Neutral Citation Number: **[2019] EWHC 3588 (QB)**

Case No: QB-2017-000090 and QB-2017-000089

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
LONDON
WC2A 2LL

Date: **13 November 2019**

Before :

Mrs Justice Eady

- -

Between :

BGC Brokers L.P. (2) Martin Brokers Group Limited (3) BGC Services (Holdings) LLP	**Claimant**
- and -	
(1) Tradition (UK) Limited (2) Anthony John Vowell (3) Simon James Cuddihy (4) Robert Goan (5) Michael Anderson Claim No. QB-2017-000090 (the "Vowell Claim")	**Defendant**
- and –	
Martin Brokers Group Limited	**Claimant**
- and -	
(1) Paul Bell (2) Tradition (UK) Limited Claim No. QB-2017-000089 (the "Bell Claim") ED Defendants	**Defendant**

- -
- -

Max Mallin QC, Bobby Friedman and Emily McKechnie (instructed by **Bryan Cave Leighton Paisner (BCLP**) for the **Claimant**
Neil Kitchener QC, Matthew Cook and Amy Rogers (instructed by **Mishcon de Reya LLP**) for the **Defendant**
David Craig QC and Andrew Smith (instructed by **Keystone Law**) for the **Defendant**

Hearing dates: **13 November 2019**

- -

JUDGMENT

Mrs Justice Eady:

Introduction

1. This Judgment concerns two claims, claim number QB-2017-00090 ("the Vowell claim") and claim number QB-2017-00089 ("the Bell claim"). These claims are jointly case managed and are due to be tried together by me over a four-week hearing commencing 25 November 2019, albeit that judicial time has also been dedicated to these proceedings in the preceding week (of which three days have been allocated for pre-reading).

2. Two separate matters were listed before me on Friday, 8 November 2019. First, the pre-trial review ("PTR"), which relates to both claims in the proceedings; specifically, there are two particular applications that I am required to determine.

3. The second matter concerns only the Vowell claim and arises from a Judgment of Senior Master Fontaine of 12 September 2019, by which the senior master refused an application by the Claimants (for ease, simply referred to as "BGC") to amend the schedule of loss ("the SOL") and the re-amended particulars of claim ("the RAPOC"). BGC seeks permission to appeal against that Judgment, but its application for permission was refused on the papers by Stewart J, for reasons set out in his order of 17 October 2019. BGC has renewed its application, seeking an expedited oral hearing to determine whether permission should be given. That hearing was initially due to take place on 7 November 2019 but was re-listed before me on 8 November, given that I was already due to hear the PTR on that day.

4. As submissions on 8 November were not completed until 4.50 pm, it was not possible to give Judgment on either matter that day, the hearing was therefore adjourned until the first day I could sit again on this case. Given the pressure of time within which it is necessary for me to give my Judgments on these matters - the parties are working to a tight timetable in the run-up to the commencement of the trial - I have not been able to perfect a written Judgment and this is, therefore, an adjourned ex tempore Judgment, albeit with the benefit of some opportunity for reflection. After setting out the background to the claims (paragraphs 5-19), I have then gone on to consider the issues arising on the pre-trial review (paragraphs 20-66), before turning to the application for permission to appeal (paragraphs 67-123).

Background

5. I have largely taken the summary that follows from the agreed, composite case summary in this matter.

The Vowell claim

6. The claimants ("BGC") are entities within the BGC group of companies, which carries on business as an inter-dealer broker. The first defendant ("Tradition") also carries on business as an inter-dealer broker. BGC and Tradition are competitors. The second defendant (Mr Vowell) is an

employee of Tradition. The remaining fifth defendant (Mr Anderson) is the joint CEO of Tradition. For ease of reference, in this Judgment I will refer to the defendants in the Vowell claim as "the Tradition defendants" or simply as "Tradition".

7. Originally, there were second and third defendants to the Vowell claim: Mr Cuddihy and Mr Goan. Both were brokers who worked for BGC at the relevant times. Mr Cuddihy is currently on garden leave; Mr Goan is no longer employed by BGC. In late 2017, terms of settlement were agreed separately between BGC and Mr Cuddihy and Mr Goan, and the claims against them were discontinued.

8. It is common ground that Mr Goan had access to BGC's spreadsheets (referred to as “BR08”), which set out the revenues generated by individual brokers and desks working for BGC and some of its subsidiaries. It is further agreed that on various occasions Mr Goan sent Mr Cuddihy extracts or information derived from the BR08, and that extracts from those documents relating to BGC's interest rate swaps, IRS business, were provided by Mr Cuddihy to Mr Vowell on various dates in 2016 and 2017 ("the BR08 information").

9. The Tradition defendants admit that Mr Vowell used one set of these figures by showing them to his colleague, Mr Finch, and one set of figures to another colleague, Mr Gordon. They admit that Mr Vowell also used them for the purpose of evaluating the performance of Tradition's euro IRS desk, to motivate his team, and to make decisions relating to his career. Tradition denies any further use by Mr Vowell. It is, however, BGC's case - disputed by Tradition - that Mr Anderson (Joint UK Chief Executive Officer of Tradition) or other members of Tradition's senior management requested, received, used and/or transmitted the BR08 information. It is also BGC's case that these spreadsheets were confidential to BGC. The Tradition defendants accept that the information was capable of being subject to a duty of confidence but contend that the information received by Mr Vowell was of no commercial value.

10. BGC also contends that Mr Anderson obtained and used confidential information in relation to BGC's IRS business. BGC relies on the fact that, in December 2016 and January 2017, Mr Anderson sent emails containing a spreadsheet with (as well as figures for Tradition and other competitors) a summary of the figures for BGC's IRS business for the month of November 2016 ("the Anderson information"). BGC contends that these figures were almost entirely accurate. The Tradition defendants say, however, that BGC has reverse-engineered these figures and it is denied that the Anderson information was obtained from confidential sources.

11. It is also BGC's case that Mr Anderson and/or others in Tradition had access to, and disclosed, BGC's confidential information to Mr Ian Stoppani, Tradition's recruiter. BGC’s case in this regard is based on an alleged approach by Mr Stoppani to a former BGC broker asking about BGC's Turkish bond desk. The Tradition defendants deny that Mr Stoppani referred to a Turkish bond desk and deny that Mr Anderson provided him with confidential information.

12. BGC further relies on what it says is spoliation by Mr Anderson, specifically that he deleted his WhatsApp messages on the day that Mr Bell and others resigned to join Tradition (as to which, see the summary relating to the Bell claim, below). This allegation is also denied.

13. BGC's case is thus that Mr Goan and Mr Cuddihy breached their contractual and/or equitable duties of confidence in accessing, misusing and/or transmitting BGC's confidential information and in transmitting it to one or more of the Tradition defendants, and that Mr Vowell and/or Mr Anderson procured or assisted in Mr Cuddihy's and/or Mr Goan's breaches of contract and/or equitable duties of confidence. In particular, BGC's position is that the information received from Mr Cuddihy by Mr Vowell had been requested and was used by Mr Anderson in developing Tradition's business. BGC seeks injunctive and other relief in respect of its confidential information and makes various claims for negotiating damages and for damages for diverted management time.

14. The Tradition defendants make no admissions as to the duties owed by Mr Goan and Mr Cuddihy. They deny that Mr Anderson and/or Mr Vowell procured and/or assisted in any breaches of contract and/or duty and contend that they were unaware of how Mr Cuddihy obtained the information he passed to Mr Vowell. Further, the Tradition defendants deny that BGC is entitled to injunctive relief, albeit that Tradition and Mr Vowell have offered certain undertakings. They also deny there is any basis in law or in fact for the negotiating damages claims and resist the claim in respect of diverted management time.

