Neutral Citation Number: [2019] EWHC 878 (Comm)

Claim No. CL-2013-000683

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Thursday, 4th April 2019

Before:

MR. JUSTICE ANDREW BAKER

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Between:

(1) KAZAKHSTAN KAGAZY PLC **(2) KAZAKHSTAN KAGAZY PLC** **(3) PRIME ESTATE ACTIVITIES KAZAKHSTAN LLP** **(4) PEAK AKZHAL LLP** **(5) PEAK AKSENGER LLP** **(6) ASTANA - CONTRACT JSC** **(7) PARAGON DEVELOPMENT LLP**	**Claimants**
- and -	
(1) BAGLAN ABDULLAYEVICH ZHUNUS **(formerly BAGLAN ABDULLAYEVICH ZHUNUSSOV)** **(2) MAKSAT ASKARULY ARIP** **(3) SHYNAR DIKHANBAYEVA** **(4) SHOLPAN ARIP** **(5) LARISSA ASILBEKOVA**	**Defendants**
- and -	
HARBOUR FUND III LP	**Additional Party**
- and -	
(1) COOPERTON MANAGEMENT LIMITED **(2) FABLINK LIMITED** **(3) WAYCHEM LIMITED** **(4) STANDCORP LIMITED** **(5) PERMAFAST LIMITED** **(6) DENCORA LIMITED** **(7) UNISTAREL CORPORATION**	**Respondents to the Application for Charging Orders**

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MR. ROBERT HOWE QC and **MR. JONATHAN MILLER** (instructed by **Allen & Overy LLP**) appeared for the **First, Second, Third** and **Fourth Claimants.**

MR. SA'AD HOSSAIN QC and **MR. ALEXANDER BROWN** (instructed by **Signature Litigation LLP**) appeared for the **Respondents to the Charging Orders.**

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Approved Judgment

Digital Transcription by Marten Walsh Cherer Ltd.,
1st Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR JUSTICE ANDREW BAKER :

1. This specific disclosure application arises in the Burlington proceedings, which were governed by Part 31, when primary disclosure, ordered to be standard disclosure, was supposed to have been given in September of last year. Strictly, today, and at the date when the application was issued in March, Part 31 no longer applies as the Disclosure Pilot Scheme applies, but the claimants submit, and the Burlington respondents have not challenged, that under one or other of the case management powers the court nonetheless has, it must be right that the court can, in an appropriate case, make a proper and targeted order for specific disclosure, such as might have been given under Part 31, if justified.

2. Leaving to one side for another day, if it does have to be explored further, the question of whether this was a result intentionally brought about, I agree with Mr. Howe QC, for the claimants, that on the basis of the disclosure statement provided in September, and the explanations and clarifications of it that have been provided subsequently, in this case the Burlington respondents have never conducted a proper, reasonable search for documents that might require to be disclosed under the test for standard disclosure under Part 31.6. That is so because, as it seems to me:

    i) firstly, no sufficient effort was made in advance of the date for standard disclosure to obtain and then review for disclosure under Part 31.6 documents held by Mills & Reeve, and

    ii) secondly the Burlington respondents have rested upon a collection by Mr. Vlachou of AJK, the former administrator of the Jailau Trust, of approximately 5,000 hard copy documents and 372 electronic documents, provided by him (Mr. Vlachou) respectively to Mr. Georghiou when he took over the administration of the trust and directly to Quinn Emanuel for review.

3. There has been, at least to some extent, concern raised on behalf of the claimants as to the adequacy of the review by Quinn Emanuel of the documents which, in that way, they had available to review, but Mr. Howe QC, in my judgment realistically, has not pressed for any order that those documents be re-reviewed by Signature, now on the record for the Burlington respondents.

4. The fact remains, however, that the Burlington respondents are unable to provide to the court any, or any satisfactory, explanation of the basis upon which the document selection was done which generated the population of documents that Quinn Emanuel reviewed. Whilst it is not, as such, a numbers game, it is a concern to find that the entire population of documents thus provided to Quinn Emanuel for review generated fewer than 200 documents actually disclosed. In comparison, the court is now told, Mills & Reeve's documents, now having been obtained and undergoing a process of review, have generated well over 2,000 documents in a population of 6,000 that on first review it is felt may well be disclosable, albeit I qualify that by recording that those documents remain to be second-reviewed, both to check the provisional decision that has been taken as to disclosability, subject to privilege, and also to review for any possible privilege. Therefore, subject to such further or better evidence or explanations as may be obtained in due course as to how the AJK document selection was effected, it is a matter of some real concern that so few documents have been disclosed from AJK as source.

5. In those circumstances, and where the parties are operating already to an expedited timetable to ensure, if possible, that these matters are ready for final determination at the hearing fixed in July, I am clear that an order is appropriately made, to be clear as to what is now required and so as to focus minds.

6. In relation to the Mills & Reeve documents, I do not propose to oblige the Burlington respondents to complete the disclosure review and give supplementary disclosure by further list, disclosure statement, and production of the documents, any sooner than the date by which Mr. Hossain QC has indicated it should be complete, that is to say, 18th April. I will, however, without making any different order than 18th April, strongly encourage Signature to consider the provision in advance of that date, if it be practicable to do so, of any initial selection from the documents being reviewed in respect of which, by the end of next week, a clear view has already been taken that they do need to be disclosed. I hope that is clear as to intent because if, in that way, even a reasonably substantial proportion, if not yet anything like the full extent of any disclosure, can be in the hands of the claimants by the end of next week, with more documents to follow by the 18th, it seems to me that that will be constructive and useful progress.

