[2024] EWHC 2953 (KB)

IN THE HIGH COURT OF JUSTICE **CC-2023-CDF-000006**

BUSINESS AND PROPERTY COURTS IN WALES

CIRCUIT COMMERCIAL LIST (KBD)

Cardiff Civil and Family Justice Centre
2 Park Street
Cardiff
CF10 1ET

Wednesday, 31st July 2024
(ex tempore judgment)

Before:

MR JUSTICE GRIFFITHS

BETWEEN:

CARDIFF CITY FOOTBALL CLUB LIMITED

Claimant

and

(1) WILLIAM ARTHUR McKAY
(2) MARK McKAY
(3) JANIS McKAY

Defendants

MR D PHILLIPS KC appeared on behalf of the Claimant
MR S CUTHBERT appeared on behalf of the Defendants

Hearing date: 31 July 2024

JUDGMENT
(Approved)

The Honourable Mr Justice Griffiths:

1. This is an application by the claimant consequent upon previous orders of the court, which the claimant believes the defendants have not complied with. The defendants are represented by solicitors and counsel and maintain they have complied with the orders in question.

2. The application notice seeks an order:

> "(1) That the First and Second Defendant provide a witness statement, deliver up the log in details to the Email Addresses (as defined in the witness statement enclosed), and give disclosure of relevant documents in relation to the Email Addresses; and
>
> (2) For an independent Barrister to undertake a review of the documents identified by the Defendants' searches."

3. However, the eighth witness statement of the claimants' solicitor, Ms Celine Jones, dated 19 July 2024, says (in paras 7 and 8) that only part (2) of this order is sought from me.

4. In the course of the argument, a draft order was handed up to me. The terms of that order are, in summary, that within five days the defendants are to select a barrister from a list of three practitioners in various chambers in Bristol to undertake a review of documents identified by Control Risks as falling within a time period set out in the order of His Honour Judge Keyser dated 22 February 2024 but which have not been disclosed to the claimant, and that the selected barrister should carry out that review and assess whether any further documents should be disclosed to the claimant, pursuant to the existing orders of the court. If the barrister does so assess, those documents would immediately be provided to the claimant (without any recourse to the defendants or any opportunity for the defendants to comment or to object to that happening). The draft order provides that the costs of the independent review will be paid by the claimant and not the defendants, and it seeks cost orders in relation to the existing applications.

5. Therefore, in summary, what the claimants now seek is that the exercise performed by the defendants' solicitors - to filter out from a mass of documents (which were provided, following an expert retrieval exercise, from emails, texts and other records) those which are disclosable - should be re-performed by a person described as an independent barrister, selected by the defendant, who would then make the disclosure of those documents directly to the claimant without any intervention by the defendants.

6. The claimant argues, essentially, that the defendants have not done a proper job and they should not be given another opportunity to do the job.

Facts

7. Because of the narrowness of the issue I have to decide today, I can state the relevant history quite briefly.

8. In 2023, the claimant, Cardiff City Football Club Limited, brought Part 8 proceedings against the first defendant, William Arthur McKay, seeking information about his

involvement in the transfer of Emiliano Sala from FC Nantes to Cardiff City Football Club in January 2019, and his relationships with FC Nantes in relation to that transfer.

9. The reasons that the claimant had for wanting that information are explained in the first witness statement of Ms Jones, between paragraphs 26 and 32. That witness statement is not in the bundle of papers before me, but it has been possible to refer me to it by reference to a bundle prepared for an earlier hearing. What is said is that the status of the first defendant, in the transfer of Mr Sala from FC Nantes to the claimant, is a matter of French law and is central to the issues to be determined in the French proceedings.

10. Although the formal agency contract was between FC Nantes and a company called Mercato Sports Limited, acting through the second defendant, Mark McKay, the claimants assert that contemporaneous documents show that it was the first defendant, William McKay, who played the lead role in the negotiations between FC Nantes and the claimant, and in persuading Mr Sala to consider a transfer to the claimant.

11. FC Nantes and the claimant in the French litigation disagree about the roles played by the first and second defendants, respectively, in the Sala transfer. It is important, according to Ms Jones's evidence, to the success of Cardiff City's case against FC Nantes, that it should obtain materials which it is hoped will substantiate its interpretation of the respective roles of the first and second defendants, in opposition to the case being put forward by FC Nantes. This is said to be important as a consequence of differences between French and English law, which mean that the test for rendering FC Nantes liable for the involvement of an individual is different from the vicarious liability test that would be applied to an independent agent under English law.

12. The Part 8 proceedings seeking this information were settled by a Tomlin order dated 7 February 2024, and the terms of settlement were contained in a confidential document referred to in the Tomlin order, although not annexed to it. The terms of settlement included the following terms which have been canvassed in proceedings in open court and to which I, therefore, may now refer.

