Neutral Citation Number: [2020] EWHC 1248 (Comm)

Case No: CL-2019-000238

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Thursday 5th March 2020

Before:

MRS. JUSTICE COCKERILL

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Between:

THE STATE OF QATAR	**Claimant**
- and -	
(1) BANQUE HAVILLAND SA	
(a company incorporated under the laws of Luxembourg)	
(2) VLADIMIR BOLELYY	**Defendants**

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MR. MARK HOWARD QC, MR. DAVID MUMFORD QC, MR. THOMAS MUNBY and **MR. HUGO LEITH** (instructed by **Macfarlanes LLP**) appeared for the **Claimant.**

MR. DAVID QUEST QC and **MR. PHILIP HINKS** (instructed by **Reed Smith LLP)** appeared for the **Defendants.**

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Approved Judgment

Transcript of the Stenograph Notes by Marten Walsh Cherer Ltd.,
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MRS. JUSTICE COCKERILL :

1. Thank you very much. I will try to get through all these many individual points as efficiently as possible, taking it in more or less the same order as it has been taken in the detailed and helpful submissions which have been made before me today.

2. I am going to start with the schedule of requests, which are pursued both under Part 18 and also as *Norwich Pharmacal* requests. To an extent it perhaps does not much matter in this context which one regards them as, in that it was agreed that both have as a hallmark necessity. I do of course also bear in mind that the Commercial Court's approach in relation to further information is that it will only order further information to be provided if it is satisfied that the information requested is strictly necessary to understand another party's case, and the emphasis on necessity is carried over into the Guide as well.

3. Taking the various headings, the first series relates to purpose and relates largely to the pleading in the defence that the trading strategy was not intended to be unlawful, and a later pleading that the defendants' purpose was not to further the blockade or target or punish Qatar.

4. So far as these requests are concerned, I am not persuaded that these are appropriate requests for an order to be made, either under Part 18 or in relation to *Norwich Pharmacal*. The requests which are sought to be made in relation to the trading strategy point, effectively piggyback off a reference to a summary which is then further clarified in the next sentence. The question as to which human person's intentions are in mind is something which will be covered by disclosure and witness evidence.

5. So far as the trading strategy generally is concerned, this is a request for evidence and the real case on what the trading strategy was is set out in the presentation. In so far as concerns the pleading in relation to furthering the blockade and so forth, that effectively is an attempt to take a pleading which is simply responsive to the particulars of claim and then use that response as if it were a positive pleading of a case in order to open out the scope of inquiry. That is not, in my view, permissible.

6. The real core of what was sought was actually in relation to the next category, which is the production and use of the presentation. This covers a large number of requests which goes on for the best part of four pages in the very helpful schedule that has been placed before me. I am entirely satisfied that those requests overall are not suitable for ordering by way of request for further information. They are a series of impermissible, detailed requests for evidence.

7. Substantially overall they are being asked to test the defence. Having said that, there is within this, as discussed during the course of argument, a core of the defendants' case which in my view overall falls just short (but short nonetheless) in an important sense of pleading fully to the case which is advanced. It may have to be a matter for some discussion when I have finished these remarks exactly where the line is drawn on this, but it seems to me that in relation to, say, request 48:

> "For what purpose and in what circumstances did the defendants' say that they created the presentation and for whose benefit did the defendants contend that the presentation was created."

8. Then if one looks at part of request 4, those requests pull together effectively the key positive case which is missing from the pleading in relation to the presentation. So what is currently pleaded by the defendants is the presentation springing fully formed from Mr. Bolelyy's pen, without explaining the context in which it arises. That is not sufficient. I have been in two minds as to whether the appropriate way to deal with this is via early disclosure or by way of particulars.

9. At the end of the day I am persuaded that the better view is that this should be sorted out on the pleadings. It is in part in play by virtue of the reply already, but I think although part of what is in the reply could usefully be in the particulars of claim, it is sufficiently in play from the particulars of claim that the defendants should clarify that. So there will need to be some further information given in relation to that head, probably by reference to those three numbers that I have indicated.

10. In relation to "associated persons" I am not going to make an order in relation to that. This is an attempt to effectively broaden out the scope of inquiry by the defendant on the basis of a very broad, unidentified pleading in the particulars of claim which could refer to just about anybody. Absent a specific pleading with sufficient factual base, it would be inappropriate to say that this was a matter which should be ordered by way of further information or by way of *Norwich Pharmacal*. It is effectively a fishing expedition. It certainly does not meet the test of necessity.

11. It requires a positive case to be put by the defendants when no positive case has been run by the claimant in the points of claim, and, as Mr. Quest submitted in the course of submissions, it might well result in a disproportionate effort, given the lack of clarity involved in the original question.

