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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

No. LM-2024-000036

**[2024] EWHC 817 (Comm)**

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 20 March 2024

Before:

HIS HONOUR JUDGE PELLING KC
(Sitting as a Judge of the High Court)

B E T W E E N :

WH HOLDING LIMITED — Claimant

- and -

E20 STADIUM LLP — Defendant

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MR P DOWNES KC (instructed by Gateley Legal) appeared on behalf of the Claimant.

THE DEFENDANT did not appear and was not represented.

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**J U D G M E N T**

**(Via Microsoft Teams)**

JUDGE PELLING:

1 This is an application by the claimant for an order pursuant to CPR r.5.4C(4)(d) that non-parties to these proceedings may not obtain a copy of any statement of case that is, or may hereafter be, on the court file in these proceedings without further order, to be sought only by application on notice to the parties. The defendant did not appear and was not represented at the hearing of the application, but its solicitors had said in email correspondence that it was neutral in relation to the application.

2 CPR Part 5 is concerned with court documents. CPR r.5.4C is concerned with the supply of documents to a non-party from court records. The general rule is that set out in CPR r.5.4C(1) and is that a non-party may obtain from court records a copy of:

> "a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it."

3 By CPR r.5.4C(3), a non-party may obtain a copy of a statement of case where there is only one defendant, where that defendant has filed an acknowledgement of service or a defence, but not before. These proceedings are Part 8 proceedings and it is not in dispute that the defendant has filed and served an acknowledgement of service.

4 By CPR r.5.4C(4):

> "The court may, on the application of a party or of any person identified in a statement of case –
>
> (a) order that a non-party may not obtain a copy of a statement of case under paragraph (1);
> (b) restrict the persons or classes of persons who may obtain a copy of a statement of case;
> (c) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or
> (d) make such other order as it thinks fit."

5 If a court makes one of these orders, then by CPR r.5.4C(6):

> "Where the court makes an order under paragraph (4), a non-party who wishes to obtain a copy of the statement of case, or to obtain an unedited copy of the statement of case, may apply on notice to the party or person identified in the statement of case who requested the order, for permission."

6 By CPR r.2.3(1) "statement of case" means a claim form, particulars of claim, a defence, counterclaim or reply, and any further information given in relation to such a document either voluntarily or pursuant to CPR Part 18. These proceedings are Part 8 proceedings, as I have said. As such, there is a Part 8 claim form, a copy of which is in evidence. There are no other statements of case as defined, although there is a document filed by the defendant, described on its face as the defendant's "*Response to details of Part 8 claim dated 18 December 2023*". The document is not a statement of case as defined and, thus, cannot be obtained by a non-party otherwise than by an order of the court giving that party permission

pursuant to CPR r.5.4C(2). Part 8 makes express provision for a defendant to Part 8 proceedings to file written evidence in answer. Any such evidence is not a statement of case and so can be obtained by a non-party only by applying for permission under CPR r.5.4C(2). Any written evidence filed in support of the claim, or in reply to evidence filed by the defendant, is likewise not a statement of case and can be obtained by a non-party only by obtaining permission under CPR r.5.4C(2). As things stand, therefore, the only document that could be obtained as of right by a non-party is a copy of the claim form.

7 The claim form has with it a separate document entitled "*Details of claim pursuant to Part 8*". This document is not referred to on the face of the Part 8 claim form. However, CPR r.8.2(b) requires a Part 8 claim form to set out the questions the claimant wishes the court to decide or the remedies that the claimant is seeking and the legal basis for the claim to that remedy. It follows that unless the document is treated as being part of the claim form, the claim form would be defective. Presumably for that reason, Mr Downes KC does not suggest that the details of claim document should be treated as falling within the proviso to CPR r.5.4C(1) in respect of documents filed with or attached to the statement of case or which are intended to be served with the claim form. This issue is important because nothing appears on the face of the claim form that could justify the order sought, and the material which the claimant relies on as justifying the order sought all appears in the details of claim document.

8 Against that background, it is first necessary to identify on what basis a court might make an order in the terms set out in CPR r.5.4C(4). As Mr Downes submitted, there is no guidance in the rule itself, nor has the issue been considered in any reported authority in this area. In my judgment, CPR r.5.4C(1) establishes a very clear general rule which, as Mr Downes correctly accepted, is an expression of the open justice principle, as to which see R (Guardian News and Media Limited) v City of Westminster Magistrates' Court [2012] EWCA Civ 420, [2013] QB 618, per Toulson LJ (as he then was) at [74]. As Toulson LJ observed at [79], the purpose of the open justice principle includes facilitating the public to understand and scrutinise the justice system. One way of facilitating that is to permit open access to the statements of cases of litigants using the courts.

