application for permission to amend a defence will be refused if it is clear that the proposed amendment has no prospect of success (*Groveholt Ltd v Hughes* [2010] EWCA Civ 538, at [50]. Thus, the court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation (cf *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329; [2008] 1 WLR 643 (a set aside case in which the same test applies) and see *Carey Group plc v AIB Group (UK) plc* [2011] EWHC 594 (Ch) and *Shah v HSBC Private Bank (UK) Ltd* [2011] EWCA Civ 1669; [2012] Lloyd's Rep FC 337."

29. In relation to the first sentence of that note, it is perhaps fair to point out that in *Groveholt Ltd v Hughes* [2010] EWCA Civ 538, at [50], Arden LJ (with whom Wilson LJ and Henderson J agreed) in fact applied the test "not reasonably arguable". But nothing turns on that difference in wording in the present case. As for the second sentence, in *Carey Group plc v AIB Group (UK) plc* [2011] EWHC 594 (Ch), Briggs J said, in a case where there was an application to strike out to which the judge was minded to accede, and the claimant sought to amend the claim to remedy the deficiency identified:

"6. The defendants opposed permission to amend, mainly on the ground that the claimants had no real (as opposed to fanciful) prospect of succeeding in the new case thereby sought to be advanced at trial. It was common ground that permission for an amendment may be refused if, treating the matter in the same way that the court would address an application for summary judgment by the opposing party, it can be seen without the necessity for a trial that the claim sought to be advanced has no real prospect of success. For that purpose, the court does not test an assertion of fact by reference to probability, which is a matter for trial. 'The criterion which the judge has to apply under CPR 24 is not one of probability; it is absence of reality.' see per Lord Hobhouse in *Three Rivers District Council v. Bank of England (No 3)* [2001] 2 All ER 513. For that purpose, it is 'open to the court to reject … evidence if it were inherently implausible or if it were contradicted, or were not supported, by contemporaneous documentation.' See per Arden LJ in *Collier v. P&M J Wright Ltd* [2008] 1 WLR 643 at 653C to D.

[…]

22. Nonetheless, it is primarily because I consider that the case now advanced is, in the circumstances which I have described, inherently implausible, that I declined to grant permission to amend."

30. I will only add that all the cases referred to in paragraph 17.3.6 of the White Book are cases where the amendment sought to be made was to add a new claim, or at least a

fresh allegation to an existing claim. None of them is a case where the amendment sought to be made reduces the allegations already made.

This case

31. The defendant says that, applying the test of real prospect of success, the allegations in their new form will still fail, and hence the amendment should not be permitted. For this purpose it relies on the various items set out in the affidavit of Mr West in support of the proposed committal application. It says that they are contemporaneous evidence demonstrating the claimant's knowledge in 2012 and 2014, before his father's death. It says they show that the claimant was then aware of the existence and essential terms of the trusts, the corpus of the trusts and how the trusts related to one another. I accept that the documents referred to do indeed deal with such things. I also accept that the claimant at least had the means of accessing this information, since he appears to have been present at a meeting where these things were discussed (and he has not challenged this in his own evidence) and the documents referred to were apparently copied to him by email (again without challenge by the claimant). For the purposes of this application, I am prepared to assume, though without deciding, that, in light of this evidence, the remaining allegations in paragraph 11(2) are "implausible … [and] not supported, by contemporaneous documentation."

32. The problem is that, since the substance of the proposed amendments is a *retreat* from what was previously alleged, the test of real prospect of success cannot be applied to what is in effect being abandoned. The claimant is accepting that he has no such prospect and is seeking to excise it. It would make no sense for me to refuse permission to do this, and thus leave in play allegations which are no longer in issue. What the defendant instead means, in saying that the amendment has no real prospect of success, is that *what is left* after parts have been abandoned does not satisfy the real prospect test. But in my judgment this is the wrong approach to the problem. What is left was always there, and no permission is needed from the court to leave it there. The correct way to deal with allegations that have been made in statements of case and are considered not to enjoy a real prospect of success (assuming it is not a matter of law, when an application to strike out can be made) is to apply for reverse summary judgment. But the defendant has not done this.

33. It is however right to say that the matter has been complicated, and perhaps confused, by the way in which the original pleading and the amendments have been made. If this were a claim, say, for trespass, expressly in relation to "Blackacre, Whiteacre and Greenacre", and the claimant sought to amend by deleting the allegation in relation to Greenacre, it would be clear that the claim was being reduced in scope. It would not be possible to refuse the amendment to delete Greenacre on the grounds that the remaining allegations in relation to Blackacre and Whiteacre were implausible or inconsistent with all the evidence then to hand. However, if the claim were originally expressed as trespass to "all of the claimant's lands" in a specific place, and the claimant only had those three properties there, it would be put in a general rather than specific way. If then the claimant sought to amend the claim, by substituting for the general claim an allegation of trespass to Blackacre and Whiteacre alone, it might not be obvious that the amendment was reducing the scope of the claim, but that would in substance be the effect. In that case too I do not see how the court could refuse the

amendment on the grounds that the remaining allegations were implausible or inconsistent with all the evidence.

34. In the present case, however, the original allegation in paragraph 11(2) was in general terms, and is now sought to be rewritten in more specific, but *narrower* terms. In my judgment, the form of the claim and of the amendment do not trump the substance. The substance of the application in this case is of a reduction in the scope of the claim, and in my judgment it would be wrong on such an application to apply the test of real prospect *either* to that part which is being abandoned, *or* to that part which is being retained.

Abuse of process

35. The second ground of opposition to the amendment is that, because the amended paragraph 11(2) is (as the defendant would say, relying on the documents referred to in Mr West's affidavit) untrue, it would be an abuse of process to permit the amendment. Moreover, the claimant could not properly sign the necessary statement of truth to support the new pleading. Counsel for the defendant accepted that this objection might well be no more than another way of putting the first objection. Whether that is so or not, I do not think that it is any better as an objection. The original statement of truth for the reply covered the general terms in which paragraph 11(2) was cast. What the new statement of truth will cover is the *excising* of some aspects of paragraph 11(2). It is not an abuse of process for a party to seek to remove parts of its claim that it no longer wishes to make, or its opposition to parts of the opposing claim it no longer wishes to challenge.

Conclusion

36. I see no other objection to the proposed amendment. It is sought to be made early on in the proceedings, before disclosure and other procedures are embarked upon, and it narrows the issues between the parties. It is plainly in everyone's interest that the trial of this claim proceeds to deal only with what is really in dispute between the parties. In the result, therefore, I will allow the application of the claimant to make the proposed amendments to paragraph 11(2) of the amended reply. For the avoidance of doubt, I should add that it was not suggested that the amendment amounted to a discontinuance of part of the claim, and accordingly I say nothing the rules for such discontinuance. I should be grateful to receive an agreed minute of order of the hearing for approval.