12. In so far as concerns the "control" aspect, this is the other area where it seems to me that there is some clarification which could usefully be made. There are two ways of taking this forward. In so far as request 20 is concerned, that request seems to me to be too wide and not necessary. However, there is a question which effectively defines whether there is an issue as to control, and if there is an issue as to control what the scope of that issue is, which will then have a knock-on effect when it comes to disclosure.

13. The way of dealing with it is, in my view, for the claimant to formulate precisely what it means by "control" within the pleading, which is a word which is susceptible of a number of meanings, and for the defendants to answer that. If the answer to the question in relation to control is effectively that control is accepted, then there will not have to be disclosure in relation to that because it will not be an issue. If there is an issue in relation to that, then the ambit of disclosure will have to be defined by reference to that issue.

14. That then takes us to the question of relationship. This is an area where I am persuaded by the defendants' submissions that what is put in the pleading at the moment is insufficiently clearly pleaded. There is a pleading in the reply of specific points. That has not been put in the particulars of claim. There is then also a suggestion that there is some further ambit to the question of relationship which has not been properly defined. In the absence of a clear case as to what is meant as regards the close relationship, it would not be in compliance with, (a), the test of necessity or, (b), the

overriding objective to make an order for answering the further information in relation to this.

15. In relation to the final points, the roles of other persons, this is an area where I am going to make an order that there be particulars given, in that to the extent that the presentation is said to be part of the conspiracy, or part of whatever arrangement there was between whoever may or may not have been involved, it is not enough to say in response that the defendants did not do anything. That is because, of course, one may participate in a conspiracy by coming up with the idea while other people execute it. If that was the case it would be no answer to say that the defendants themselves were not involved in the active steps pursuant to the presentations. It follows that I will make an order in relation to that. That deals with the further information.

16. In so far as concerns the early disclosure arguments, to an extent that may be less acutely felt in the light of the determination I have come to on further information. I am not going to make an order for early disclosure. I am not persuaded that there was a breach in relation to initial disclosure. Initial disclosure is very tightly focused. That is key documents on which reliance has been placed, such as, for example, a contract or a key meeting note potentially which evidences a contract having been made or a particular representation made, but sub-paragraph (2) provides for key documents necessary to understand the case which has been met.

17. Despite Mr. Howard's submissions in relation to this, I am not persuaded that that is intended to mean anything other than the test in Part 18 and that sort of test is more or less *sui generis* with the sort of seriousness which is indicated by sub-paragraph (1).

18. One also has to bear in mind that the purpose of the disclosure pilot is to streamline and not to complicate disclosure and so it would be unlikely that what was had in mind by the drafters of the disclosure pilot was a scheme whereby initial disclosure required something more than really very necessary documents; in other words that it required the disclosure of an evidence base required to test the evidence rather than to support the very key allegations.

19. Then in so far as concerns the questions of ordering the disclosure early in any event. Starting with the forensic investigation, the fact that documents have been gathered does not mean that those are key documents needed to understand the case. There was really, perhaps understandably, given that the claimants do not know what those documents are, a lack of clarity about why the supporting documents would be necessary to understand the case. That is a substantial category of documents which the defendants would not otherwise be obliged to disclose at this stage.

20. I was in some hesitation about whether to proceed on the basis of early disclosure on the remaining categories, but when one looks at what is sought in relation to 2 and 3, the copies of the presentation in hard and soft versions with metadata and what seems to be extended metadata, in circumstances where a document has already been provided with metadata in a native file and where I am ordering answers in relation to further information, it cannot be said that this is necessary to understand the case which is being made and there will of course be disclosure following in a few months' time.

21. That then takes one to the date for disclosure. I am going to say January 2017. June 2016, in my view, goes back rather a long way too far. However, there is likely to be

something of a lead-up, if there is anything to be found, and in my view January strikes a reasonable balance.

22. We then move on to the individual categories and issues. I am just going to literally go through the list of issues for disclosure, knocking off the points as we go. I do that against the following background, because one of the major issues which we have to grapple with is the question of Model E versus Model D. In relation to that it is clear from the disclosure pilot that Model E is exceptional. It is, as I have already noted, the case that the disclosure pilot is designed to try to produce something which is more limited than might have been the case in the past; and so it is plainly not enough to say that this is a serious case involving conspiracy and therefore Model E must follow. That is not the approach which the disclosure pilot indicates.

23. On the basis of *Berezovsky* which was pre-disclosure pilot and the fact that Model E is now supposed to be more rare, we would expect to get Model E being ordered in fewer cases and in more demanding circumstances than in *Berezovsky*.