The Bell claim

15. The claimant in this matter (referred to as "RPM"), is an inter-dealer broker and part of the BGC group of companies. The first defendant, Mr Bell, was formerly a co-head of RPM's forward cable desk ("the desk").

16. On 3 April 2017, six members of the desk resigned to join Tradition - the "RPM Five" plus Mr Bell. They commenced employment with Tradition in January 2018. RPM alleges that Tradition and Mr Bell were parties to an unlawful team move, entailing breaches of duty by Mr Bell, procured by Tradition, and an unlawful means conspiracy. In particular, it is RPM's case that Mr Bell acted as a recruiting sergeant for Tradition and/or otherwise assisted in the recruitment of members of the desk by Tradition and, in so doing, acted in breach of various contractual and/or fiduciary duties. These claims are denied.

17. It is RPM's case that, but for the unlawful conduct alleged in the claim, the RPM Five and Mr Bell would each have stayed working on the desk at RPM and it is claimed that RPM suffered loss and damage as a result. The defendants deny this. They say that RPM's claim is grossly inflated and that RPM has suffered no loss as a result of the alleged wrongdoing. Amongst other things, they say that the RPM Five and Mr Bell would have left RPM, and RPM would have suffered the losses alleged, irrespective of any of the matters alleged to have been wrongful.

18. RPM also relies on what it alleges was the purposeful destruction of WhatsApp messages on the part of Mr Anderson. This is again denied.

19. In the alternative, RPM seeks an account of profits against Mr Bell for breach of fiduciary duty and/or confidence, and Tradition for breach of confidence. These claims are also denied.

The pre-trial review

Introduction

20. Initially, the outstanding issues to be addressed at the PTR were fourfold:

    (1) RPM's application, dated 15 October 2019, that certain witnesses in the Bell claim be excluded from the court during the evidence of other witnesses and for related directions ("the exclusion application").
    (2) Mr Bell's application (supported by Tradition), of 9 October 2019, that certain parts of RPM's witness statements be excised ("the excision application").
    (3) Other trial directions, in particular in relation to the service of skeleton arguments and the timetable for the hearing.
    (4) An application by Tradition, in relation to the assignment of documents as "confidential" by BGC ("the confidentiality application").

21. In the event, at the outset of Friday's hearing, I was told that agreement had been reached in relation to the confidentiality application, save in respect of costs. As I had heard no argument on the application, it was agreed that the parties would lodge written representations setting out their respective positions on costs on this issue by 4.00 pm, 12 November, and that the appropriate way forward on this question could be addressed after I had given my Judgment at the resumed hearing today.

22. The parties were also able to reach agreement for skeleton arguments to be exchanged and lodged by 10.00 am on 18 November 2019. As for the timetable for the hearing, this has now been agreed, subject to my decisions on the outstanding applications. These agreements mean that it is no longer necessary for me to address any particular issues relating to trial directions at this stage

23. Turning then to applications that remained before me, I first heard argument on the exclusion application followed by submissions on the excision application. I have followed the same order in dealing with the applications in this judgment.

The exclusion application

24. In this application, RPM seeks the following orders.

    (1) That the relevant witnesses (a term defined as "the members of the RPM Five plus Mr Stoppani") be excluded from the court during the witness evidence of the other relevant witnesses and of Mr Bell, and that each of the relevant witnesses not be allowed access to the daily transcripts of the trial until his evidence is complete.
    (2) That Mr Bell be called first to give and complete his evidence prior to that of the relevant witnesses.

25. This application is resisted by Mr Bell and by Tradition.

The approach

26. The general principle is that civil trials will be heard in public and no one who wishes to be present should be excluded from the hearing. This plainly follows from the common law principle of open justice, which I take as my starting point in considering this application; see the observations of Toulson LJ (as he then was) in the opening paragraphs of his Judgment in *R (on the application of Guardian News and Media Limited) v Westminster Magistrates' Court and another* [2012] EWCA Civ 420. Although acknowledging that there are exceptions to the principle of open justice, Toulson LJ made clear that these would have to be justified by some even more important principle, noting at paragraph 4 of his Judgment that:

> "The most common example occurs where the circumstances are such that openness would put at risk the achievement of justice, which is the very purpose of the proceedings"

27. As is acknowledged in the commentary to the White Book (see paragraph 32.1.4.3), it is within the court's discretion to exclude witnesses from a civil trial, which it may do for the purpose of preventing the evidence of such witnesses from being influenced by what they have heard and seen of other witnesses called to testify before the court. This exercise of discretion can be seen as concerned with the achievement of justice where there is good reason for concern as to the quality, purity and reliability of the evidence were the witness in question not to be so excluded; see the observations of Holman J at paragraph 21 *Luckwell v Limata* [2014] EWHC 536 (Family).

28. A witness should not be excluded, however, unless on the particular facts, and in the particular circumstances, the court is satisfied that there are good reasons that make it appropriate; see per Holman J at paragraph 16 *Luckwell*.

29. The exceptional nature of the court's discretion to exclude a witness from the hearing is all the more apparent where that witness is also a party to the proceedings. In *Tomlinson v Tomlinson* [1980] 1WLR 322, at page 327, Sir John Arnold (president) suggested that the power of exclusion would not extend to a party. Although in *De Costa & Another v Sargaco & Another* [2016] EWCA Civ, 764, the Court of Appeal did not consider there was an absolute prohibition against this possibility, the court took the view that there was a strong presumption that a party was entitled to be present throughout the trial; see per Black LJ (as she then was) at paragraphs 59 to 61.

The basis for the application in the present case

30. For RPM, it is urged that there are good reasons for making the orders sought in this case. Specifically, it is said that the relevant witnesses are likely to be influenced by hearing each other's evidence and that of Mr Bell. In the case of the RPM Five, it is argued that, having worked together and moved to Tradition together, they have a common interest in maintaining a united front and supporting their new employer, in particular, given their admitted hostility towards BGC. It is also said that similar considerations applied in relation to Mr Stoppani, the effective in-house recruiter for Tradition. RPM submits that there are crucial factual disputes between the parties and there is a risk that the quality, purity and reliability of the evidence would be endangered if the order were not made.

31. Recognising that Mr Bell, as a party to the proceedings, is in a different position to the other witnesses, RPM proposes that this difficulty can be simply addressed by the pragmatic direction that Mr Bell be called as the first witness for the defendants in the Bell claim.

Discussion and conclusions on the exclusion application

32. I return to what I consider to be the starting point in relation to this application: that is, consistent with the principle of open justice, no one who wishes to be present during the public trial of these claims should be excluded from the hearing unless good reason can be shown.

33. In the present case, it is apparent that there are a number of factual disputes between the parties and I have had careful regard to the particular evidential conflicts identified by RPM in support of this application. The evidence of the witnesses called will undoubtedly be of importance in the determination of these disputes and it is clear that there is little trust between the parties in these hard-fought proceedings. These are, however, not unusual characteristics of litigation. The question for me is whether good reasons have been demonstrated such that I should direct that the relevant witnesses be excluded from the hearing and that Mr Bell must be called first if he too is not to be excluded.

34. Starting with the particular position of Mr Bell, I am bound to note that he is a defendant in these proceedings and has an obvious interest in seeing that justice is done. As is common ground, he is plainly entitled to be present throughout the hearing. More than that, however, I take the view that both defendants in the Bell claim - that is, both Mr Bell and Tradition - are entitled to decide how best to present their defence. This is an adversarial, not an inquisitorial process. Although it may be open to the court to direct the order of witness evidence, no authority has been cited to me in support of such an exercise of judicial discretion and it would be highly unusual for the court to prescribe to a party to the proceedings how it was to present its case in this way.

