Neutral Citation Number: [2017] EWHC 2644 (Comm)

Case No: CL-2014-001023

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2017

Before :

MR JUSTICE ROBIN KNOWLES CBE

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Between :

VINCENT AZIZ TCHENGUIZ AND OTHERS	**Claimants**
- and -	
THE DIRECTOR OF THE SERIOUS FRAUD OFFICE	**Defendant in 2013 Folios 1448/1449**
- and -	
(1) GRANT THORNTON UK LLP **(2) STEPHEN JOHN AKERS** **(3) HOSSEIN HAMEDANI** **(5) JÓHANNES RÚNAR JÓHANNSSON**	**Defendants in CL-2014-001023**
- and -	
WILLIAM PROCTER	**Third Party in CL-2014-001023**

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Christopher Hancock QC, Jonathan Crystal, Katharine Stock and Richard Greenberg (instructed by **McGuireWoods London LLP**) for the **Claimants and Third Party**
Simon Colton QC and Patricia Burns (instructed by **Government Legal Department**) for the **Director of the Serious Fraud Office**
Adrian Beltrami QC and Andrew McIntyre (instructed by **Simmons & Simmons LLP**) for **Grant Thornton UK LLP and Others**
Jeremy Goldring QC and Tom Gentleman (instructed by **Travers Smith LLP**) for the **5th Defendant**

Hearing dates: 2nd and 3rd October 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 ROBIN KNOWLES CBE

MR JUSTICE ROBIN KNOWLES :

Introduction

1. This is complex litigation and issues over documents have arisen at various points. Many of those issues have concerned the interests of third parties in documents or their contents, and undertakings given (here and abroad) that limit the use to which documents may be put.

2. For reasons that will become apparent, this is an interim judgment on a number of applications that I began to hear on 2 and 3 October. I will use abbreviations in this judgment that are familiar to all parties to the litigation and should not limit the ability of any outside party to follow matters.

The order of 3 May 2016

3. On 3 May 2016 I addressed case management questions in the VT Claim and the RT Claim concerning a large number of documents held by the VT Claimants or by the RT Claimants as a result of earlier proceedings against the SFO ("the SFO Proceedings"). The SFO Proceedings were ultimately compromised.

4. I made a number of orders the same day. On being informed that the SFO had inadvertently disclosed certain of these documents to the VT Claimants and the RT Claimants, and that the documents so disclosed were said to be subject to legal professional privilege or public interest immunity or irrelevant, one of the orders I made was in relation to those documents.

5. That order was designed to "hold the ring" and allow an orderly process for decisions to be made (if required by any party) about what should happen to those documents in the context of the VT Claim and the RT Claim. The order required the SFO to list the documents said to have been inadvertently disclosed, and the VT Claimants to isolate and return them to the SFO where they were to be held by the SFO to the order of the Court. The order next gave the VT Claimants an express liberty to apply "in connection with any proposed use of such documents and/or any challenge they wish to make to the SFO's claim for privilege, public interest immunity and/or irrelevance in respect of" documents said to have been inadvertently disclosed. (I should add for completeness that the VT Claimants had an option to destroy documents rather than return them; this I believe to have been in recognition of the possibility that some copies might contain annotation confidential to the VT Claimants.)

6. The VT Claimants sought permission to appeal against a number of the orders I made on 3 May 2016. On 12 July 2016 Gloster LJ gave permission to appeal on 3 Amended Grounds of Appeal advanced by the VT Claimants. Pending the hearing of the appeal itself Gloster LJ stayed my order requiring documents said by the SFO to have been inadvertently disclosed (including 17 particular documents: "the 17 Documents") to be returned to the SFO to be held by the SFO to the order of the Court. However

Gloster LJ went on to prohibit the VT Claimants from reviewing those documents, subject to agreement or further order of the Commercial Court.

7. As I understand the position, the VT Claimants have since then agreed a stay of the appeal itself.

The present applications

8. I gave summary judgment in the VT Claim against the VT Claimants on 20 April 2016 (in favour of Mr Jóhannsson) and 16 December 2016 (in favour of the GT Defendants).

9. An appeal against these decisions is to be heard by the Court of Appeal late next month (November 2017). The VT Claimants say they have been prompted to seek to use certain documents in light of what Christopher Clarke LJ said when granting permission to appeal on Ground 7 of the Grounds of Appeal advanced by the VT Claimants.

10. That was on 14 February 2017. Ground 7 had proposed to argue: "The Judge should have held that there was a further compelling reason to refuse summary judgment, namely that [the VT Claimants] have in their possession evidence which can reasonably be expected to be available at trial, but which they are currently unable to rely upon ...".