13. First, the second and third defendants were joined to the proceedings. They were therefore parties to the Tomlin order. I have already referred to the first and second defendants; the third defendant is the wife of the first defendant.

14. Second, all three defendants agreed to disclose documents by 4 pm on 19 February 2024, failing which, they were required to provide the claimant with a witness statement explaining the steps taken to find the documents, and why those steps have failed.

15. No documents were, in fact, disclosed by the due date and the claimant obtained an order for compliance endorsed with a penal notice. That order ("the Disclosure Order") was made by His Honour Judge Keyser KC and dated 22 February 2024. The claimants maintain that there has been non-compliance and a contempt of court in connection with the Disclosure Order. But, because of a stroke suffered by the first defendant, their pending committal application has, by consent, been adjourned from today, and I am not concerned with it.

16. The claimants also took other steps to procure compliance with the Disclosure Order. The upshot was a hearing before me on 22 March 2024 and an order of the same date ("the

Delivery Up Order"). The Delivery Up Order, the details of which were worked out by the parties themselves at my direction, laid down a detailed procedure for a search to be carried out "to ascertain whether there is data as detailed in the Settlement Agreement dated 6 February 2024 and the Order of HHJ Keyser KC dated 22 February 2024" (see paragraph 4).

17. This procedure included the following steps.

18. First, an expert would identify data from the relevant period and would provide it to the defendants' solicitors. This was referred to as "the Provision of Data".

19. Second, within seven days of that, and I quote from paragraph 5.e. of the Delivery Up Order:

> "…the results of the expert search and any data retrieved will be reviewed thereafter by a solicitor (or solicitors) from the defendants' solicitors, exercising their duties as officers of the court. The solicitor (or solicitors) will identify whether the subject matter of the data falls within either the Settlement Agreement dated 6 February 2024 or the Order of HHJ Keyser dated 22 February 2024, and as a result, is disclosable to the claimant ("the Disclosable Data")".

20. Third, by paragraph 5.g. of the Delivery Up Order, within seven days of the Provision of Data, the Disclosable Data would be provided to the claimants' solicitors.

21. The scope of the Disclosable Data is defined, broadly speaking, by date, by the identities of the parties to the communications, and by a description of the subject matter. It is not defined by reference to a CPR Part 31 test for disclosure in an action, based on relevance to issues in dispute.

22. The broad description of subject matter is repeated in identical terms in different parts of the Disclosure Order of His Honour Judge Keyser, depending on the parties affected, but two appearances may be quoted by way of example, from paragraphs 1.a. and paragraph 1.d. of the Disclosure Order.

23. Paragraph 1.a. refers to all emails and text messages (whether sent by SMS, WhatsApp or otherwise) passing between the relevant defendant and any officer or employee of FC Nantes:

> "…concerning the transfer or potential transfer of Emiliano Sala from FC Nantes, whether to Cardiff City Football Club Ltd or any other club or generally."

24. Paragraph 1.d. of the Disclosure Order catches emails and text messages

> "…concerning arrangements for Emiliano Sala to fly from Cardiff to Nantes on 19 January 2019 and from Nantes to Cardiff on 21 January 2019."

25. Of those two descriptions, it is the description which first appears in paragraph 1.a., and which is constantly repeated thereafter (for example, at paragraphs 1.b., 1.c., 2.a., 2.b., 2.c., etc) which is of particular importance in today's application.

26. The other relevant point to make about the Delivery Up Order is the shortness of the seven-day deadline for the provision of data. The defendants' solicitors had only seven days between the provision of the documents by the expert who had retrieved them and the deadline for completing a review of them to see whether they fell within the terms of the Disclosure Order or the Settlement Agreement. The defendants, I am told, did run into difficulties with that short deadline and sought an extension, but it was refused by the claimant. The result was that they had to apply to the court and they obtained an extension of only two days.

27. Under those time constraints the defendants' solicitors conducted the review and they say that they have provided to the claimant all the Disclosable Data identified as a result of it.

28. The claimants do not believe them. By this application, they seek to check the work the defendants' solicitors have done by having an independent person appointed (in the form of the barrister to be selected by the defendants' solicitors from the shortlist of three), in order to perform that check.

Arguments

29. I have had the benefit of written and oral submissions from David Phillips KC, on behalf of the claimant, and from Samuel Cuthbert of counsel, on behalf of the defendants. I am most grateful to both of them for the considerable assistance they have given me and for the relevance and concision of their submissions.

30. In support of the application, Mr Phillips KC says that, without sight of the documents, it is not possible for the claimant to identify with certainty the extent of the defendants' failure. He says that all that can be done is to point to the explanations provided by the defendants for withholding certain documents and highlight their improbability.