9 Mr Downes submitted, however, that the open justice system was not engaged in a case of this sort since there had been no judicial engagement with this claim to date. Leaving to one side the point that the claimant's application has, by definition, resulted in judicial engagement, in my judgment this point is without substance. No question of engagement arises because the jurisdictional trigger that engages CPR r.5.4C(1) is the filing of an acknowledgement of service by the defendant. Prior to that, no relevant right arises. Once that step occurred, the general rule, set out in CPR r.5.4C(1) applies. There is nothing express or implied in its formulation that justifies the sort of fetter for which Mr Downes contends. If such a fetter applied it would, potentially at least, result in obviously arbitrary and irrational outcomes which would apparently require a court to be more willing to restrain the access that the general rule requires depending on whether an application of any sort had been listed or heard or adjudicated upon. Mr Downes submitted that I should reach the opposite conclusion, essentially for the reasons set out in the decision of the First-tier Tribunal of the Tax Chamber in Cider of Sweden Limited v HMRC [2022] UKFTT 76 (TC). I am not able to accept that submission. That case proceeded on the basis that the "*… FTT had an inherent jurisdiction to allow access to documents equivalent to those referred to in CPR r.5.4C(1) …*". Thus, the Tribunal was concerned with a different question to that which I am concerned with because CPR r.5.4C(1) has direct effect in all civil courts to which the CPR applies. In my judgment the general rule is mandatory in its terms, subject to the powers of the court to restrict its applicability, which will exercised, however, only on

application by a party to the relevant claim. To approach the issue in any other way would be to make the mandatory machinery inoperable because it is administrative in nature and is operated generally by HMCTS officials without any judicial oversight or involvement.

10 Given the absence of any argument from a party opposing the order sought, I express my conclusions concerning the basis on which a court might make an order in the terms set out in CPR r.5.4C(4) with a degree of hesitation. However, in my judgment, the following represents the probably correct approach to an application of this sort.

11 First, as I have said, CPR r.5.4C(1) establishes a very clear default principle. Secondly, if that very clear general default principle is to be departed from, it will require clear justification. Thirdly, the circumstances that may justify a departure are acutely fact-sensitive and are not closed but are likely to include and probably most likely to be established by reference to one or more of the matters set out in CPR r.39.2(3)(a)-(g). Fourthly, given the underlying reasons for the general rule, it is likely to be departed from only if and to the extent it is shown to be necessary to do so in order to both secure the proper administration of justice and/or to protect the interests of the party whose application is being considered. Finally, even if in principle it is shown that some intervention is necessary, any such intervention must, by definition, be no more than is proportionate; that is, the minimum interference with the general rule necessary to protect the interests of the applicant. Subject to these qualifications, I accept that in principle if a statement of case contains material shown to be confidential or which, by its nature, is confidential and it is shown, or can be readily inferred, that publicity would damage that confidentiality then a court might in principle consider making one of the orders identified in CPR r.5.4C(4).

12 I return to the facts of this case. Mr Downes submitted that there were four reasons why an order in the terms of CPR r.5.4C(4)(a) ought to be made. They each focused on provisions within three agreements between the parties that either contain commercially confidential information and/or were subject to provisions by which the parties agreed that the terms and/or the subject matter of the agreements would be treated as confidential. I do not intend to be any more specific about the issues of confidentiality that are said to arise because this judgment is being delivered in open court. It is not necessary for me to be any more specific because I am only concerned about what appears in the details of claim document. There is much in that document that cannot sensibly be regarded as confidential or so confidential that its disclosure would so compromise the administration of justice or so compromise the private interests of either the claimant or any of the individuals referred to in the document as to make it necessary to make the order sought or proportionate to make any of the other orders available. The most that can be said is that the monetary sums referred to in paras.6, 7, 8, 12 and 14(a) of the details of claim document constitute confidential or sensitive private financial information relating to the individuals identified in those paragraphs.

13 In my judgment, the appropriate balance between the interests of the individuals identified in those paragraphs in keeping their financial information confidential and the interests of the public in the maintenance of open justice is to be struck by redacting the monetary sums, but only those figures, set out in each of the paragraphs I have mentioned. That is an order that I have jurisdiction to make, applying CPR r.5.4C(4)(c) and/or (d). It keeps interference with the general rule to the minimum necessary to protect the truly confidential information that arises, namely the monetary sums identified in each of the paragraphs to which I have referred and the confidentiality of which will be damaged by publication Such an order is proportionate in the result and also because it will be open to any non-party to apply for access to the unredacted document on notice to the claimant under CPR r.5.4C(6).