11. In his judgment on 14 February 2017 Christopher Clarke LJ said at [4]:

> "… The fact that the proceedings below were conducted on the basis that no issue was taken for summary judgment purposes on the merits of the pleaded allegation of wilful misconduct and the like does not, arguably, exhaust the significance of the fact that there are many documents which are likely to be relevant which are at present subject to embargo. …
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> …
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> I am told that a hearing is to take place in May [2017] as to whether or not some, and if so, which of the embargoed documents may be released. I am also told that the hearing of the appeal in these matters is currently fixed for November [2017]. I also understand that because judgment has been entered against them, the now appellants are not, as matters stand, allowed to participate as parties at the May hearing. It seems to me there is a real possibility that this state of affairs is the worst of all possible worlds.
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> There is a pending appeal in which the claim is that judgment should not have been entered against the appellants. One of the grounds of appeal is that there is relevant material known to those who have seen it, but which is the subject of an embargo

> and cannot therefore, unless the embargo is lifted, be put before the court. It seems to me that in those circumstances, subject to any considerations of which I am not aware, it would be highly desirable that the now appellants were able to participate in the question as to whether the embargo should be lifted because, to the extent that it is lifted, the released material may bear upon the outcome of the appeal in November.
>
> The alternative is that (i) the now appellants do not participate; (ii) either none or a limited number of documents are released from the embargo; and (iii) the appeal is then heard in November. If the appeal fails, that will be the end of it. But there is a possibility that the appeal succeeds in which case it will then be necessary to consider whether or not the embargo should continue having regard to the observations or submissions which are then made by the appellants who, on this hypothesis, remain parties to the action which has not been struck out as far as they are concerned.
>
> Accordingly, I would have thought it sensible that they should be allowed to participate in the determination in May [2017]."

12. The reference to the May hearing or determination was, as highlighted, to a hearing in May 2017 in the RT Claim. The RT Claim continues to trial in October 2018. It does not involve the summary judgment questions as did the VT Claim. (I gave summary judgment against the RT Claimants on one distinct aspect of the RT Claim, and the Court of Appeal has refused permission to appeal against that decision.)

13. In the passage quoted, Christopher Clarke LJ appears to refer both to the possibility of documents if released in May 2017 having a bearing on the outcome of the appeal, and to the question of what would happen, if the appeal succeeded, to documents released in May 2017.

14. In the event the VT Claimants did not seek to participate in the determination in May 2017. In particular they did not seek to raise the question whether what Christopher Clarke LJ described as "the embargo" should be lifted from the 17 Documents.

The first of the present applications: three declarations

15. The first of the present applications was issued on 15 August 2017, in the SFO Proceedings. The application concerns the 17 Documents.

16. Mr Christopher Hancock QC, appearing with Mr Jonathan Crystal, Ms Katharine Stock and Mr Richard Greenberg for the VT Claimants, asked me to deal with this application separately, and first.

17. I have allowed one of the GT Defendants, GT(UK), to be joined to it, as requested by Mr Adrian Beltrami QC appearing with Mr Andrew McIntyre for the GT Defendants. I have not read the 17 Documents (now, or at any earlier point in this litigation).

18. The application seeks declarations, rather than simply orders as between the VT Claimants and the SFO. This is a material feature.

19. Three declarations are sought. First, that the VT Claimants "were entitled" to use the 17 Documents in the SFO Proceedings. Second, that the VT Claimants "are entitled" to use the 17 Documents for purposes permitted by Eder J in an order dated 31 July 2014 as amended on 22 March 2016, made in the SFO Proceedings. Third, that the 17 Documents "are to be treated as excluded from" the list that in my Order dated 3 May 2016 I required the SFO to prepare, of documents said to have been inadvertently disclosed, so that these could be isolated.

20. I am not persuaded that the declaration first sought, as to previous rather than present entitlement to use the 17 Documents, and to use them in the SFO Proceedings, serves any useful purpose. On that ground, I decline to make that declaration.

21. The second declaration is not well founded. At the hearing on 3 May 2016, when concerned to case manage the VT Claim and the RT Claim, I had been told about documents said to have been inadvertently disclosed by the SFO. I imposed a regime that would allow that, and any related issue, to be addressed, with holding arrangements in the meantime. The transcript shows that what I said at the hearing was that, of any document in this category, "the SFO are to hold it to the order of the court and in the event, at any point, that any party says that they should be entitled to copy it, look at it, challenge the claim that the SFO made to extract it from the whole, that liberty is preserved …".

22. Paragraph 18 of my order of 3 May 2016 indicates that the order of Eder J was affected in relation to these documents rather than was not. That paragraph was in these terms: "For the avoidance of doubt, this order (save in respect of the Inadvertently Disclosed Material …) and its effects are not intended to limit or be limited by [the order of Eder J]" (emphasis supplied).