31. There is some circularity in this submission because it assumes that there has been a failure and that the difficulties in establishing it are evidential rather than substantial. An alternative explanation is that difficulties in establishing the extent of any failure are due to there being no failure or no significant failure in the first place.

32. Another way of looking at it is that it is in the nature of the process that it trusts the professionalism and sense of duty of the defendants' solicitors, as officers of the court. It does not look over their shoulders, unless the evidence that something has gone wrong is really clear. An example of such clarity might be that they themselves say how they have gone about things and their stated approach is obviously wrong.

33. The claimant's specific challenges were originally contained in paragraphs 37-45 of the sixth witness statement of its solicitor, Ms Celine Jones, dated 2 May 2024. In her seventh witness statement, dated 9 July 2024, she explains that the concerns expressed in her sixth witness statement resulted in an application to the court by the claimants, which was resolved by a Consent Order, which I made, dated 15 May 2024. The Consent Order provided for certain questions to be answered by the defendants in witness statements. It also stated, in a recital, that the defendants' solicitors undertook "…to respond within seven working days to any requests made to them by the claimant's solicitors for

explanations as to why documents have not been disclosed from the Relevant Period as confirmed in its correspondence to the claimant's solicitors dated 14 May 2024".

34. On the same day as the Consent Order was made, 15 May 2024, such a request was, indeed, sent to the defendants' solicitors by the claimant's solicitors.

35. The defendants' solicitors responded on 24 May 2024. They set out in an Excel spreadsheet their detailed responses to the various points raised. The Excel spreadsheet set out, one by one, a number of documents whose non-disclosure was under challenge and, in respect of each document, provided comments justifying the non-disclosure.

36. The claimants, as Ms Jones says in paragraph 11 of her seventh witness statement, do not consider that the defendant's review has been satisfactory, notwithstanding the explanations in the Excel spreadsheet. That criticism is strongly maintained before me by Mr Phillips KC, although he says that the claimants need to see more of the documents themselves before being able to put very much flesh on the bones of their objections.

37. The reasons provided by the defendants' solicitors in the Excel spreadsheet were commented upon by the claimants' solicitors in a letter dated 5 June 2024.

38. Those comments were, in turn, responded to by a further communication from the defendants' solicitors, dated 14 June 2024.

39. The upshot of these exchanges is that the claimant now focuses on just 18 documents. I have been provided with a very helpful schedule ("the Schedule"), which summarises the positions of the parties, as stated in the correspondence, in relation to each one of those 18 documents.

40. Before turning to those specific challenges, I will review the applicable law.

The law

41. The claimants' leading counsel has helpfully referred me to the review of authority and summary of principles by Foxton J in *Terre Neuve SARL v Yewdale Ltd* [2023] EWHC 677 (Comm), at paragraphs 21-31. In that case, Foxton J was being asked to order that documents be provided "to a court-appointed independent lawyer who would identify relevant documents and redact those which were privileged… so that those could be the subject of disclosure in the usual way" (para 17). Foxton J cited Mann J in *A v B* [2019] 1 WLR 5832, [2019] EWHC 2089 (Ch) who had said (at para 22):

> "…the general rule is that the disclosing party has to carry out the disclosure exercise itself, applying a relevance test as best it can. It is assumed in the first instance that it will do that bona fide. In most cases comfort can be taken (at least to a degree) by the fact that solicitors are involved, and they are better placed to assess relevance than the party (and not inclined to suppress a relevant but damaging document)."

42. In *Nolan Family Partnership v Walsh* [2011] EWHC 535 (Comm), to which Mr Cuthbert referred me, Teare J considered and granted an application for an order that an independent

firm of solicitors be appointed as supervising solicitors to carry out disclosure, on behalf of a defendant who was not represented, and who had taken no part in the proceedings for some time. Teare J emphasised (at para 14), that his decision was "made on the particular facts of this case". He recognised that he was doing something that had not been done before, but he established (and this is not disputed before me) that the court has "inherent jurisdiction to appoint a supervising solicitor to enable discharge of the first defendant's disclosure obligation, in order to ensure that that obligation is fulfilled" (para 10).

43. In *Vilca v Xstrata* [2016] EWHC 1824 (QB), to which Mr Cuthbert has also referred to me, Foskett J (at para 33) declined to make an order along similar lines; although, in a detailed and lengthy analysis of his own, he did accept some specific criticisms of the defendants' approach. He thought it was enough, in that case, that those criticisms had been made explicit; and he asked the defendants' own solicitors to come up with a plan to put things right. He said (in para 33):

> "Is the issue raised by the claimant sufficient to justify the kind of review they seek? I do not doubt (consistent with the view expressed by Teare J in *Nolan Family Partnership v Walsh* [2011] EWHC 535 (Comm)) that I could direct a review by another firm of solicitors or by independent counsel, even if, as is suggested, it would be unprecedented. However, it would be a most unusual order to make (imposing, as it would, a costs burden on the client whose solicitor's conduct was the subject of the review) and it would, in my view, require strong grounds for it to be ordered".