35. As for the relevant witnesses, while they do not have the same interest as Mr Bell, they each also have a legitimate interest in seeing that justice is done in this matter. If the principle of open justice is to be respected, the right of those involved in the proceedings as witnesses to be present during the hearing must be acknowledged; any restriction on that right would need to be limited to that which was both proportionate and necessary. In this regard, I note that, although a witness was excluded from the hearing in *Luckwell v Limata*, the court was careful to limit the exclusion to only those parts of the evidence that would potentially impact on the witness' testimony. That is a course that would be undoubtedly far more difficult in the present proceedings.

36. Turning to the particular concerns that have been raised by RPM in support of this application, it is right to note that there are allegations of unlawful means conspiracy levied against Mr Bell and the relevant witnesses, which lie at the heart of the claim. In these circumstances, it is said that I can properly exercise my discretion to ensure the quality, purity and reliability of the witness testimony, without any pre-judgment of these allegations, and that the threshold need not be very high.

37. The difficulty with that submission, however, is that it might seek to suggest that, in cases involving such allegations, there is a burden on those who seek to deny any conspiracy, to demonstrate why they should not be excluded from the hearing before they have given their evidence. That would privilege the claimant who seeks the exclusion of other parties' witnesses and is plainly not the correct starting point. In my judgement, there would need to be something

more - some good reason that is other than that allegations of conspiracy are being defended in these proceedings - for considering that, absent the orders sought, the achievement of justice would be put at risk.

38. On this question, I am not persuaded that good reasons have been shown, either in the case of Mr Bell - who, as I have already noted, has a particular interest in not being excluded from the hearing of the claim brought against him - or the relevant witnesses. That is not to say that I do not recognise that there is a danger that witnesses might, whether consciously or not, be influenced by hearing the testimony of others before they are called. That, however, is not an unusual feature of a civil trial. Judges are not naive in considering the oral testimony of witnesses and appropriate safeguards are built into the trial process, not least in the testing of oral evidence in cross-examination. In truth, the risks identified by RPM in support of this application are no more than those that are a normal part of civil litigation. They do not demonstrate good reason for interfering with a defendant's right to present their defence as they see fit, or otherwise for excluding Mr Bell or the relevant witnesses from the public hearing of this case.

39. For completeness, although I do not consider that it is necessary for the defendants to demonstrate prejudice in resisting this application, I would also accept that the order sought gives rise to prejudice weighing against the directions in question. First, as I have already identified, the defendants would not be able to present their defence in the way they saw fit. To enable Mr Bell to be present for the duration of the hearing, he would need to give evidence first, whether or not it was considered that was best for the defence of the claim. Second, because practical difficulties could arise in the taking of instructions from the relevant witnesses. On this latter point, RPM sought to deny that this presented a real-world risk, but I do not consider I can simply dismiss this possibility. Indeed, experience suggests that such instructions might well be needed during the trial and the task for the defendant's lawyers would be all the harder if the relevant individual was not in court and could not be shown the transcript. Moreover, this is merely one of the practical shortcomings of the orders sought. Even if excluded from the hearing, the relevant witnesses may well learn of what has taken place, whether through press or other reports, or because the defendants' legal teams considered it necessary to seek instructions on a particular point. In any event, given the lateness of the application, Mr Bell and the relevant witnesses will already have been able to talk to each other about the case and to read each other's statements. The proposed orders cannot address these points.

40. I am not persuaded that good reasons have been demonstrated for the exercise of the court's discretion to limit what would otherwise be the normal entitlement to Mr Bell and the relevant witnesses to attend the public hearing in this matter. Having carefully considered the concerns identified by RPM, I am satisfied these are in truth no more than normally arise in civil litigation. Moreover, the timing and practical limitations of the application mean that the orders sought are unlikely to provide the protections RPM seek and would amount to a disproportionate interference with the principle of open justice in this case. This application is therefore refused.

The excision application

41. By this application, it is asked that I direct that certain passages be excised from the witness statements adduced in support of RPM's case in the Bell claim. These passages relate to factual

allegations that Mr Bell sought to orchestrate a team move to ICAP (another inter-dealer broker and competitor of RPM) on two occasions, in 2014 and 2015.

The parties' positions

42. For Mr Bell and Tradition, it is complained that these matters form no part of RPM's pleaded case; they are inadmissible; in any event, it would not be fair or proportionate to allow these allegations to be introduced at such a late stage of the trial. Whilst it was not in issue that there was an earlier approach or approaches by ICAP, RPM was seeking to introduce an unpleaded factual allegation that Mr Bell was orchestrating and coordinating an earlier team move to ICAP, or that he was acting unlawfully in relation to it; that, it is submitted, was a factual allegation of conspiracy that would need to be properly pleaded. Moreover, it was to be noted that RPM had raised these allegations in a letter before claim sent to Mr Bell on 14 July 2017, but had then taken a deliberate and considered decision not to plead any allegation of wrongdoing in connection with any aborted team move to ICAP. Effectively, RPM was now seeking to adduce similar fact evidence, to the effect that Mr Bell had been guilty of wrongdoing in relation to ICAP, and was asking the court to infer that he was similarly guilty in respect of the later move to Tradition. The application for excision was limited to this evidence, which was not relevant to the issues properly to be determined.

43. For RPM, however, it is said that the evidence it seeks to adduce does no more than address its pleaded case that Mr Bell was in a position to exercise substantial influence over the RPM Five in making their decision whether to stay with RPM or move to Tradition. The court would need to decide whether or not it accepted RPM's case in this regard, and the evidence of Mr Bell's involvement in the earlier ICAP approaches was relevant to this issue. Moreover, Mr Bell and the members of the RPM Five had asserted in their witness statements that they would have wished to leave RPM and BGC come what may; the reason they did not join ICAP earlier had thus been put in issue and RPM should be permitted to seek to rebut the defendants' evidence in this regard.

44. For Mr Bell and Tradition, it is further contended that, even if relevant - that is, potentially probative of one or more of the issues in the litigation and thus legally admissible - the court should nevertheless exercise its case management discretion to exclude this evidence, which would distort the trial by focusing on what was (at most) a collateral issue and which was designed to prejudice the defendants by introducing similar fact evidence through the backdoor. More generally, admission of this material, which was hearsay in nature, would inevitably prejudice the defendants who had not prepared for trial on the basis that these allegations were relied on by RPM and would now face real difficulties in seeking to contest the new allegations made.

45. For RPM it is countered that there was no proper basis for excluding this evidence at this stage. The fact that this was hearsay evidence was not a basis for excising this material from the statements, and the court could only properly determine the value of this evidence during the trial and should not seek to do so at this interlocutory stage.

The relevant legal principles

46. There is no dispute as to the relevant legal principles. The starting point is that a party is entitled to know from the pleaded case the allegations to which they have to respond and the preparatory steps for trial will be premised on that pleaded case. Disclosure and inspection will thus be

conducted by reference to the pleaded issues and the parties' witness statements will be prepared to address the issues arising from the pleadings.

47. A claimant's particulars of claim must include:

> "A concise statement of the facts on which the claimant relies" see CPR 16.4, paragraph 1(a).

48. That is particularly important where an allegation of conspiracy is raised; see per Lord Millett at paragraph 186 *Three Rivers District Council v Bank of England (No. 3)* [2003], 1 AC 1 HL, and CPR PD 16, paragraph 8. And, whilst those citations specifically relate to allegations of fraud or wilful default, it is apparent that an allegation of conspiracy is to be treated in the same way; see the observations of Megaw LJ in *Jarman & Platt Ltd v Barget* [1977] FSR 260, at pages 267 to 268.