23. I think this must all have been understood by the VT Claimants. As summarised in their written submissions on the present applications, it was "pursuant to the liberty in the 3 May order" that they applied on 3 October 2016 "to review the allegedly inadvertently disclosed documents with a view to seeking permission to use them". They then agreed to a stay of that application too when summary judgment was given against the VT Claimants and in favour of the GT Defendants.

24. As to the third declaration, I do not think I should make this when it is the fact that the 17 Documents are in the list and have been for a very substantial time now.

Standing back

25. In oral submissions Mr Hancock QC suggested that the underlying issue was one that, "had matters proceeded as perhaps they should have done in the lead-up to the 3 May hearing", would have been before me at the hearing on 3 May 2016. This was, he submitted, whether "on the basis of a full understanding of the facts and indeed the legal position, the order that the SFO sought was justified in relation to [the 17 Documents]".

26. Respectfully, I do not see the matter in that way. Matters proceeded as they did before and on 3 May 2016. My concern on 3 May 2016 was positively not to reach a substantive conclusion in relation to the 17 Documents, but to hold the ring in a way that would enable a decision on a full consideration of the facts and law at a later point (i.e. when and if a party exercised the liberty to apply).

27. It was not an order that pretended to be based on a full understanding of the facts and legal position – I was clear that I did not have such an understanding at the time. If I made the wrong order in those circumstances that would be, and was, for the Court of Appeal. The arrangements made by the order actively contemplated that I could make a further, subsequent order, but that would be a new order made in the circumstances, and with the degree of understanding, existing at the time of that new order.

28. I refer at paragraph 23 above to the decisions of the VT Claimants to issue the application they did on 3 October 2016 and then to agree to that application being stayed. The first of the present applications is not easy to understand given those decisions.

29. It is submitted by the VT Claimants that "the point became live again" after the words used by Christopher Clarke LJ in February 2017. But if the point became live again, I do not understand why the VT Claimants did not ask to participate in the May 2017 hearing. Nor why they would wish to proceed in the form of the declarations sought by the first of the present applications rather than by asking to lift the stay on the application they issued on 3 October 2016 (or otherwise invoke paragraph 1(c) of my order of 3 May 2016), or to vary the order in July 2016 made by Gloster LJ.

30. I am sure however that it is important to stand back. For me the underlying point is that, one way or another, the VT Claimants have now made clear they wish the Court to decide, as against the SFO (and, see later, as against GT(UK)), whether the VT Claimants have the right or should be permitted to use the 17 Documents.

31. To be practical, even this first of the present applications is in my view best seen as an exercise by the VT Claimants of the liberty to apply in my Order of 3 May 2016, at paragraph 1(c). It is still open to the VT Claimants to exercise that liberty to apply, and in another of the present applications it asks to do so. My hands are not tied in terms of outcome: Gloster LJ's order of 21 July 2016 prohibiting the VT Claimants from reviewing the documents said by the SFO to have been inadvertently disclosed (including the 17 Documents) is subject to agreement or further order of this court.

The question of public domain

32. By the time of the oral hearing of the first of the present applications, the VT Claimants sought to argue that the 17 Documents are within the public domain.

33. This argument is new. It did not feature in that application when commenced and I accept the argument of Mr Simon Colton QC and Ms Patricia Burns for the SFO that the SFO have not had proper opportunity to address it.

34. The SFO have used responsibly the time they have had and it appears as a result that the SFO accept that 4 of the 17 Documents were "read to or by the court, or referred to, at a hearing which has been held in public" (i.e. the Court of Appeal hearing on 14 July 2014). If that is correct then it helpfully advances things, even though it is not the end of the matter because those documents face an application by GT(UK), to which I refer below.

35. I add that the argument that the 17 Documents are in the public domain is also not a little perplexing for a particular reason. The VT Claimants argue that the 17 Documents are within the public domain as the result of a hearing before the Court of Appeal in the SFO Proceedings on 14 July 2014. But this was not the basis on which the VT Claimants argued before Eder J on 31 July 2014 when addressing permission to use documents disclosed in the SFO Proceedings.

36. In any event, if the argument about public domain is to be pursued, at least in relation to the remaining 13 of the 17 Documents, there must be a proper, even if expedited, programme for evidence and argument to allow a fair determination.

37. This is all very close to the forthcoming hearing before the appeals before the Court of Appeal to be heard in late November, and that is the hearing that the VT Claimants say they are working towards. I consider the proper course is for me to say nothing on the subject of those appeals.