44. Per Tugendhat J in *CBS Butler Ltd v Brown* [2013] EWHC 3944 (QB) at para 38:

> "In my judgment, an order which would deprive the Defendants of the opportunity of considering whether or not they shall make any disclosure is (in the words of Hoffmann J) an intrusive order, even if it is made on notice to the defendant. It is contrary to normal principles of justice, and can only be done when there is a paramount need to prevent a denial of justice to the claimant. The need to avoid such a denial of justice may be shown after the defendant has failed to comply with his disclosure obligations, having been given the opportunity to do so".

45. Tugendhat J's reference to Hoffman J was to his judgment in *Lock International plc v Beswick* [1989] 1 WLR 1268 at 1281, where he referred to the need to "employ a graduated response" and ensure "proportionality to the perceived threats to the plaintiff's rights and the remedy granted."

46. Foxton J said in *Terre Neuve SARL v Yewdale Ltd* [2023] EWHC 677 (Comm) at paras 30-31:

> "30. Such an order will also necessarily introduce a significant additional cost into the litigation, and the potential for satellite litigation. It should not be seen as simply another tool in the box of a litigant with legitimate complaints about the other party's disclosure.

> 31. In considering whether an order of the kind sought will be a proportionate response to the claimant's interest in obtaining disclosure of relevant documents, relevant factors will include:
>
> i) Whether the disclosure is being sought for the purposes of the court's adjudicative
> jurisdiction, where it is possible for adverse inferences from deficiencies in disclosure to make good some of the adverse effects of inadequate disclosure, or whether it is sought in a context where this will not be the case (…)
>
> ii) How significant the documents are in the litigation, and whether there are alternative means of addressing the issues to which the documents relate.
>
> iii) Whether the documents have been subject to no review at all (as in *Nolan*), or whether one party believes (as is frequently the case) that the job has not been done as well as it should have been. As Mann J noted, the usual remedy in the latter case will usually stop far short of the order sought here.
>
> iv) The degree of intrusion the order represents.
>
> v) How compelling the case is that the relevant party has failed properly to conduct the disclosure exercise, and how widespread or significant the apparent failure is. In this regard, parties will frequently disbelieve another party's protestations that relevant searches have been done and no relevant documents located. However, at the pre-trial stage of the proceedings, it is not generally possible for the court to reach a concluded view on what has happened, nor proportionate to make the attempt, and it may well be unwise to express one given the potential impact of such a finding at trial. Courts very frequently state that they cannot "go behind" such assertions, leaving it to the complaining party to pursue the issue at trial, when the court can make the appropriate finding and give effect to its consequences (*West London Pipeline & Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm), [86]).
>
> vi) The cost of the exercise, having regard to the amount of the claim."

Disputes

47. The claimants' criticisms of the defendants' disclosure to date are, in the evidence, most recently and fully set out in paragraphs 12-17 of Ms Jones's seventh witness statement, which summarises them (at para 12) in this way:

> "Broadly, CCFC considers IPS Law's review to be defective on two grounds: (i) the Spreadsheet contains many inaccuracies which suggest that IPS Law did not take its obligations pursuant to the undertaking seriously and/or carried out a half-hearted attempt to comply; and (ii) IPS Law has wrongly applied the principle of legal privilege."

48. The arguments, as I have mentioned, focus on 18 documents in the Schedule, which I take it are the claimants' selection of the most egregious examples upon which they can rely, in

order to make good those two criticisms. I will refer to them by the order in which they appear in that Schedule as if they had been numbered from 1 to 18.

Schedule documents 1 - 18

49. Schedule document 1 is an email from the first defendant to the second defendant. It is within the dates required for it to be Disclosable Data and it is between two people who are within the scope of the Disclosure Order. The explanation for not disclosing it in the Excel spreadsheet was:

> "Private correspondence between a Journalist and Willie [i.e. William McKay, the first defendant] Re: his understanding of events. Does not fall into Relevant parameters".

50. The claimants' solicitor's response of 5 June said that if the "understanding of events" was in relation to the transfer of Sala or the arrangements for Sala to fly, then it would be within the scope of the disclosure which had been ordered.

51. The response of the defendants' solicitors on 14 June was:

> "This email was not disclosed as it is an email forwarded from Willie to Mark [i.e. from the first to the second defendant]. The original email is from a journalist asking questions and setting out their understanding of events re: Sala's transfer. Neither Mark, Willie nor any other relevant person is providing any factual information relating to the transfer of Sala."