49. Where an issue arises as to the admissibility of particular evidence, a two-stage test is to be applied. First, is the evidence potentially probative of one or more issues in the litigation? If so, it is legally admissible, but the court will then go on to consider, secondly, whether there are good grounds for why it should decline to admit that evidence in the exercise of its case management powers; see *JP Morgan Chase Bank & Others v Springwell Navigation Corporation* [2005] EWCA Civ 1602 at paragraph 67, applying the principles laid down by Lord Bingham in *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 254, HL.

50. At the second stage, Lord Bingham suggested that three matters might affect the way in which a judge should exercise their discretion in this regard; see as summarised by the Court of Appeal in *JP Morgan v Springwell*:

> "(i) That the new evidence will distort the trial and distract the attention of the decision-maker by focusing attention on issues that are collateral to the issues to be decided.
>
> (ii) That it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice.
>
> (iii) That consideration must be given to the burden which its admission would lay on the resisting party."

51. In relation to the third of these considerations, Lord Bingham specifically identified:

> "The burden in time, cost and personnel resources ... of giving disclosure, the lengthening of the trial, with the increased cost and stress inevitably involved, the potential prejudice to witnesses called upon to recall matters long closed or thought to be closed, the loss of documentation, the fading of recollections ... In deciding whether evidence in a given case should be admitted, the judge's overriding purpose will be to promote the ends of justice, but the judge must also bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process that is fair to all parties."

52. See Lord Bingham at paragraph 6 in *O'Brien* and, of course, the principles now identified in the overriding objective under the CPR.

53. As the trial judge, it is common ground that I will be best placed to make the necessary determination of admissibility. That said, I am mindful that I must exercise particular caution in determining such an application at a pre-trial stage. As is observed in the White Book at paragraph 32.4.21, a passage now approved in *Bates v The Post Office* [2018] EWHC 2698 (QBD):

> "Where an application is made during the trial, the judge is well placed to determine whether particular passages in a witness statement have real value or are irrelevant and/or disproportionate. A judge asked to approach such questions at the interlocutory stage is at a disadvantage and should only strike out proffered evidence if it is quite plain that no matter how the proceedings may look at trial, the evidence will never appear to be either relevant or, if relevant, will never be sufficiently helpful to make it right to allow the party in question to adduce it (*Wilkinson v West Coast Capital* [2005] EWHC, 1606 (Ch) (Mann J). The court must be on its guard to ensure that costs and delays are not increased by ill-conceived applications to strike out witness statements."

54. Inevitably the question whether such a determination should be made at a pre-trial stage will be fact and case sensitive. As was observed by Underhill P (as he then was) in the context of a discrimination claim in *HSBC Asia Holdings BV & Another v Gillespie* [2011] ICR 192 EAT, whilst caution is necessary, if satisfied on the facts of a particular case that the evidence in question will not be of material assistance in deciding the issues raised and that its admission will cause inconvenience, expense, delay or oppression, such that justice would be best served by its exclusion, the judge should be prepared to rule accordingly.

Discussion and conclusion

55. This is an application made by Mr Bell, supported by Tradition, and accordingly he bears the burden of demonstrating that the evidence in question should be excised from the statements in advance of the trial.

56. If I take the view that the evidence does not in fact go to a pleaded issue in the case, there is, however, no dispute: it would not be legally admissible and it should be excised from the statements. That is the first issue that I need to determine.

57. Even if I do consider the evidence to be legally admissible, however, I need then to consider whether a proper basis has been demonstrated for its exclusion or, at least, whether that is something I can properly determine at this stage.

58. I therefore turn to the passages that have been placed before me.

59. Looking at the first witness statement of Mr Manston, a consultant director at RPM who worked on the desk at the relevant time, the evidence in question relates to an approach by ICAP in late 2014. Mr Manston relates his account of what happened as evidence of:

> "The fact that any approach would be to most or all members of the desk and would require the coordination of Mr Bell"

60. Mr Manston then goes on to give evidence of what he says was an invitation from Mr Bell to meet with others after work to discuss moving to ICAP ("the Café Brera meeting"), and states his belief that:

> "The initial approach by ICAP was made to Mr Bell, who then orchestrated the original approaches made ... to members of the [desk] in December 2014."

61. In his second statement, Mr Manston refers back to his earlier account and seeks to infer that this suggests that Mr Bell also organised a meeting of the RPM Six in March 2017 ("the Everyman meeting").

62. Addressing this evidence, I am clear that the passages in issue in Mr Manston's second statement are inadmissible as stating Mr Manston's opinion rather than his evidence of fact. If any inference is to be drawn from Mr Bell's conduct in 2014, that must be for the court; I cannot see how I will be assisted by these passages in Mr Manston's second statement. As for the earlier passages in Mr Manston's first statement, however, I can see that these might be relevant to RPM's pleaded case that Mr Bell was in a position of influence with the RPM Five. At this stage, I go no further than to say that I can see that it is thus potentially relevant and admissible material. The actual value of the evidence may be open to question, but I do not consider this is a matter that I can properly determine at this stage and I would not allow the application in respect of the passages cited in Mr Manston's first statement.

63. Turning next to the statement of Mr Cramp (a senior managing director and partner in BGC), the evidence is plainly of a very different nature to that of Mr Manston. Mr Cramp gives evidence of what he says was a conversation he had in April 2017 with Mr Berry (an executive managing director of ICAP in charge of its foreign exchange and emerging markets division). The evidence in question plainly raises allegations of deliberate wrongdoing on Mr Bell's part that go further than merely to the question whether or not he was in a position to influence or coordinate the future career choices of fellow members of the desk but to whether, in seeking to do so earlier, Mr Bell acted unlawfully. Had RPM wished to rely on Mr Bell's earlier conduct in relation to the approach from ICAP as evidence from which it might be inferred that he had similarly acted unlawfully in relation to the move to Tradition, that should have been pleaded. This is not an allegation of fact that can now be introduced through the witness statement evidence and the passages in question should be excised as legally inadmissible.

64. For completeness, I should make clear that even if I was wrong about the admissibility of this evidence, I would in any event exercise my case management discretion to exclude it as it raises very specific and very different issues from those that are to be determined in this case, relating to an entirely different potential move some years earlier. It would only serve to distort rather than to assist the court's focus. And it is also clear, even at this pre-trial stage, that the potential prejudice would far outweigh any possible probative value of this evidence, and the introduction of this material would jeopardise the fair trial of the case.

65. I also allow the application in relation to paragraph 42(f) of Mr Warner's statement. Mr Warner is the executive managing director and general manager for the UK and Middle East for BGC and gives evidence of various factors which he says supports the view that Mr Bell coordinated the move to Tradition. The last matter on which he relies relates to what he says he was told by Mr Cramp, which effectively repeats what Mr Cramp has sought to include in his statement as set out above. For the same reasons I have given for excluding this material from Mr Cramp's

statement, I would also allow the application in relation to this particular passage from Mr Warner's statement.

66. Having thus given my judgment on the excision application, it is also right to note that the appropriate consequential deletions or amendments will also then need to be made from the relevant statements of Mr Bell and Mr Larner.

Permission to appeal

Introduction

67. Turning then to the second matter before me at this stage, the application before the senior master was made under CPR 17.1 paragraph 2(b), for permission to further amend the RAPOC and SOL. Before turning to the specific amendments in issue, it is, however, helpful to see how the application was made in the context of the history of the litigation as a whole.

68. For convenience, I will adopt the senior master's summary of the relevant procedural history, as set out in her Judgment on the original application. As the senior master records, the Vowell claim was issued in October 2017; the related Bell claim was issued in December 2017. Her Judgment then helpfully sets out the relevant procedural history as follows:

> "6. The claim has been subject to a number of interlocutory hearings by order of Deputy Master Hill QC dated 22 March 2018. BGC was granted permission to join Mr Anderson to the Vowell claim and to amend the claim form and particulars of claim. Paragraph 20 of the amended particulars of claim, the APOC, was pleaded as follows:
>
> 'As a result of the matters set out above, BGC has suffered loss and damage, particulars of which will be provided following provision of further information and/or disclosure.'
>
> 7. As at the first costs and case management conference on 24 July 2018 before Master Davison, the parties agreed in advance of the hearing that BGC would serve a schedule of loss in the Vowell claim after disclosure. BGC explained to the master at the CMC that they might wish to make further amendments to the APOC after disclosure. An order was made for, inter alia, service of a SOL by 4 December 2018 and a longstop date for any further amendments to the particulars of claim by the same date. The longstop date was supported by the parties to ensure that the trial timetable would not be subject to slippage and the trial date would be secure. The date for all those steps was subsequently extended by agreement between the parties to 6 March 2019.
>
> 8. On 20 February 2019, BGC applied for permission to re-amend the APOC. That application was granted by Master Davison by an order dated 2 May 2019, and the RAPOC were served on 17 May 2019. BGC served its SOL on 6 March 2019. At paragraph 1 of the SOL it is stated:
>
> 'This schedule of loss, "the schedule", is provided pursuant to schedule 14 of the order of Master Davison dated 24 July 2018 as subsequently amended. The schedule provides BGC's current estimate of the loss caused to it by the first,

> second and fifth defendants, "the Tradition defendants", based on the information presently available. The claimant will supply revised and updated schedules of loss from time to time as required and/or permitted by the court. The claimant also will rely on expert evidence on loss in due course.'
>
> 9. Witness statements were exchanged on 12 August 2019. Reply witness statements are due to be exchanged on 9 September 2019. BGC filed and served its expert report on 30 August 2019. The defendant's expert report is to be filed and served by 2 October 2019. Expert discussions are due to take place between 23 and 25 October 2019. A joint statement by the experts is to be filed on 1 November 2019."

The proposed amendments

69. The proposed amendments to the RAPOC relate to two issues:

    (1) An increase in value of one of the heads of damage ("the damages amendment").

    (2) The introduction of a claim against Tradition for an account of profits and/or such other gain-based remedy as the court thinks fit ("the account of profits amendment").

70. In respect of the damages amendment, the proposed addition to the RAPOC is simply set out in a new sub-paragraph 16(10), which states as follows:

> "BGC also relies on the facts and matters set out in paragraphs 12 and 13 of its updated schedule of loss, a copy of which is annexed hereto."

71. The paragraphs referenced in the updated schedule of loss ("the USOL") are, however, extensive. The amendment to paragraph 13 of the USOL was agreed and duly allowed by consent. The amendments to paragraph 12 of the USOL, which extend over four pages, are, however, resisted.

72. The senior master's Judgment then helpfully sets out the relevant context, and I again gratefully adopt her summary (so far as relevant for my purposes), as follows:

> "15. BGC claims in the SOL for damages in three categories described as (i) negotiating damages, (ii) further negotiating damages and (iii) diversion of management time. Negotiating damages, previously known as 'rotten part' damages are commonly claimed in circumstances where actual loss may not be possible to prove but the benefit obtained by a defendant can be valued by estimating what a defendant could reasonably be expected to pay to purchase the licence from the claimant to use the confidential information lawfully.
>
> …
>
> 19. The claim for further negotiating damages are set out in paragraphs 12 to 13 of the USOL which relate to two allegations. (i) that the information provided by the BR08 extracts gave Tradition all knowledge of the position of a key competitor in the marketplace and allowed Tradition to understand its own position in the market so that it was able to and, it is to be inferred, did strategise

> and conduct its business accordingly and was therefore able to increase its prospects of improving its market share. The use of this information is valued in the use of ... at around £10 million. (ii) alleged use of the BR08 extracts by Mr Anderson, which is denied as set out in paragraph 16 of the RAPOC and referred to in the USOL as 'the Anderson information', valued at around £1 million ...
>
> 20. This is a very significant increase on the value attributed to both components of the further negotiating damages claim ... In addition the paragraph 12 amendments include over four pages of factual allegations."

73. As for the account of profits amendment, the senior master summarised the nature of the proposed alternative claim in this regard as follows:

> "31. BGC has pleaded an alternative claim for an account of profits or such gain-based remedy as the court directs so that, if following the trial, the court finds that Tradition has profited from the misuse of BGC's confidential information but considers that negotiating damages is not an appropriate remedy, BGC can request an alternative remedy of an account of profits …"

Applications to amend: The applicable legal principles

74. In identifying the test she was to apply in determining the claimant's application, the senior master summarised the relevant legal principles derived from her review of the case law at paragraphs 23(i) to (x) of her Judgment. BGC does not seek to suggest that the senior master erred in her summation of the applicable legal principles, which I therefore do not need to repeat. Its appeal is put on the basis that she fell into error in applying those principles in this case.

The senior master's decision

The damages amendment

75. For Tradition it was objected that this amendment represented a significant change - from an allegation of knowledge of the BR08 extracts and Anderson information, to actual use - which would, if made out, have a significant effect on damages. The allegations contained in the USOL were also said to be too vaguely worded and it was contended there was insufficient evidence to support all of the new factual allegations made.

76. The senior master accepted that the proposed amendment was significant, both in nature and effect, but did not agree that the evidence was insufficient, allowing that BGC could reasonably have said it had no actual knowledge of what Tradition had done but could plead that an inference should be drawn in this regard. Moreover, despite the lack of particulars, had the application been made prior to the longstop date, or even after that date with good explanation, the senior master considered it possible that permission might well have been given, but only:

> "25. … if the court could have been satisfied that the timetable to trial could encompass time for a request for further information as well as the other usual directions to trial"

That, the senior master considered, was no longer possible if the trial date was to be maintained.

77. The senior master further considered that it was implicit from the terms of the draft order accompanying the application to amend that BGC accepted, if the amendments were allowed, that there would be no opportunity for disclosure and further witness evidence. She noted, however, that it was BGC's case that neither would be necessary because:

> "27. …The substance of the case has not changed, nor has a new cause of action been introduced. The further negotiating damages have already been addressed in the amended defence, in the witness statements, that their own expert has already considered the amended case on further negotiating damages that Tradition's expert would therefore have to deal with the amended case. In any event, and as Tradition's expert report is not due to be served until 2 October, and they have had the use of it since 18 July, their own expert will have sufficient time to deal with the amended case on quantum. BGC also point to Tradition's witness evidence in which Mr Anderson states that he considers there is no value to the information provided in the BR08 extracts or the Anderson information so that whatever value BGC put on the information Tradition would presumably dispute it"

78. The senior master was not persuaded by those submissions reasoning as follows:

> "28. … I consider that BGC's position would be unsatisfactory for both Tradition and the court. Tradition is entitled to investigate the additional factual allegations set out in some detail at paragraphs 12(a) to (l) of the USOL and to deal with them in the usual manner, namely request further information, if so advised, seek disclosure from BGC, obtain their own disclosure, consider what additional evidence would be required from witnesses of fact and from their expert ..."

79. Having then summarised the detailed submissions made for Tradition as to the further steps that would need to be taken, the senior master continued:

> "29. Tradition are entitled to consider any amended case in the appropriate manner, including whether further particulars of the pleaded case need to be sought before a re-amended defence is drafted, to consider the reply before finally deciding whether further disclosure is required from BGC, to investigate their own disclosure in relation to the additional issues and factual allegations pleaded, to investigate what further witness evidence is required and what further instructions need to be given to their expert. The additional claim is put at £11 million, almost doubling the entirety of the damages sought, and more than 10 million more than the original damages sought for this head of loss. On any view, a defendant would be entitled to properly investigate a claim of this magnitude. I do not accept BGC's submissions that Tradition have exaggerated the difficulties which would be caused if the amendments were allowed. Even if Tradition discover, after investigation, that the additional evidence required would be minimal, they should be entitled to time to consider what would be required to deal with the amended pleaded case properly. Any further issues in dispute consequential upon the amended claim would not be crystallised until after service of a re-amended defence and an amended reply.

> 30. I conclude that if the amendments are permitted and the trial date is to be kept, Tradition would not receive a fair trial and moreover that the trial judge would be put in a difficult position in dealing with the claim in such circumstances. This is not, therefore, a situation where the only prejudice which Tradition would suffer would be in costs, as submitted by BGC."

The account of profits amendment

80. Accepting the case put on the account of profits amendment to be reasonably arguable, and thus rejecting Tradition's argument that this was not a remedy available to BGC in this case, the senior master turned to consider the implications of allowing this amendment, summarising the parties' respective positions at paragraphs 33 and 34 of her Judgment. She did not, however, immediately express a view as to which of these competing positions she preferred but turned to consider the balance of injustice in respect of both forms of amendment; the balance of injustice.

81. Assessing the balance of injustice, it is apparent that the senior master was fully conscious of the need to take account of the injustice to BGC in not being able to claim the quantum that its evidence supported in relation to a claim arising from the admitted receipt of information that, it was accepted, should not have been received and was potentially capable of being subject to a duty of confidence. That, the senior master made clear, was a very significant factor; see paragraph 35 of her Judgment. That said, she also considered the following factors to be relevant (I paraphrase):

    (1) The application to amend had been made very late in the day (or, at least, was late).

    (2) The lateness of the application meant that, even if no consequential directions as to disclosure and further evidence were necessary, the statements of case would not close until 11 days before trial; for a trial of this length and complexity, that was entirely unsatisfactory.

    (3) More specifically, even if Tradition were to deal with the case put by amendment without disclosure and further evidence, it would be a diversion from their preparation for the trial of this and the Bell claim, which had not been built into the timetable and for which Tradition would not have budgeted.

    (4) There was no explanation for the late amendment. Although that was not fatal, it was a significant factor in the exercise of the court's discretion. In particular, the senior master noted there was no suggestion that the amendment was the consequence of new evidence.

    (5) Accepting that the longstop date for amendments to pleadings was not intended to bar proper applications, it would be expected that any applications after that date would be in respect of new information which could not have been appreciated at an earlier date.

    (6) On the damages amendment, BGC was a sophisticated brokerage firm which could have been expected to have well in mind the extent to which its market share would have been affected by improvements in strategy available to Tradition on receipt of the BR08 extracts and Anderson information. Indeed, this factor had been identified and anticipated by BGC at paragraphs 5(b) and 12 of the SOL.

(7) As for the account of profits amendment, this was a remedy that could have been sought at the commencement of proceedings, as it was in the Bell claim. That it might seem to be an obvious alternative remedy was not a good enough reason for adding it at such a late stage before trial. As for prejudice, earlier case management of the claim had not been able to address this possible alternative remedy and Tradition had therefore not been able to make submissions as to the effect that any account should be conducted within the trial.

(8) More generally:

> "43. The overriding objective requires that the court must deal with cases justly, at proportionate cost, which includes, so far as practical, saving expense in dealing with the case in ways which are proportionate, as set out in Rule 1.1(2)(c) and ensuring that cases are dealt with expeditiously and fairly. The manner in which the application has been brought at this late stage before trial would not enable the court to fulfil those criteria. In my judgment, even if I am wrong as to my characterisation of the application as very late and not as merely late the same reasoning would apply.
>
> 44. The overriding objective at Rule 1.1(2)(f) requires the court to deal with the case in way which enforces compliance with the rules, practice directions and orders. An amendment of the extent requested at this stage before trial would breach the longstop date ordered for the applications to amend, which is part of the carefully crafted directions in a claim which has been the subject of numerous interlocutory hearings tailored towards maintaining an orderly progress towards a 20-day trial."

82. For all those reasons the senior master concluded that the balance of injustice to Tradition clearly outweighed any injustice to BGC.

The appeal

83. BGC lodged its appeal against the senior master's decision on 2 October 2019 and it was initially considered on the papers by Stewart J, who refused permission for reasons given in his order of 17 October 2019.

84. BGC has renewed its application at this oral hearing. For ease of reference, I have addressed the grounds of appeal in the same order as in BGC's argument before me. For completeness, I note that ground 2 is not pursued.

Submissions, discussions and conclusions

The test I am to apply

85. There is no dispute as to the test I am to apply in considering whether to grant permission. As provided by CPR 52.6(1), permission to appeal may be given only where: (a) the court considers that the appeal would have a real prospect of success or (b) there is some other compelling reason for it to be heard. To demonstrate a real prospect of success, BGC thus needs to show that its appeal has a realistic prospect - as opposed to a fanciful one - of succeeding on the

appeal itself; see *Tanfern Limited v Cameron McDonald* [2000] 1WLR 1311, CA, at paragraph 21.

86. The question here is whether the decision of the senior master was wrong; that is, did the senior master err in law or fact or in the exercise of her discretion?

87. The focus of the challenge is thus on the exercise of a judicial discretion and in such cases it must be shown that the decision below "*has exceeded the generous ambit within which a reasonable disagreement is possible*"; see per Brooke LJ in *Tanfern* at paragraph 32, citing the well-known passage from the speech of Lord Fraser of Tullybelton in *G v G* [1985] 1WLR, 647, HL. In subsequently giving the Judgment of the court in *Price v Price* [2003] EWCA Civ 888, Brooke LJ observed that another way of describing the appellate function in relation to judicial discretion was to be found in the judgment of Lord Woolf MR in *AEI Limited v PPL* [1999] 1WLR, 1507 C to D, as follows:

> "Before the court can interfere, it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should or should not have considered, or that his decision was wholly wrong because the court has formed the conclusion that he has not balanced the factors fairly in the scale"

88. Where, however, the proposed appeal relates to a case management decision (as it does here), the court is also entitled to take into account whether the procedural consequences of an appeal - which may include loss of the trial date - outweigh the significance of the case management decision. In this regard, Tradition urges me to have regard to the overriding objective and that the grant of permission would imperil the trial date, increase expense, prevent the case from being dealt with expeditiously and fairly, and lead to the case taking up an excessive share of the court's resources. It is further noted that BGC delayed in bringing this appeal, only filing its application for permission 20 days after the senior master's judgment.

Ground 1

89. BGC's first ground of appeal concerns the damages amendment. BGC contends that the senior master erred in concluding that, if the amendment were allowed, Tradition would not receive a fair trial. Specifically, BGC argues: (a) the senior master was wrong to proceed on the basis that BGC had accepted there would be no opportunity for disclosure and further witness evidence - its draft order did not include provision for such steps because BGC did not consider it necessary but any limited requirement for such steps could have been accommodated; (b) the senior master failed to take proper account of BGC's submission that the substance of the case had not changed as a result of the increase in quantum of the alternative claim - the existing claim for negotiating damages had already been addressed in substantially the same way as would be if the amendment were allowed; (c) she was therefore wrong to conclude that the trial date would inevitably be lost.