38. In connection with the public domain argument I was asked to permit an analysis to compare "Bates" identifying document numbers of documents in the appeal bundles in the SFO Proceedings with those borne by the 17 Documents. This analysis may be of limited utility but I will permit a suitably experienced independent barrister, solicitor or fellow of the Chartered Institute of Legal Executives to undertake it as the Court's officer and on terms as to confidentiality in relation to any contents seen, and to report the results to all parties. In the first instance this would be at the cost of the VT Claimants.

The question of inadvertent disclosure

39. A further argument of the VT Claimants on the first of the present applications was that the question whether there was inadvertent disclosure has been determined against the SFO.

40. I do not consider this argument to be sound. The issue before the Court of Appeal at the hearing on 14 July 2014 leading to its judgment on 31 July 2014 (at [2014] EWCA Civ 1129; [2015] 1 WLR 797) was not the issue of whether documents had been inadvertently disclosed, but the issue of whether it was obvious (to a reasonable solicitor) that documents had been disclosed inadvertently. That issue assumes inadvertent disclosure.

The question of legal professional privilege

41. The question whether the SFO may successfully claim legal professional privilege will be affected by the answer to the question whether the 17 Documents have entered the public domain.

42. If the 17 Documents have not entered the public domain, it does not necessarily follow that a loss of privilege in one claim (the SFO Claim) means an inability to maintain privilege in another claim (the VT Claim). The law is concerned "to ensure that a loss of legal professional privilege (given its fundamental importance) is limited to that which is necessary to protect other interests": see Eurasian Natural Resources Corporation Ltd v Dechert LLP [2016] EWCA Civ 375; [2016] 1 WLR 5027 at [53] per Gloster LJ, and B v Auckland District Law Society [2003] 2 AC 736 per Lord Millett.

43. Specifically, I accept the submission of Mr Colton QC for the SFO to the effect that the fact that the VT Claimants succeeded before the Court of Appeal on what was a CPR 31.20 application for permission to use documents in the SFO Proceedings is not (and given the basis on which they were successful) conclusive of the question whether they should have permission to use documents in the VT Claim.

Other present applications, and next steps

44. Had the VT Claimants succeeded on these points (and if they yet succeed on the public domain question) they will still face an application by GT(UK), that the 17 Documents and 3 others are subject to its privilege. I have yet to hear argument on this.

45. A further application by the VT Claimants seeks permission under CPR 31.22(1)(b) to use in the VT Claim 97 documents ("the 97 Documents") disclosed in the SFO Proceedings, as well as the 17 Documents. In addition to the GT Defendants and the SFO, the parties to this application include the Fifth Defendant, Mr Jóhannsson, represented by Mr Jeremy Goldring QC and Mr Tom Gentleman.

46. Argument has not yet reached this further application as regards the 17 Documents.

47. But in relation to the 97 Documents, there is no suggestion of inadvertent disclosure, privilege (save for 3), or public interest immunity. I understand the VT Claimants intend to make a Ladd v Marshall application to the Court of Appeal for permission to rely on these documents. Aside from the 3, I also understand that it is on such an application, rather than on this further application, that the GT Defendants and Mr Jóhannsson intend to oppose the VT Claimants.

48. Consistently with my approach at paragraph 37 above, I wish to say nothing in respect of appellate questions. The SFO has explained its position in relation to these documents and the position as regards third parties. I will grant now the permission sought under CPR 31.22(1)(b) in relation to the 97 Documents (less the 3). A range of procedural safeguards will apply as part of this permission on the further application, and these are not in issue. They have been formulated by the parties and will be set out in the order.

49. I give the permission because I am satisfied, taking into consideration what has been said to me by the parties represented at this hearing, and the particular procedural context, that it is appropriate to do that. As with the 17 Documents, I have deliberately not read the 97 Documents. I have not needed to form any view on Section V of the witness statement of Mr Hardeep Nahal dated 25 August 2017 (entitled "Relevance of the SFO Disclosure Documents set out in Schedule A"), and indeed I consider it appropriate that I refrain from doing so.

50. An application by the SFO to re-impose CPR 31.22(1) protection in respect of 7 documents is agreed between the parties and acceptable to me. I am also prepared to make an order under CPR 5.4(C)4 in terms that are agreed between the parties.

51. My decision on the 17 Documents under the further application (for CPR 31.22(1)(b) permission) is held over for argument, including the conclusion of any further argument over the 17 Documents on the first of the present applications, and the argument over the 17 Documents and 3 others on GT(UK)'s application. I will give directions for evidence and a further hearing to facilitate this as far as possible and as quickly as possible. I invite the parties to liaise with each other on receipt of the draft of this judgment, and then with the Commercial Court office and my Clerk.