52. I think there is force in the observation that it is a little difficult to understand why a communication within the relevant date range and passing between two parties caught by the ambit of the Disclosure Order was judged not to be "concerning the transfer or potential transfer of Emiliano Sala from FC Nantes" in circumstances where the defendants' solicitors say that it was setting out a journalist's understanding of events "re: Sala's transfer". It does appear that the reviewer may have been applying a test of relevance, rather than the test in the Disclosure Order. However, without looking at the document, it not possible to say whether that is the case.

53. I should say in relation to Schedule document 1 that Mr Cuthbert, doing his best, not having seen the document, said on instructions that the document was making enquiries about the transfer, but did not concern the transfer in any active way. That did not seem to me a complete answer to the obvious inconsistency between an email being said to be "re: Sala's transfer", and, at the same time, being said not to be "concerning" the transfer within the meaning of the Disclosure Order.

54. Schedule document 2 was not disclosed, according to the Excel spreadsheet, because "Content not Relevant as per Court Order – Linkedin Message – not related people or subject". The claimant's solicitors challenged this, and the defendants' solicitors said in their response on 14 June 2024: "This email was not disclosed as the email body contains no factual information relating to the transfer of Sala or arrangement details for the flights between Cardiff and Nantes and vice versa".

55. Mr Cuthbert said, on instructions, that this was simply a way of saying that it was not about the transfer and it was, therefore, not within the scope of the definitions in the Disclosure Order. Disclosure was not being refused on the basis that it was not relevant to issues in litigation. If that is correct (and, on the face of it, what a solicitor says about a document he has reviewed in an exercise such as this is presumably correct) then the Disclosure Order did not require it to be disclosed. There is no obvious discrepancy within the explanations which have been given to suggest that it is not correct.

56. Schedule document 3 is a document that was said by IPS Law not to fall within the scope of the Disclosure Order because it was a flight arrangement for 5 to 6 December 2018, and the Disclosure Order referred to flights from Cardiff to Nantes on 19 and 21 January 2019. Whilst that response in the defendants' solicitor's letter of 14 June 2024 was not directly quoting from the scope of the order about communications "concerning the transfer or potential transfer of Emiliano Sala from FC Nantes", which is broader than references to particular flights on a particular day, Mr Cuthbert says, on instructions, that this document does not concern the transfer or the potential transfer of Emiliano Sala. If that is so, and it is not obvious from any inconsistency in the explanation that was given that it is not so, it was not disclosable. He says on instructions that it, in fact, concerns a different player. That would put beyond doubt that it was not disclosable.

57. Schedule document 4 is a blank document and, therefore, does not concern anything at all. I see no reason to think, therefore, that the assertion that it is not disclosable requires further justification.

58. Schedule document 5 was not disclosed, according to the Excel spreadsheet, because "Subject not relevant as per Order – not in date range." In their letter of 14 June 2024, the defendants' solicitors said that it was not disclosed because it was "an invoice for services provided before 14 November 2018, which is clearly before the flight dates specified in the Court Order". The claimant says that is not sufficiently explicit in making it clear it is not in relation to flights for Sala's transfer, or not "concerning the transfer or potential transfer" of Sala. But Mr Cuthbert says on instructions, that it does not relate to Sala in any way. That is not inconsistent with what IPS Law said in their letter of 14 June, although it goes beyond it. Therefore, it does not appear to be a disclosable document and the defendants' solicitors did not exercise their judgment wrongly by saying that it was not a disclosable document.

59. Schedule document 6 was not disclosed because, according to the defendants' solicitor's response of 14 June, there was "no mention of Sala's name in the email body". This, however, I do not consider to be a complete answer to the challenge. The point being made in the letter of 5 June from the claimants' solicitors (to which the defendants' solicitors were responding), was that the subject matter of the email was "Can you find us a home for Reece Oxford on loan?" They explained that, according to communications that had been disclosed between David Sullivan and the first defendant, William McKay, there was a discussion about Sala transferring to West Ham in exchange for Reece Oxford and money; and they gave a document reference. They therefore suggest that it might be a relevant and disclosable pursuant to the Disclosure Order. The defendant's response, that Sala's name was not mentioned in the email body, does not deal with the point that this communication could be said to be "concerning the transfer or potential transfer of Emiliano Sala" because it is dealing with a transfer of another player who was being discussed as part of a transfer of Sala to West Ham in exchange for Reece Oxford and money.

60. Mr Cuthbert was not able on instructions to go further than what the defendants' response said on 14 June 2024, nor was he able in the time available to him to look at the document himself, because it was produced by his solicitors for him to review at the very close of the argument. Therefore, it does seem to me that the explanation for not disclosing this document is currently inadequate. That does not mean that the document is disclosable, it just means that another look would be required in order to see whether it is disclosable because the reason already given for not disclosing it is not sufficient.