14 In those circumstances, I direct that pursuant to CPR r.5.4C(4)(c) and/or (d), the financial amounts referred to in each of paras.6, 7, 8, 12 and 14(a) of the details of claim document are to be redacted from any copy of that document supplied from the records of the court to any non-party.

15 I note that in the draft order supplied in support of the application it was suggested that the costs of this application should be costs in the case. Provisionally, I do not see why the costs of this exercise should be costs in the case given the defendant was neutral as to the application, will gain no benefit from this order and has not sought any similar relief. As I have said, the response document is not a statement of case so no such order is required or, indeed, I think, could even be given. However, this conclusion is provisional since I have not heard submissions as yet on the issue concerning costs. Subject to that point, I am prepared to make an order in the limited terms I have identified.

**LATER**

16 This is an application for permission to appeal. The test I have to apply is whether there is a real prospect of the Court of Appeal coming to a different conclusion from that which I have arrived at.

17 In my judgment, permission should be refused for the following reasons. First, this is an application which has been made in circumstances where there is not available a countervailing case advanced on behalf of a party opposing the order. That makes an appeal in this case a particularly unattractive one since the same problems will face the Court of Appeal that have faced me, namely that there will be no opposing views expressed.

18 Secondly, and aside from that, in my judgment, the grounds which are identified, individually or collectively, do not justify the giving of permission to appeal, at any rate by me. First, it is said the area is free from authority. That is so, although, in my judgment, the conclusions that I have reached are those which are consistent with authority in other areas and derive from the applicability of the open justice principle that was conceded in the course of the argument t before me. The contrary is not realistically arguable. Secondly, it is said I have differed from the approach adopted by the First-tier Tribunal in the *Cider of Sweden* authority to which I referred in the judgment. That is unarguable because that case proceeded by reference to a different procedural regime and was plainly distinguishable for the reasons I identified. In any event that decision was not binding on me and the comity principle would have only arguably arisen if the decision relied on had been that of the Upper Tribunal as opposed to the First Tier Tribunal. Thirdly, it is said that there will be a benefit in the appellate court "*setting the position straight*", as it was put by Mr Downes. So far as that is concerned, that requires me to be satisfied that there is at least a realistic prospect that the Court of Appeal would disagree on the issues I have decided and, in my judgment, there is no such prospect.

19 Next, it was argued that the open justice principle and the role it has to play in this area would be a relevant consideration. In my judgment, that is not realistically arguable, it having been conceded that CPR r.5.4C(1), at least, is an attempt by the rule committee to carry into effect the open justice principle. It is generally not open to a party on appeal to argue a point that as conceded in the court below.

20 It is said that the threshold test I have applied is too high but, as I have explained in the judgment, r.(1) within CPR r.5.4C is a general principle which it was conceded was established by reference to the open justice principle. It follows that it is only appropriate to

depart from what is otherwise a mandatory provision where it can be demonstrated that there is a plain necessity to do so and, even then, that any order made should be proportionate in its effect. The very fact that there is a menu of different types of orders available, as set out expressly in CPR r.5.4C(4), indicates the need to approach these questions restrictively by reference to principles such as necessity and proportionality. The contrary is not realistically arguable and there is no real prospect of a different outcome on appeal.

21 Finally, it is suggested that expert determination in some way alters the way in which this issue should be approached. I do not accept that that is so. There are primary statutory provisions, which relate to arbitration. They do not apply to expert determination and, in any event, the question which arises is whether on the face of the statement of case there are issues of such confidential moment that require protection. So far as that is concerned, the only material which is remotely confidential are the financial sums identified in each of the paragraphs that I have referred to. If those are redacted then all that is left are references to the existence of agreements which take nobody further, to the numbers of shares held by particular information which again takes no one anywhere without the financial information that I have directed should be redacted, and references to the outcomes or the basis on which the expert determination are challenged. The challenges identified are advanced by reference to construction principles and the significance of the outcome will not be apparent if the redaction process I have referred to is adopted. Therefore, as it seems to me, no relevant confidentiality problem is created as a result of the order I have made.

22 In those circumstances, I refuse permission to appeal. Any further application for permission to appeal must be made to the Court of Appeal.

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**CERTIFICATE**

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

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This transcript has been approved by the Judge.