24. That it seems to me is supported by the decision in *McParland* and there is also a very interesting decision of Master Kaye a few weeks ago refusing Model E disclosure and following at a similar analysis. So bearing in mind that *Berezovsky* indicated that the approach that one should be taking is to look for effectively Model E disclosure where there has been an application which has focused attention on an identifiable category or class of document and linked to the specific issues and that then some explanation should be provided as to the nature of the inquiry envisaged (that is sub-paragraph (4) of paragraph 12). Gloster J (as she then was) also indicated that sub-paragraph (6):

> "The court before whom the application is being made should have an appropriately clear idea as to what documents are likely to fall within the scope of the order, to what specific issues the relevant documents to be searched on an enhanced basis relate and what the relevant trains of inquiry might be."

25. So that forms the background to the inquiry which I have to look at in relation to Model E versus Model D. That of course is important because without the trains of inquiry, as Mr. Quest pointed out, how is the defendant to know the difference between Model D and Model E?

26. I will say in large measure, as will be anticipated in the light of that lead-up, I am going to say that where Model E has been suggested by the claimant that will not be accepted and in general the answer will be Model D. So 1, Model D; 2, Model D; 3, Model D.

27. On 4 we have an issue as to the scope of the defendants' normal business. In relation to this, were this one which was seeking a search-based order such as on a Model D basis, I would agree with the view that this was too broad. But what is sought is in addition to what was effectively offered. What is sought is an overview of the defendants' broader business activities and the pleading is that the defendant did not do this business as part of its overall business. It seems to me it is not irrelevant for there to be some context given to this in the disclosure of documents, evidencing trading by the first defendant and credit default swaps. So the scope of business should be done on the basis of a search for documents providing a summary or overview of the

defendants' business activities and otherwise it will be as per the request set out by the defendants.

28. Then request 5. That follows from my answer on requests for further information. 6 is not an issue. Request, 7 Model D, no narrative documents. It is broad enough without narrative documents because of the way that the issue is formulated. 8 is not an issue. 9, the relationship between D1, shareholders, controllers and so forth. That is one where I have said that it is too vague and it either needs to be re-pleaded, as discussed, and replied to or no disclosure on that as matters stand.

29. Then in relation to 10 and 11, that same point follows. So it is a question of replead to explain what relationship is sought, or that does not form a disclosure issue.

30. 12 is absolutely at the heart of the debate. That is the question of agreement, arrangement or understanding. The submissions are either Model D for both parties, as submitted by the defendant, or Model B for the claimants, Model E for the defendants as submitted by the claimant.

31. In so far as this is concerned, although I entirely take on board what Mr. Howard had to say in reply in particular, I am going to say both parties to apply Model D for the moment. This is an area where, if necessary, Model E can be come back to, but when one looks at what should be caught by Model D, particularly in the context then of the other queries, communications and so forth which are identified, one would expect Model D to catch either everything or sufficient to provide a focused basis for a specific train of inquiry. In particular, what we have here is although one can entirely see that there may be things off camera, it may not be a written-out agreement signed and sealed, if there is any agreement, what we do not have is the material to enable me to say what the train of inquiry is. In the disclosure pilot it does indicate that the court should, when ordering Model E, be in a position to determine the scope of the search using the information provided in the disclosure review document. That is backed up by the authorities to which I have referred looked at in the light of the change sought by the Pilot. I am not now in that position of being able to determine the scope of the search. So for those reasons I am not going to order Model E at this stage. It may be a question for coming back.

32. Model D for 13. For issue 14 I am persuaded that the claimant should apply Model B and the defendant Model D. Issue 15, I am not persuaded that this is a relevant case to the pleaded issues. I am not going to order it. Similarly in relation to 16, the case, as it appears at the moment, is all about how it got into the inbox of the UAE Ambassador. It is nothing to do with how it got to The Intercept.

33. So far as trading and quoting behaviour, that is 18 and 19 and 20 are concerned, all of those Model D both sides.

34. 21 is not in issue. 22, Model D both sides. I am persuaded that given that the pleading shows that the claimants have some material it would be appropriate that they search - even if it may be limited material that is turned up. Ditto for 23, 24 and 26. 27 is again is a Model E/Model D dispute, in so far as the defendants' disclosure is concerned Model D. 29 Model D.

35. Issue 30: "Did the relevant persons understand the article published on www.businessstandard?" That is not agreed as an issue and I am persuaded that, as matters stand, that is not a key issue. Bearing in mind what has been said in *McParland* and in Master Kaye's recent case about the need for the disclosure issues to be key issues, I am not persuaded that that is an appropriate issue to order disclosure on. The nature of the issues is such that it is likely that material relevant to this will be turned up by other heads of disclosure. Evidence in relation to this will be a matter of construction of the presentation and the article, documentary evidence which is likely to be turned up by other heads and thirdly witness evidence and there is of course also always the ability to come back in due course.

36. 31, Model D. 32, both sides Model D. Then the rest are agreed down to 45, which is also Model D.

37. On number 2 it will be Model D on both.

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