61. Schedule document 7 was originally not disclosed, according to the Excel spreadsheet, on grounds of legal privilege, but the defendants' solicitors in their letter of 14 June frankly acknowledged that that this was an error and that the real reason for not disclosing it was that it was that it had "nothing to do with the transfer of E. Sala from FC Nantes to Cardiff City Football Club". That means that it was not within the scope of the Disclosure Order. The claimant's argument in relation to this document and subsequent documents is that the defendants' solicitors initially claimed the document was privileged and their later adoption of a different explanation shows a misapplication of the test for privilege in the first place, and also that there has been an insufficiently meticulous and conscientious approach to the disclosure exercise.

62. I reject that criticism. Many thousands of documents, about 6,000 documents, were being reviewed under great pressure of time. The Excel spreadsheet itself is a considerable document. Mistakes are made and one should not assume that the explanation for the initial mis-statement is some kind of incompetence or bad faith, as opposed to the usual human error which is to be expected from anybody, however professional and conscientious they may be. The position that is now maintained before me, on more mature reflection, is that this document is simply not in scope. Nothing that has been said, and nothing known about this document, suggests that that is wrong. Therefore, if one starts from the position, as I do, that an officer of the court making an assertion is presumably doing so in good faith and to the best of their ability, there is nothing to see here.

63. Schedule document 8 was originally not disclosed because it was written in Mandarin. The claimants challenged that. It was then translated and found not to be relevant, and not within the scope of the Disclosure Order. It was not about the transfer or potential transfer of Emiliano Sala from FC Nantes. The claimants object that the translation was not done immediately. I reject that criticism. There was limited time. It was not to be expected that a document in Mandarin would be relevant. There is no suggestion that anybody amongst the defendants or at their solicitors could translate Mandarin. There was a cost and a time factor to obtaining a translation, and I do not think the defendants' solicitors can be criticised for not commissioning one in the seven to nine days they had. When they did get a translation, the document turned out to be irrelevant, or so they say. There is no reason, I think, to go behind their assertion in that respect and certainly nothing which has been shown to me to support doing so.

64. Schedule document 9 was in the Excel spreadsheet originally said not to be disclosed because "Content not Relevant as per Court order – Inter family correspondence Re Companies House / Mercarto sports". The defendants' solicitors challenged this, on the basis that it was an email between Mark McKay and his solicitor, with the subject heading "FW: Cardiff City and Mr McKay". The defendants' solicitors responded on 14 June saying "this

document has not been disclosed for the reason of legal privilege". The claim for legal privilege is challenged, but not on the basis of any evidence. This is an email between the second defendant and his solicitor, so it is a document which has every appearance of being potentially privileged. The fact that, on the initial Excel spreadsheet, a mistake was made about the basis for non-disclosure does not, given the magnitude of the task and the shortness of the time, appear to me to be significant or to suggest incompetence or bad faith, to the extent that the claim now made for legal privilege is undermined in relation to this document.

65. Schedule document 10 is in exactly the same position. It is an email from the second defendant to his solicitor. Originally the objection was not explicitly on the grounds of privilege. However, when the claimants challenged its description as "News letter flowers", the defendants' solicitors' response on 14 June said the document was legally privileged. No basis for challenging that is evident from the material available, and although some speculation about lack of privilege is put forward on the basis of it having been described as "newsletter / flowers", I do not think the speculation was profitable or the point substantial, given the identity of the parties to the communication.

66. Schedule document 11 is an email to the second defendant from a flower merchant, which was initially claimed to be legally privileged. When the privilege claim was challenged, again, it was accepted that the Excel spreadsheet was in error and the point was made, instead, that the document was not disclosable because it was not within the scope of the Disclosure Order. Again, the point is taken that a mistake was initially made. Again, I do not conclude from that mistake and the circumstances of this case that I should on that ground alone order a comprehensive review of all the disclosure by an independent barrister. What is now said about the document is that it is not in scope. No basis has been put forward for questioning that.

67. Schedule document 12 is another document in respect of which legal privilege is claimed. It is an email from a non-lawyer (George Madden) to the first defendant, who is also not a lawyer. The claim to privilege was challenged in correspondence and the defendants replied specifically on 14 June that, although the email was between two parties who are not legally qualified, the contents remain non-disclosable "due to the legal aspect of the content". That is a rather imprecise way of claiming privilege. The circumstances in which privilege can be claimed in relation to communications between two non-lawyers are limited, although they are not non-existent. Therefore, it is possible that it is privileged. Mr Cuthbert says, on instructions, that the email refers to a discussion with a legal advisor, so, in that sense, it documents legal advice. If that is the case, then a claim to privilege is credible. I do not think that I should or need to go behind what is said about that.

68. Schedule document 13 is in exactly the same position. It between two non-lawyers, but it is said that it refers to legal advice which had been given and is, to that extent, therefore privileged.