7. In relation to the AJK documents, that is to say documents now in the possession of AJK which may well, although I am not in a position to make a definitive finding today, be documentation that is within Cooperton's control because it is documentation generated by AJK in the course of its administration of the trust, acting as or for and on behalf of Cooperton, there is, in my judgment, a real difficulty in how far the court can practicably go in making any order. In one sense, I confess, I am tempted by the solution advocated by Mr. Howe QC, that in the light of my conclusion in agreeing with his submission that the original disclosure exercise was inadequate, I ought simply to make a direction the terms of which echo the original search obligation for the purposes of standard disclosure. If I did that, I would not make the order by reference to the particular classes of documents suggested in the claimants' draft order, or their presently proposed search terms, if and to the extent that some process of searching electronic records might then be involved. Rather it would simply be an order that a proper search now be undertaken, leaving the Burlington respondents, as Mr. Howe QC puts it, to take on board the message that what happened in September, in the view of the court, was not a sufficient or adequate search, and act in their own interests and on advice as to what they are in a position to do and take such steps as they may be advised to take.

8. My concern about that is that it is only likely, in the particular circumstances of this case, to sow the seeds of further contention and consequential further applications in a case which needs, if possible, to be ready for trial in three and a half months.

9. Reflecting on what seems to me to be the central legitimate concern that the application has highlighted, the key step that must be taken is the proper identification and explanation of the means by which, and basis upon which, AJK selected the hard copy documents provided to Mr. Georghiou and the electronic documents provided directly to Quinn Emanuel, which were then the subject of the review for disclosability by Quinn Emanuel in September.

10. It may be that the claimants will not be able, entirely, to shake off their concern or suspicion that the difficulty in the way of going further, namely that AJK are no longer on the scene as the administrators of the trust, was itself, at least as to its timing, a

deliberate tactic. As I have said, I can make no finding one way or the other as to that. It would not assist, in any event, with the practical reality that they are not, today, on the scene. How far Mr. Georghiou or Signature who, in practice, will be the parties able to take the matter forward for the purpose of the respondents, are or are not able to go, may ultimately depend, particularly given the timescale, on the degree to which AJK co-operate.

11. In all those circumstances, and though in a perfect world I might have wished to go further if it had been practicable to do so, I propose only to order that the Burlington respondents must, by their solicitors, on or before this coming Monday, 8th April, 2019, write to AJK requesting a full explanation of the means by which, and basis upon which, those two document collections were selected for provision, respectively, to Mr. Georghiou and to Quinn Emanuel.

12. I would ask that, in drafting the order on today's hearing, a description be agreed, preferably with the dates when the two collections of documents were provided, for those two collections of documents, that can be built into the order and that the parties, but particularly Signature on behalf of the Burlington respondents, can have reasonable confidence will be immediately meaningful to AJK.

13. The respondents' solicitor's letter is to ask for a full and detailed response from AJK to be provided by them, AJK, no later than 18th April. That is as far as I can go, obviously, that is to say, directing what the respondents, by their solicitors, must ask for by way of a deadline for a response. I am not in a position, much as I might like to be, to make a direct order against AJK that they must comply, or must comply by any particular deadline.

14. I think, also, just for the avoidance of any possible doubt, I would wish to make clear in the order that in writing in that way, the respondents' solicitors must be clear that their request is in addition to the related but somewhat different request already addressed to AJK by Mr. Georghiou directly by his letter of 29th March, 2019. That letter, which I have not mentioned previously in this short judgment, I should be clear, had already, albeit only very recently, begun a process of more fully investigating with AJK the possibility that there might be documentation still that could and/or should be disclosed, and is one of the reasons why I go no further than I do by way of order for additional steps to be taken today.

(For continuation proceedings see main transcript)

15. In relation to the costs of the specific disclosure application, this is a case in which I see some real force in both sides' logic, that is to say:

    i) In favour of the claimants, it is a case in which, as I concluded, there was a real problem with the disclosure exercise as carried out and as reported upon through the disclosure statement. That has ultimately generated this application, in respect of which the claimants have recovered some relief, on much narrower terms than they sought but in that regard the court having expressed some degree of frustration that the narrowness of the relief was a byproduct of the *fait accompli* of where we are and what is practicable.

ii) In the Burlington respondents' favour, it does seem to me that there was a breadth and depth to the application made that was somewhat in the nature of a sledgehammer cracking a nut.

16. It is also the case that – although in one sense readily enough curable by drafting work on the draft order, had I been granting more wide-ranging relief at all – the order as sought was really very wide-ranging indeed and would have required substantial justification of the sort which the claimants did launch the application to try to make good, by reference to allegations of conduct in relation to the disclosure exercise that had been undertaken.

17. It does not seem to me, in those circumstances, that it would be a fair or just outcome to require the Burlington respondents to pay the costs of the application in any event. There could be an argument for saying no order as to costs but, in the circumstances, I prefer to adopt Mr. Hossain QC's proposal and order that the costs will be costs in the application of the primary case.

18. Talking of which, what are we calling our primary cases for these purposes? Are we calling them applications? I cannot remember.

MR. HOWE: In the applications.

MR. JUSTICE ANDREW BAKER: We are calling them Applications, with a capital A, and we do a bit of reciting.

MR. HOWE: Charging order applications, yes, or charging order proceedings.

MR. JUSTICE ANDREW BAKER: I am very grateful. Thank you. All right. If, in drawing up the order as regards the listing of the disclosure CMC, whoever is doing the drafting just puts in some appropriate wording with some square brackets in or something, while behind the scenes I see what I can do in terms of either narrowing the window or possibly even, in effect, sorting it out in advance and we then put a particular date in the order, if you leave that with me and my clerk we will liaise with you, or the Listing Office will.

MR. HOWE: Thank you, my Lord. We will do that.

MR. JUSTICE ANDREW BAKER: Thank you very much.

MR. HOWE: Thank you very much, my Lord.

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