Neutral Citation Number: [2022] EWHC 2710 (Ch)

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

No. PT-2021-000894

Rolls Building
Fetter Lane
London EC4A 2NL

Monday, 17 October 2022

Before:

DEPUTY MASTER BRIGHTWELL

B E T W E E N :

ADJOIN LIMITED — Claimant

- and -

FORTYTWO HOUSE S.A.R.L. — Defendant

Philip Sissons (instructed by Charles Russell Speechlys LLP) appeared on behalf of the Claimant.

John McGhee KC and Harriet Holmes (instructed by Gowling WLG (UK) LLP) appeared on behalf of the Defendant.

J U D G M E N T

DEPUTY MASTER BRIGHTWELL:

1 On 26 August 2022 I heard an application by the defendant to amend its defence in this dispute concerning the claimant's alleged rights of light in relation to a proposed development at 75-77 Worship Street, London. The defendant wishes to allege that companies or other persons connected with the claimant or its beneficial owners have a history of releasing rights of light for financial compensation, and that this is relevant to the question whether damages would be an adequate remedy if an injunction would otherwise be granted. I gave a judgment on that date indicating that in principle the issue raised by the proposed amendment appeared relevant, but expressing the view that it was insufficiently particularised.

2 At the conclusion of that hearing I directed the defendant to file and serve an amended draft defence for consideration by the claimant and then gave a direction for the claimant to file objections (if any) to the proposed amendments, roughly three weeks thereafter, so that the court could rule, if required, on the dispute as to the extent to which the defendant should be permitted to amend.

3 In the events that happened, however, the claimant issued an application dated 30 September 2022, being the date on which the parties had ultimately agreed the claimant's objections should be filed and served, to stay the proceedings. Essentially, the grounds relied on were that the defendant's then solicitors, Bryan Cave Leighton Paisner (to which I shall refer as BCLP), had previously acted for members of the Bard family and some of the related entities, being companies which are, or at least arguably are, connected with the claimant or its beneficial owners in such a way as to be relevant to the issue which the defendant wishes to introduce by way of amendment. The application notice said that further details would be

provided in due course but mentioned three companies, Shoreditch Stage 1 Limited, Shoreditch Stage 2 Limited and Sola 7 Limited, as companies for which BCLP had previously acted in relation to the release of rights of light. It has subsequently been stated in evidence on behalf of the claimant that BCLP in fact continues to act for Sola 7 Limited.

4 In response to the application, the defendant filed a number of witness statements. On 30 September 2022 was the first witness statement of Rachel Kerr, a partner of Trowers & Hamlins LLP. Trowers are instructed by AmTrust International Underwriters, an insurer for the defendant with a material interest in the proceedings. Ms Kerr sets out the defendant's case as to the way in which the issue arose. She says that at the outset the defendant was interested, by reason of this being an issue that arises in other cases, in whether related parties may have released rights of light for financial settlements as a claim for an injunction often masks a true desire for compensation. She also says that the disclosure in the claimant's reply to the defence of a deed of release of light entered into by the claimant dated 7 May 2015 led to instructions to investigate whether the claimant may have released rights of light enjoyed by other properties it owned or had previously owned in London. Ms Kerr ends her statement by saying:

> "To the best of my knowledge and belief, no privileged or confidential information has been provided by the Defendant's solicitors, BCLP."

5 The claimant relies on a witness statement of the same date of Hugh Sayer, director of the claimant company. He sets out the concerns the claimant has about BCLP's role, particularly in paragraphs 7 and 8 of that witness statement which I have considered in detail and which run to two full pages. In particular, the allegation is made that a partner of BCLP, Chris de Pury, its Global Head of Real Estate, had a material role in providing advice

to allegedly related entities in relation to strategy for matters concerning rights of light. There was also reference to other fee earners in positions expanded on further at paragraph 13 of that witness statement, where reference is made to Akhil Markanday, who has been advising the defendant in these proceedings, and also to Rashpal Soomal (now formerly of BCLP), who is mentioned particularly, I am told, because she was present at an unsuccessful mediation which took place earlier this year.

6 There is then a second witness statement from Ms Kerr dated 4 October 2022, in response to that of Mr Sayer. She refers to what Mr Sayer said at paragraph 11 of his witness statement, concerning the point BCLP had made that the relevant information was in the public domain, and which he had disputed. In response, Ms Kerr says at paragraph 9:

> "Mr Sayer's statement that the reference to relationships between individual members of the Bard family is based on inference and speculation and that it is likely to have been derived from BCLP's knowledge is wholly incorrect. Details of the family relationships were readily available by using Google."

She goes on to describe how relevant searches were made.

7 I would note that BCLP have repeatedly stated, and I was taken to various references by Mr McGhee KC who appears today on behalf of the defendant, that no confidential information has been used by the defendant, having been obtained from BCLP in breach of confidence. Nonetheless, by a letter dated 4 October 2022, BCLP said as follows:

> "As you are aware, Mishcon de Reya LLP have raised allegations in relation to the use/misuse of confidential information belonging to its client R Holdings Limited and 'connected parties'. We entirely reject any suggestion that any client confidential information has been misused.
>
> To avoid these allegations being used for any collateral purpose and thereby creating unwarranted distraction and prejudicial delay in the Proceedings, our client has taken the decision to instruct other solicitors to act for it. We will come off the record as soon as these other solicitors are instructed which we anticipate will be within the next week."

On 10 October 2022, Gowling WLG came on the record acting for the defendant.

8 The claimant, represented by Mr Sissons today as it was at the last hearing, accepts what Ms Kerr says in her statement. That is clear from the second witness statement of Hope Barton, who is a solicitor acting for the claimant. But, Mr Sissons says, there remains a concern that confidential information has been misused. He relies, in particular, on the positive duty of a solicitor in accordance with paragraph 6.4 of the Solicitors Code of Conduct to make a client aware of all information material to the matter of which he or she has knowledge, unless a stated exception applies.

9 In light of the repeated denials that there had been any misuse of information and the explanation as to the way in which the enquiries had been undertaken by Trowers on behalf of the defendant's insurers, the claimant's final position appears to be that there may well have been some inadvertent sharing of information. Particular reference was made to the mediation at which a fee earner was present who had also acted for the related entities in

relation to rights of light matters and also to the timing of the enquiries begun by the insurers. A flurry of enquiries appears to have begun on 4 March 2022, which I am told was two days after the failed mediation.

10 The claimant relies also on a reference in a witness statement which I considered at the last hearing, made by Edward Gardner, one of the solicitors at BCLP, about 'anecdotes' in the rights of light field.

11 Mr Sissons asked for further time for the claimants either to carry out further investigations or to wait for BCLP, or others, to provide answers and, perhaps in reply to Mr McGhee's submissions, he pointed out that third parties had begun to correspond with BCLP in relation to these matters. He submitted that the purpose of the stay was to investigate but with three possible ends in sight. First, he said that one of the former clients of BCLP might take action to restrain the use of confidential information. Secondly, he said that the court would have a discretion as to whether or not to admit relevant evidence, which would be better exercised once investigations had been carried out. But, thirdly, and perhaps most relevantly for present purposes, he said these investigations might be highly relevant to the determination of the defendant's application for permission to amend the defence. He submitted that there is a general discretion whether or not to allow amendments and the court might decline to allow the amendments if it transpired that the defendant, or its insurers, had used information improperly obtained to obtain information, even if that information was on publicly available registers. I should also point out that he makes clear that the claimant has not yet had an opportunity to verify that all of the information adverted to in the amended draft defence is, in fact, publicly available.

12 Mr Sissons submitted to me that the appropriate test, and the test that I should apply by analogy, is the *American Cyanamid* test; effectively to ask whether there is a serious question to be tried and then apply the balance of convenience. He submitted that the court is not in a position to determine whether the claimant's concerns are well founded at this point.

13 I was not taken to any authority suggesting that the *American Cyanamid* test is the appropriate test to apply when exercising a general case management power, such as the power to grant a stay and, given the court's wide discretion when exercising such powers, I do not consider that it is the correct test, not least as the question of the adequacy of damages does not arise. I do accept, however, that the question of prejudice to both sides is a relevant consideration once the basis for a stay has been established. It is the claimant's position that there is no evidence of any prejudice to the defendant because no evidence has been put in explaining what that prejudice would be.

14 There was some debate about what the prejudice to the claimant will be if the application for a stay is denied. Mr Sissons did accept that merely disclosing the objections to the amended draft defence, which the evidence suggests were in a state of advanced preparation with a view to their being filed and served in late September. The prejudice to the claimant, he submits, will come from its inability to rely on the fruits of any further enquiries or the fruits of anything that emerges from the enquiries made by third parties during the period of any stay, when it comes to consider the application to amend the defence.

15 It is appropriate now to turn to the five points of objection which Mr McGhee raises in response to the application. First, he submits that the claimant has no standing to raise the point because the allegation is not that BCLP acted for the claimant in any rights of light

matter but that other entities did so; those other entities, certainly to date, have not taken any action.

16 Secondly, he contends that there has been a delay in pursuing this matter, it being apparent during 2021 that the defendant was looking into the question whether entities connected to the claimant had released rights of light, queries having been made to that effect and Charles Russell Speechlys acting not only for the claimant but also for Sola 7 Ltd, and also for a company called Sola 9 Ltd, during 2021. He submits that those acting for Sola 7 Ltd were well aware, or can be taken to have had knowledge, of the correspondence and they will also have had knowledge that BCLP had previously acted for them.

17 Thirdly, Mr McGhee submits that the evidence shows that no confidential information has, in fact, been inappropriately used.

18 Fourthly, he submits that, as a matter of principle, even if it has, the court would not refuse to make the amendments on that ground.

19 Finally, he submits that, even if the application to amend was refused, the defendant would be entitled to produce the documents referred to in the draft amendments on disclosure and to cross-examine on them in any event.

20 It seems to me that the key argument is the fourth one raised by Mr McGhee, that is whether in principle, if a stay is granted and if it discloses, or leads to the disclosure of evidence beyond that presently available, that information has been passed to the defendant in breach of confidence, is there any real likelihood that the court might, on account of that (i.e. and

not for other reasons) refuse to permit the defendant to amend its defence in the form which has been produced?

21 The parties' submissions focused on the test for the admission of evidence, rather than the case law concerning the power of the court to strike out (or, by extension, to refuse to permit an amendment) where there has been some form of misconduct. I can see why this is so and I can see the connection between the two lines of authority. The defendant relies on *Ras Al Khaimah Investment Authority v Azima* [2021] EWCA Civ 349, a joint judgment of the court, being Lewison, Asplin and Males LJJ. One of the points considered there was whether evidence should be excluded where the existence of the documents had come to light as a result of the unlawful hacking of a party's computer. At [41]-[42], the court said this:

> "41. Cases of evidence procured by torture aside, the general rule of English law is that evidence is admissible if it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained. Relevant evidence is admissible even if it has been stolen: *Kuruma v R* [1955] AC 197. In *Helliwell v Piggott-Sims* [1980] FSR 356 Lord Denning MR said:
>
> > "I know that in criminal cases the judge may have a discretion. That is shown by *Kuruma v the Queen*. But so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning. I do not say that it was unlawfully obtained. It was obtained under an Anton Piller order which was not appealed against. But, even if it was unlawfully obtained, nevertheless the judge is right to admit it in evidence and to go on with the case as he proposes to do."

42. We add to that the pithy statement by Millett LJ in *Bell Cablemedia Plc v Simmons* [2002] FSR 34 at [42]:

> "The common law has always set its face against preventing a party to civil proceedings from adducing admissible evidence even where it has been improperly obtained: *Calcraft v Guest* [1898] 1 QB 759. Equity has never sought to intervene in this context. It has never sought to mitigate the rule in *Calcraft v Guest*, but on the contrary has applied it to proceedings in its own courts. It is significant that in *Ashburton v Pape* the equitable jurisdiction was firmly based on confidence and not upon any wider principle of fair play in litigation. But in any case the defendant's mistake, as I have already pointed out, is not the kind of mistake in respect of which a court of equity would ever grant relief. It will not protect a dishonest man from the consequences of mistakenly disclosing evidence of his dishonesty."

The court then went on to consider CPR Part 32.1, to which I was referred.

22 Mr Sissons referred me the notes in the *White Book* to that rule, with reference to the case of *Mustard v Flower* [2019] EWHC 2623 (QB), where the admissibility of recordings of medical examinations made covertly was in issue. Master Davison said the following, at [19]:

> "… Mr Audland QC did not contend that the manner of obtaining the recordings should, of itself, lead to their exclusion. He accepted the proposition that evidence that had been unlawfully or improperly obtained

> might still be admissible. What was required was that the court should consider the means employed to obtain the evidence together with its relevance and probative value and the effect that admitting or not admitting it would have on the fairness of the litigation process and the trial. The task of the court was to balance these factors together and, having regard to the Overriding Objective, arrive at a judgment whether to admit or exclude. To put it slightly differently, the issue was whether the public policy interest in excluding evidence improperly obtained was trumped by the important (but narrower) objective of achieving justice in the particular case. This approach, from which Mr Grant did not dissent, seems to me to be fully in line with the authorities to which I was referred and which I need not set out. I do, however, note that in the majority of such cases the balance has been struck in favour of admitting the evidence."

23 To the extent that there is a difference in approach between the two cases, I prefer, as I must, the approach of the Court of Appeal in *Azima* but it seems to me the decision in *Mustard v Flower* can be reconciled with the approach in *Azima* when one considers the case law concerning the ability of the court to strike out.

24 I consider that the approach of the authorities to the admissibility of evidence where there has been misconduct mirrors the approach when the court considers whether to strike a claim out in similar circumstances. Mr McGhee referred me to the decision of the Court of Appeal in *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167, where an unfair prejudice petition was pursued in circumstances where the petitioner admitted that he had relied on forged documents. Chadwick LJ, at [54], expressed the approach in these terms:

"I adopt, as a general principle, the observations of Millett J in *Logicrose Ltd v Southend United Football Club Ltd* (1988) Times, 5 March, that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules, even if such disobedience amounts to contempt for or defiance of the court, if that object is ultimately secured, by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled - indeed, I would hold bound - to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."

25 The issue for this court, either now or after a stay, is whether the defendant should be allowed to amend to run a new argument; in answering that question, the court can ask whether if that argument was already pleaded, would it be liable to be struck out. When one considers the reference in *Mustard v Flower* to the fairness of the litigation process and views it against the judgment of the Court of Appeal in the *Arrow Nominees* case, the question for the court when determining whether to strike out a claim -- and, by extension, that must apply also to the power to strike out a part of a claim -- appears to be whether the litigant's conduct has been such that it has rendered further proceedings unsatisfactory and has prevented the court from doing justice. In other words, has the party's conduct been such that it is no longer possible to have a fair trial? That is also consistent with the decision to which I referred the parties, *Masood v Zahoor*, reported as a Practice Note at [2010] 1 WLR 746, also a decision of the Court of Appeal, where at [71] Mummery LJ summarised the *Arrow Nominees* case by saying:

> "… this decision is authority for the proposition that, where a claimant is guilty of misconduct in relation to proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute his claim, then the claim may be struck out for that reason."

26 It is relevant to consider the stringency of that test and the approach of the Court of Appeal in *Azima*, that evidence is admissible if it is relevant and that torture aside the court is not concerned with how the evidence has been obtained, together with the fact that the claimant did not submit that if it transpires that there is some connection between the facts relied on by the defendant and some low-level inadvertent leakage of information from BCLP, that it would no longer be possible to have a fair trial or for the court to do justice between the parties. When taking those matters into account, it seems to me on the facts of this case and

not least where BCLP have denied any disclosure of confidential information and where that firm has ceased to act, that it is unrealistic to suppose that any facts may emerge which will lead the court to refuse to permit the amendments because of the issues raised in the present application.

27 In those circumstances, and based on the fourth objection raised by Mr McGhee, it seems to me that there is no practical utility in granting a stay of these proceedings such that the claimant cannot be prejudiced by its refusal and, for that reason, the application for a stay will be dismissed.

28 Accordingly, I will comment only briefly on the other objections raised by Mr McGhee. In a sense, the objection about standing falls away. I would not have decided the application on that ground. If the facts had been such that there was a realistic prospect of a stay leading to the revelation of information which might justify a refusal to grant the amendments, I do not consider it automatically follows that the person who would have to have been wronged would be the claimant. There must be circumstances where a wrong committed on a third party would lead the court not to permit the wrongdoer to continue a claim.

29 Likewise, it is no part of my decision that the stay is refused because there has been a delay on the part of the claimant. The claimant only became aware of the full list of entities relied on by the defendant on 22 August 2022. While I accept that the issue of related entities was raised sooner, it is not necessarily incumbent upon a party to take action in relation to a breach of confidence until it is aware of an actual potential breach. The possibility of information having passed from BCLP to the defendant in breach of confidence could, in

my view, quite reasonably not have been considered by the claimant until relatively recently.

30 Furthermore, there was some real point to the application when it was first issued. If an application for an injunction restraining BCLP from acting for the defendant was to be pursued, a stay may well have been appropriate given that other steps needed to be taken in the proceedings in the short term. On the authorities concerning such injunctions, relied on by Mr Sissons in his skeleton argument, there must be a real possibility that such relief would have been granted, whether or not there had been any breach of confidence. This consideration fell away once BCLP had ceased to act for the defendant but the evidence does not suggest that the claimant had sat on the issue, tactically or otherwise, before making this application.

31 As to the third ground of objection, that no confidential information has in fact been used by the defendant, that is largely subsumed within the fourth ground. But the evidence, as I have outlined, suggests that it was the enquiries carried out by Trowers on the instructions of the insurers that led to the facts known to the defendant coming to the defendant's knowledge.

32 As to the final objection, that the defendant would be able to produce the documents on disclosure and cross-examine in any event, Mr Sissons' response here was to say that if the amendment was allowed further documents may emerge, possibly on disclosure, so that the claimant would be prejudiced by that eventuality. I consider that point to be adequately addressed by the reasons I have given for holding that there is no real prospect that the stay itself would lead to circumstances changing such that the amendment would be refused.

33 For those reasons, I will dismiss the application for a stay.

_____

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript is subject to Judge's approval