69. Mr Phillips KC says, in relation to both these documents, the claimants would have to know more before they could say it was or was not privileged. He says that is a reason for having the document looked at by someone else. But my view is that, unless he can show that there is some strong basis for questioning the judgment that has been made that there is privilege, then the matter should rest with the judgment of the officer of the court who has been tasked

to make it, in circumstances where it is quite possible that the document is privileged for the reasons put forward by Mr Cuthbert.

70. Schedule document 14 is within scope of the Disclosure Order in the sense that it is at a relevant date (6 November 2018) and between relevant parties. In the letter of 14 June, the defendants' solicitor said it was not disclosed because it related to "services provided before 6 November 2018, which is clearly not in the date range specified for the flights". I agree that that in itself was not a compelling explanation of it not being within the scope of the Disclosure Order, because it would have been in scope if it was in any way "concerning the transfer or potential transfer of Emiliano Sala from FC Nantes" (to quote the Disclosure Order). However, Mr Cuthbert says, on instructions, that it did not concern the transfer and is not, therefore, in scope.

71. Schedule document 15 is a document over which legal privilege was claimed in the Excel spreadsheet. The defendants' solicitors also said, in their letter of 14 June, that it "relates to a legal matter concerning another professional football player, not E. Sala". The claimant accepts that it does not fall within the scope of the Disclosure Order, but says that the basis for claiming legal privilege is not understood and (as their comment in the Schedule puts it) that it "again demonstrates IPS's misunderstanding of the test for legal privilege". I do not think there is anything in this. It is not within the scope of the Disclosure Order. Therefore, it was not disclosed. Whether or not it could also have been privileged was very much a second-order matter in those circumstances. It does not seem to me that the claimant not having enough information to be satisfied that it was privileged is a sound basis for asserting that it was not privileged, or that the defendants' solicitors are not to be trusted to assess privilege, or that there has been a defective approach, generally, by the defendants' solicitors to the disclosure exercise.

72. Schedule document 16 was described in the Excel spreadsheet as "Subject not relevant as per Order – Political Newsletter". The claimants' solicitors queried that, saying that it was, in fact, an email from the second defendant to the chairman of Cardiff City Football Club in relation to the footballer Adrian Tameze (the subject line being "Tameze"). The defendants' solicitors in their letter of 14 June confirmed that, but said it was, nevertheless, about another professional football player. Again, the only point that is taken now is that the original explanation was wrong, and shows a lax approach to the disclosure exercise. I am not persuaded that the correspondence on this document creates a level of concern or uncertainty justifying a comprehensive review by an independent barrister of all the disclosures which have and have not been made.

73. Schedule document 17 is a document not disclosed, according to the Excel spreadsheet, because "Content not relevant per Order and legal privilege". The claimants' solicitor challenged the claim for legal privilege, pointing out that it is an email from the second defendant to NatWest. The claimants' solicitors on 14 June responded, saying "The contents of this email relate to a court matter, for this reason it has been deemed non-disclosable due to legal privilege". The fact that a communication from a non-lawyer to an outside party, such as a bank, relates to a court matter, does not mean that it attracts legal privilege. Therefore, I think this claim to privilege, having been challenged, did require a fuller explanation than the one that has been given. That does not mean that it was not privileged, but it does mean that the assertion of privilege is not satisfactory at present. Mr Cuthbert himself, having taken instructions, said that he needed to have a closer look at this document

before making any robust assertion of privilege. It is to his credit, and to the credit of his instructing solicitors, that they have not maintained a blanket objection to challenges.

74. Schedule document 18 is a document not disclosed, according to the Excel spreadsheet, because "Content not relevant as per Order – another player". The claimants' solicitors suspected that explanation was not correct, because it was an email from the second defendant to NatWest and they said in correspondence that "it is unlikely that Mr McKay was emailing his company's bank regarding a football player." The defendants' solicitors' reply on 14 June said that the document "relates to a HMRC payment, a subject which is not in any way disclosable under the Court Order". It is not now argued before me that this document is within the scope of the Disclosure Order, but it is suggested that "it shows IPS withheld the document for the wrong reason and shows their lax approach to the exercise." However, the two explanations are not inconsistent with each other. I read them as meaning that the document is about an HMRC payment in relation to another player, and that it is "not relevant as per Order"; in other words, it was not (in the words of the Disclosure Order) "concerning the transfer or potential transfer of Emiliano Sala from FC Nantes".

Conclusion

75. The upshot of that is that there are only three documents in respect of which there may remain some questions to be answered from this selection of 18, and those are Schedule documents 1, 6, and 17.