90. I cannot see that it was material to the senior master's decision whether or not BGC had actually accepted that there would be no opportunity for disclosure of further witness evidence if the damages amendments were allowed. Even if BGC had made clear its position that such further steps could be accommodated if needed (contrary to its primary position that they were unnecessary), that would not have addressed her concerns. What clearly weighed with the senior master was her view that Tradition would not have sufficient time to investigate the new

factual allegations and re-appraise their case in the light of BGC's reliance on these matters to support a very significant increase in the damages claim (more than £10 million more than the original claim under this head). The senior master accepted that Tradition would be entitled to request further information, seek disclosure, obtain their own disclosure, and consider what additional evidence would be required from witnesses of fact and their expert. Even if, having taken some or all of these steps, it transpired that minimal additional evidence would actually be required, the senior master legitimately took the view that this would not detract from the fact that Tradition would need time to undertake that investigation and appraisal.

91. Moreover, I do not consider that the senior master lost sight of BGC's submission that the substance of the case had not changed (indeed, BGC's case in this regard is set out in some detail at paragraph 27 of her Judgment). From BGC's perspective, no further disclosure or witness evidence might be necessary, but the senior master was bound to have regard to both sides and accepted Tradition's argument that they would wish to make good their defence to the amended claim by searching for and producing relevant documents and evidence. BGC contend this would be unnecessary, but, having read the proposed amendments to the USOL, I am satisfied that the senior master was entitled to reach the conclusion she did. Certainly, she was entitled to conclude that Tradition were not exaggerating the difficulties and that the further issues that might actually be in dispute on the amended claim would not fully crystallise until after service of a re-amended defence and amended reply.

92. Expanding its case on this ground in its skeleton argument, BGC contends that the senior master: (i) failed to deal with the point that the parties would need to make the same arguments, whether or not the amendments were allowed; (ii) failed to appreciate the extent to which the Tradition defendants had already addressed the points in question; (iii) failed to properly take into account that Tradition had already made clear its case on use (namely that, save for admissions, there was none); and (iv) failed to consider that all the points were raised in BGC's evidence and Tradition had had the opportunity to respond in reply statements.

93. By way of general observation, I note that the senior master was giving her Judgment under a certain degree of pressure of time, mindful that time was of the essence. If she failed to rehearse every point raised, that would be understandable, and in any event the parties do not come to this Judgment as strangers. More than that, however, the senior master was plainly very familiar with these proceedings and her summary of BGC's case at paragraph 27 demonstrates that she had a good grasp on the points raised. The specific complaints made by BGC in argument do not, in my judgement, properly engage with the concerns that were at the heart of the senior master's decision in this regard.

94. Thus, Tradition may have already made clear its case on use, but the senior master permissibly considered it was entitled to consider further how best it could make good that position in relation to the new allegations. Similarly, the fact that the parties would be making the same arguments on use in a general sense did not mean that the senior master was wrong to accept that Tradition would wish to specifically consider what evidence it might seek out and deploy to meet the new allegations raised by the amendment. The same points can be made in relation to the statements already served by Tradition. The senior master's reasoning makes plain she did not lose sight of what had already been said and done in relation to the negotiating damages claim, but she legitimately took the view that Tradition should be entitled to seek to say and do more if the amendment, with the very substantial increase in potential liability, was allowed.

95. At the risk of repetition, the same can be said in relation to BGC's objections to the senior master's concerns about fairness in relation to disclosure. BGC might not have considered there was any need for additional disclosure, but the senior master permissibly took the view that Tradition would be entitled to consider this question further. The fact that Tradition might have taken a particular view on the question of further disclosure when addressing the case on the basis of the RAPOC and original SOL did not mean it was bound to that position when faced with new allegations on which BGC based its claim for a substantial increase in damages in the proposed re-amended RAPOC and USOL.

96. As for whether the senior master erred by failing to have regard to the steps that might still be accommodated before trial, I see no basis for inferring other than that she had a very real grip on the remaining timetable and the steps that were still to be undertaken. Indeed, her understanding in that regard is only too apparent from her concerns that Tradition would simply not have sufficient time to consider the amended case in an appropriate manner and her subsequent consideration of the potential diversion of resources that would follow if the amendments were allowed at that stage of the proceedings (see paragraph 37 of the senior master's Judgment).

97. For the reasons given, I am satisfied that, having applied the correct legal test, the senior master carefully weighed in the balance the relevant factors in this case and reached an entirely permissible decision. BGC's prospects of succeeding on this challenge to the judgment under ground 1 are properly to be characterised as fanciful.

Ground 5

98. BGC's submissions next address ground 5, which is acknowledged to raise a similar issue: specifically, whether the senior master erred in failing to take into account, or give sufficient weight to, the fact that there was already a pleaded case of use in respect of both the BR08 and the Anderson information.

99. BGC's complaint in this regard arises from a passage within the senior master's Judgment where she was addressing, and rejecting, particular arguments put forward by Tradition. Specifically Tradition had argued:

> "(i) The pleading in paragraph 12 of the USOL of actual use by Tradition of the BR08 extracts and Anderson information is a significant change from paragraph 5(b) which alleges knowledge of that information but not use…
>
> (ii). The USOL is vaguely worded in that there are a number of allegations which do not provide full particulars of factual allegations at paragraphs 12(e)(i) to (iv), where the phrases such as those set out below, for example, are used rather than setting out the particular allegations made in full."

100. At paragraph 25 of her Judgment, the senior master addressed those arguments as follows:

> "The evidence is sufficient to support the amendments taking into account BGC's expert report. With regard to changing the pleaded case to plead actual use, I accept that can be supported by evidence in relation to a plea of an inference to be drawn …"

101. When moving away from those very specific arguments taken by Tradition to the more general question, whether a fair trial might still be possible if the amendments were allowed, it is apparent that what really weighed with the senior master was the fact that the proposed damages amendment - the amendment to the RAPOC incorporating four pages of amendments to the USOL - introduced new factual allegations. Even taking BGC's case at its highest, and seeing the amendments as adding "*further specific detail to the existing allegations of use*", the senior master was entitled to consider that Tradition would be denied a fair trial if unable to seek better particulars of this "*further specific detail*" and to consider what disclosure and other evidence it might seek to obtain to counter the additional allegations now made.

102. For completeness I note BGC's reliance on the senior master's reference (when subsequently considering the balance of injustice) to the complexion of the further negotiating damages claim "*having wholly changed both in nature and in amount*". This, however, was a response made to BGC's submission that the additional factual allegations could simply have been included in the witness statements; the senior master did not accept this was simply a matter of evidence, but saw it as a substantive amendment to the claim. In terms of amount, that is indisputable. As for the nature of the claim, the master had been taken to parts of the pleaded case (allowing for the incorporation of the SOL and USOL into that case) where that was a legitimate characterisation of the amendment. That there had been some reliance in the RAPOC would not detract from that observation. In any event, it remains apparent that, having balanced all these factors, what weighed with the master was the unfairness to Tradition in dealing with the additional evidential issues that would arise if the amendment were to be allowed.

103. Again, I am unable to see that BGC's ground of challenge in this regard has any realistic prospect of success.

Ground 3

104. By the third ground of appeal, BGC contends that the senior master erred in treating the longstop date as a form of mandatory reference point against which the lateness or otherwise of the proposed amendments fell to be judged. The longstop, BGC submits, was an irrelevant factor to which the master ought not to have regard.

105. The references to the longstop to which BGC takes issue are at paragraphs 25 and 42 of the senior master's Judgment.

106. At paragraph 25, dealing with the damages amendment, the senior master observed:

> "Despite the lack of particulars complained of ... had the application to amend been made prior to the longstop date, or even after that date with good explanation, I consider it possible that permission to amend might well have been given ..."

107. Still addressing the damages amendment but considering the balance of injustice in this regard at paragraph 41, the senior master opined:

> "Although I accept the submission that the longstop date for amendments to pleadings was not intended to bar any proper allegations, it would be expected that any applications made after the longstop date would be in respect of

> information that had only recently come to light and could not have been appreciated at an earlier date"

108. BGC objects that there was no longstop date and contends that the senior master erred in subsequently characterising this as a potential breach of a court order (as suggested by paragraph 44 of her Judgment). It further makes the point that, at the first CCMC, it had been ordered that time should be allowed in the timetable for amendments following disclosure and even then this was explicitly on the basis that: *"... BGC's hands would not be tied and there would be no future restriction on our future ability to amend."* (BGC is here quoting from its submissions at the CMC on 24 July 2018). BGC also objects to the suggestion that this was an agreed position or that it formed part of:

> "44. … carefully crafted directions in the claim ... tailored towards maintaining an orderly progress towards a 20-day trial"

BGC contends that in fact Tradition objected to any provision being made for amendments and points out that at the time this provision was made the trial had been listed for only 12 days. Its commencement was subsequently brought forward to allow for the extended period required for the hearing, albeit that meant that the timetable for preparation was inevitably truncated.

109. I cannot see that this last objection by BGC supports its contention that the senior master's decision was wrong. The fact that the time for preparation was truncated by the expansion of the hearing dates and the bringing forward of the commencement of the trial only serves to underline the practical difficulties arising from BGC's late application to amend. Moreover, neither the fact that Tradition might not have agreed to the initial provision for further amendments, nor that this was at a time when it was envisaged that the trial might have been limited to 12 days, detracts from the fact that this was part of a series of carefully crafted directions on the part of the court, that were plainly intended to maintain an orderly progress towards trial.

110. More substantively, however, it is simply wrong to characterise the senior master's Judgment as treating the date by which provision had been made for further amendments to be made as a form of mandatory reference point against which the lateness or otherwise of the proposed amendments fell to be judged. First, because the senior master expressly accepted that an amendment might have been allowed after that date if there was good explanation; see paragraph 25. Second, because she went on to record her acceptance that the longstop date was: "... *not intended to bar any proper applications*", see paragraph 41. Third, because it is apparent that the senior master's focus was appropriately on the substance not the form. The date set for further amendments was to ensure that the trial timetable was not subject to slippage; whether that was by agreement or not cannot be the significant point, this was a direction made by the court and the senior master was plainly entitled to reach the conclusion she did as to its purpose.

111. Consistent with the court's direction, albeit subject to later variation by the agreement of the parties, BGC had applied for permission to re-amend the APOC on 20 February 2019. The yet further application to re-amend the RAPOC was outside the provision that had been built into the timetable by the court's direction. This was not an irrelevant consideration. Court orders are made for a purpose and the senior master was entitled to see the specific direction as seeking to ensure there was no slippage in the timetable for preparation for trial and to take the view that to allow later amendment without good reason would be contrary to that direction. Having entirely

legitimately taken that view, the senior master was similarly entitled to reach the conclusion that any subsequent application to amend would only be made in respect of new information that could not have been appreciated at an earlier stage. Consequently, I form the view that this ground of appeal also has no realistic prospect of success.

Ground 4

112. Ground 4 relates to a specific aspect of the senior master's reasoning in relation to the account of profits amendment: BGC objects to the reference to the fact that this part of the case had not been cost budgeted for by Tradition. For BGC it is contended this was: (i) irrelevant as Tradition could be compensated in costs such that they would not suffer any prejudice; (ii) incorrect as Tradition had been in possession of the draft amendments for two months before submitting cost budgets in early September 2019; and (iii) could not be a material consideration given the considerable resources available to Tradition for these proceedings (some £5.5 million having been budgeted for the two claims).

113. I do not agree this was an irrelevant consideration. The senior master was obliged to consider how the case might be dealt with in a just and proportionate manner, which would include considerations of expense. The fact that Tradition might ultimately be compensated in cost does not answer this point. More specifically, I do not think that the senior master lost sight of the enormous resources that both parties were already dedicating to these proceedings. She was, however, entitled to have regard to the way in which Tradition would have budgeted for costs and resources and as to how the proposed amendment might impact on this.

Ground 6

114. Ground 6 also relates to the account of profits amendment. BGC argues that the senior master took into account irrelevant factors, or failed to properly take into account that which was relevant, in finding that Tradition would suffer prejudice because all matters of liability and quantum would not be resolved at the forthcoming trial. Given that the question of any account of profits would - as the senior master recognised at paragraph 25 - necessarily be the subject of inferences drawn from the evidence, BGC objects that the account claim could only ever have followed the findings of fact made at trial. Moreover, an order for account of profits would only be made by the judge at trial if (a) Tradition were found to be liable to BGC for misuse of BGC's confidential information and (b) the judge considered it appropriate to make such an order having regard in particular to the availability of other remedies.

115. Again, I cannot see that this ground has any realistic prospect of success. I do not agree that the senior master failed to take this matter into account; she plainly had regard to the fact that this was an issue that would need to be considered at a further hearing. Indeed, at paragraph 34, she expressly set out Tradition's objection that if BGC established misuse and persuaded the judge of the merit of the amended basis of claim there would need to be a further hearing. That was, of course, the difficulty with the late amendment: by amending to include the account of profits claim, BGC would be opening up the possibility that the litigation would not end at the close of the trial (subject to the giving of judgment and any subsequent appeals) as the parties would otherwise have contemplated. That was plainly the point of concern for the senior master, and she was entitled to take account of Tradition's position that, had this matter been raised at an earlier stage, they would have wanted to consider how this might have been dealt with as part of

the trial this year as is intended in relation to the Bell claim so as to avoid the necessity for a further hearing.

116. There was no explanation for the late amendment and I cannot see that it was irrelevant for the senior master to have regard to the potential consequences in terms of finality in these proceedings, even if (1) those consequences were contingent on BGC succeeding and (2) those consequences might have arisen even if this claim had been included at an earlier stage. The fact was that BGC had not included the claim at an earlier stage and Tradition had managed its case on the basis that there would not be an additional hearing of this nature, and there was no proper reason as to why it should now be faced with this risk. Again, this was a permissible exercise of judicial discretion by the senior master and I cannot see this ground of challenge has any realistic prospect of success.

Ground 7

117. This ground of challenge also relates to the account of profits amendment; pursuant to this ground, BGC contends that the senior master erred in concluding that the balance of injustice to Tradition clearly outweighed that to BGC.

118. The difficulty with this objection is that it is a straightforward attack on the senior master's exercise of her judicial discretion. BGC seeks to draw on its earlier criticisms of the senior master's decision, but I have not accepted that it has realistic prospects of succeeding on any of those earlier grounds. The question for me is not whether I would have made the same decision but whether the exercise of discretion "... *exceeded the generous ambit within which a reasonable disagreement is possible*" (see *Tanfern*, above). I am unable to say that it did, and I can only find that the appeal on this ground has no realistic prospect of success.

Ground 8

119. More generally, BGC objects that the master failed to give proper consideration to whether one or all of the amendments should have been allowed. Specifically, it is contended that the senior master erred in failing to separately consider the BR08 information value amendments and the Anderson information value amendments. It is right to say that the senior master addressed these amendments together as amendments going to the damages claim, albeit that she gave separate consideration to the account of profits amendment.

120. For Tradition, it is objected that BGC did not suggest that the senior master should do otherwise; it is said that BGC cannot now seek to challenge her approach at this stage.

121. BGC does not suggest that it put a positive case that the amendments should be the subject of separate consideration, but says that the senior master was still obliged to consider each of the amendments individually.

122. Again, I am not persuaded that BGC has any realistic prospect on this ground of appeal. The senior master was entitled to take the damages amendments together in her reasoning. That was an entirely logical case management decision on her part, and there is no basis for me to infer that she lost sight of the different allegations that were raised by the amendments in reaching her decision.

Disposal

123. For all the reasons given, I refuse the application for permission.