76. I do think that there is a limit to the extent to which a firm of solicitors, which is presumably charging fees to its clients in the process, should be required to respond in detail to specific questions from the other side, in relation to multiple documents in a disclosure exercise, consisting of many thousands of documents requiring review. Even if some of the responses which are provided are less than perfect, this is not necessarily a sinister circumstance from which an inference should be drawn that they do not know what they are doing, or (even worse) that they are deliberately failing to do what they ought to do. The defendants' solicitors are accountable to the court, of which they are officers, and to their professional consciences. We operate on the basis that the legal profession is an ethical profession. The defendants' solicitors are not required positively to prove to the claimants' satisfaction that they have complied with their duties. The default position is that they are trusted and assumed to have done so. It is clear from the iterations of the claimants' challenges, that the defendants' solicitors have not done nothing. Nor have they disclosed nothing. Nor have they refused to engage with specific challenges and criticisms from the claimants.

77. The number of documents in respect of which there is an unresolved query is down to three, and that is from the shortlist of 18, which the claimants' solicitors and counsel selected as their best points for me to consider in detail. Therefore, 15 of the 18 challenged documents were, so far as I can see, and as I find, not disclosable, for the reasons which have been given to me.

78. I do accept that there are questions in relation to three documents, but I do not think that that level of imperfection makes it appropriate in the interests of justice, or a proportionate response, that I should order the appointment of an independent barrister to review the entirety of the documents provided by the expert, to see whether they are disclosable under the terms of the Disclosure Order. That would require the barrister to duplicate a review of

nearly 6,000 documents. That is out of all proportion to the level of imperfection which, taken at its highest, is suggested by the points made to me today and, as I have said, it is perfectly possible that when the three documents which I have whittled the case down to are looked at again (and I am personally entitled to look at them if necessary), it will turn out that they were not disclosable after all.

79. It is true that the claimant is agreeing to pay the costs, but the claimant cannot buy itself into an order which I do not think is justified on first principles.

80. I accept that it is a relatively unusual feature of this case that the duty of disclosure is derived from the settlement, which means that there will be no trial, and the claimant will not benefit from adverse inferences in respect of any deficiency. Instead, the disclosure is part of their substantive rights derived from the settlement; and what they do not get, they will never have.

81. However, the important question is whether they have not, in fact, got the disclosure they bargained for. The disclosure they bargained for was the result of an accelerated process to be reviewed on a timescale of only seven days, which is a very short time in which to review nearly 6,000 documents.

82. It is suggested that the level of intrusion is so limited as to weigh heavily on the scale against refusing relief of this sort. However, it is my judgment (and I am supported by the authorities that I have cited) that cutting the defendants and their solicitors out of the process of looking at documents and turning them over to their opponents is intrusive by its very nature, and the order sought does not allow either the court or the defendants' solicitors or other legal advisors to comment on what the independent barrister has done.

83. It is also relevant to run through the list, although not an exhaustive list, of relevant factors suggested by Foxton J in the *Terre Neuve* case. I have accepted that disclosure has not been sought for the purpose of the court's adjudicative jurisdiction. The documents may be significant to the claimant, but there may be alternative means of addressing the issues to which the documents are said to relate. This is a case in which the defendant is engaging. It is not a case in which there has been no review and no engagement. I have mentioned the degree of intrusion, which I do not regard as negligible if I were to grant the order. I do not regard the case that the defendants' solicitors have failed properly to conduct the disclosure exercise as compelling. The queries that are outstanding do not suggest to me a widespread or significant failure. The cost of the exercise is being borne by the claimant, but that can only go so far.

84. It seems to me that a more proportionate response to such doubts as may be outstanding is to order the defendants' solicitors specifically to review each of the 18 documents in the Schedule, in order to satisfy themselves afresh whether or not they are within the scope of the Disclosure Order. This is not a confirmation exercise; they should not approach it from the point of view of saying they have made their initial judgment and they are just checking it. They should look at these 18 documents afresh, now that the arguments have been articulated more clearly, and decide whether the documents are disclosable or not.

85. Insofar as claims to privilege are concerned, they should carefully consider and, so far as necessary, take advice about the legal test upon which they rely when claiming that privilege; and I say that particularly in relation to document 17.

86. If they find that any of the 18 documents is disclosable, they should, of course, disclose it, but if, in making that decision, it seems to them, acting in good conscience, and as officers of the court, that some of their previous judgments conducted at speed may also require revisiting, then they should not hesitate to do that as well. I will direct that they should serve a witness statement, at a date which I will discuss with counsel, confirming that they have performed this exercise and what the outcome is.

87. The starting assumption must be that a respectable firm of solicitors acting explicitly in accordance with their duties to the court (which is a point spelled out in the Delivery Up Order) is complying with and discharging those duties with professional competence, and I should be slow to go behind that. That assumption has not been displaced by the evidence put before me or by the submissions made to me upon that evidence.

88. I do not, therefore, make the order sought. I do, for the reassurance of the claimant and the court, direct the review of the 18 documents and the filing of the witness statements to which I have referred. But, in substance, I dismiss the application.

Transcript of a recording by Acolad UK Ltd
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Acolad UK Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof