Neutral Citation Number: [2019] EWCA Civ 7

Case No: A3/2018/1585

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
CHANCERY DIVISION
HIS HONOUR JUDGE KLEIN (sitting as a High Court Judge)
[2018] EWHC 1706 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2019

Before:

LORD JUSTICE LEWISON
and
LORD JUSTICE HENDERSON

- -

Between:

SPI NORTH LIMITED	**Appellant**
- and -	
(1) SWISS POST INTERNATIONAL (UK) LIMITED	**Respondents**
(2) ASENDIA UK LIMITED	

- -

Mr Vikram Sachdeva QC (instructed by **Milners Solicitors**) for the **Appellant**
Mr David Drake (instructed by **Peters & Peters LLP**) for the **Respondents**

Hearing date: 29 November 2018

- -

Approved Judgment

Lord Justice Henderson :

Introduction

1. According to CPR rule 16.5(1), the defendant must state in his defence:

> "(a) which of the allegations in the particulars of claim he denies;
>
> (b) which allegations he is unable to admit or deny, but which he requires the claimant to prove; and
>
> (c) which allegations he admits."

2. Although the rule does not use the language of "non-admission", it is I think still common practice in a professionally drawn defence for the pleader to state that a particular allegation in the particulars of claim is "not admitted", when the intention is to say that the allegation falls within paragraph (1)(b) as one which the defendant is unable to admit or deny, but which he requires the claimant to prove. So used, the expression is a convenient form of shorthand, provided that the requirements of the sub-paragraph are not thereby overlooked or watered down. Under the CPR, unlike the previous Rules of the Supreme Court ("RSC"), a non-admission may only properly be pleaded by a defendant where he is, in fact, *unable* to admit or deny the allegation in question, and therefore requires the claimant to prove it.

3. Plainly, a defendant is able to admit or deny facts which are within his own actual knowledge, or which he is able to verify without undue delay, difficulty or inconvenience, by reference to records and other sources of information which are under his control or otherwise at his ready disposal. Furthermore, in the case of a corporate defendant, which can only act through human agents and has no mind of its own, its actual knowledge must clearly be understood as that of its individual officers, employees or other agents whose knowledge is for the purposes of applying rule 16.5 to be attributed to it, in accordance with the relevant rules of attribution: see the well-known observations of Lord Hoffmann in Meridian Global Funds Management Asia Limited v Securities Commission [1995] 2 AC 500 (PC) at 506-507. But does paragraph (1)(b), properly construed, go further, and require a defendant to make reasonable enquires of third parties before it can be said that he is "unable" to admit or deny a particular allegation? That is the novel question of principle which arises on this appeal.

4. The judge (His Honour Judge Klein, sitting as a judge of the High Court in the Business and Property Courts) answered this question in favour of the defendants, which are both UK companies, when dismissing an application by the claimant for an order striking out their defence unless it was amended to comply with rule 16.5. The argument before him revolved around a list of thirteen alleged breaches of paragraph (1)(b) where according to the claimant the defendants had improperly pleaded a non-admission in the defence which counsel had settled on their behalf. In some, but by no means all, of those instances, it was said that the defendants would, or at least might, have been able to admit the relevant allegation had they taken reasonable steps to

contact certain key individuals who had been closely involved in the transactions in issue as employees of the defendants, but had subsequently left their employment.

5. After hearing oral argument for the best part of a day, the judge gave an extempore judgment of which we have the approved transcript: [2018] EWHC 1706 (Ch). He expressed his conclusion as follows, at [18]:

> "Taking all these matters into account, as a matter of principle, I have concluded that a defendant is not required, before being able to make a non-admission, to have made reasonable inquiries. Instead, in my view, consistent with Mr Drake's submission, I have concluded that a defendant can properly make a non-admission based on his own knowledge. In the case of an individual that would be his own knowledge and may well be, as Mr Drake contends, information he has reminded himself of by looking through and making reasonable inquiries of his records. In the case of a corporate defendant, the non-admissions are based on the corporate knowledge."

6. The claimant now appeals to this court, with permission granted by the judge. In the short written reasons which he gave for granting permission, the judge observed that there is no authoritative decision on the issue, and that while, in construing CPR rule 16.5, a court is required to have regard to the overriding objective in rule 1.2, this court might weigh the various elements of the overriding objective differently from the way he had weighed them, leading to the conclusion that the claimant's construction of rule 16.5 should be preferred.

7. On the hearing of the appeal, we had the benefit of full written submissions, supplemented by commendably brief and focused oral arguments, from the same counsel who appeared below, Mr Vikram Sachdeva QC for the claimant and Mr David Drake for the defendants.

The background

(1) Facts

8. The claimant, SPI North Limited, was incorporated on 6 April 2010. At all material times it has been engaged in the postal services industry in the UK.

9. The first defendant, Swiss Post International (UK) Limited ("SPI UK"), is a UK affiliate of the Swiss Post group of companies.

10. On or around 1 September 2010, the claimant and SPI UK entered into a written Premium Partner Agreement ("the PPA"), under which the parties agreed to enter into a business relationship for an indefinite period. The general purpose of the PPA was to enable SPI UK to increase its market share of "Swiss Post" branded delivery services to customers in the northern part of the UK, by granting the claimant the exclusive right to sell the relevant products in a defined territory on mutually advantageous terms. Detailed provision was made for the prices which SPI UK would

charge to the claimant for its products, leaving the claimant free to charge its customers whatever prices it chose. The claimant was to pay SPI UK a royalty of 5% of its turnover generated by sale of the branded products. As one would expect, the PPA also made detailed provision for other features of the commercial relationship between the two companies. Article 12 expressly recorded their "mutual intention only to establish relations of commercial co-operation", and that no relationship of agency should exist between them.

11. The PPA was signed on behalf of SPI UK by Paul Taylor and Nicholas Frazer, who were respectively the company's CEO and commercial director. Article 21 of the PPA provided that all notices and other communications between the parties should be sent to Wendy Holt at SPI UK, and to Mark Brodigan and Nicholas Hall at the claimant. Ms Holt was then the partner and relationship manager at SPI UK, while Mr Brodigan and Mr Hall were directors of the claimant and had signed the PPA on its behalf.

12. In 2012 the Swiss Post group entered into a joint venture with the French La Poste group which was intended to combine their respective cross-border mail activities, subject to certain exceptions and subject to approval by the relevant regulatory authorities. Clearance for the joint venture was duly obtained from the European Commission in July 2012. On 31 December 2013, the trade and assets of SPI UK were transferred to the second defendant, Asendia UK Limited, an affiliate of the La Poste group which had previously been called La Poste UK Limited. "Asendia" was the brand name of the new joint venture.

13. The claimant's case is that the Asendia joint venture entailed breaches by SPI UK of the PPA, and that the second defendant induced SPI UK to commit those breaches. In the present action, which was begun by a claim form issued on 31 May 2017, the claimant says it has suffered loss which it estimates (on a loss of profit basis) as between £1.2m and £2.3m, or (on a loss of capital value basis) as between £9.8m and £17.4m. In its amended particulars of claim dated 15 August 2017, the claimant relies on various express provisions of the PPA, but also alleges implied terms that SPI UK would support the Swiss Post brand and the claimant's use of it, and would not derogate from its grant to the claimant. In addition, it is alleged that a collateral agreement on prices was reached between Ms Holt and Mr Frazer of SPI UK and Mr Brodigan and Mr Hall of the claimant, to the effect that the prices of goods and services charged by SPI UK to the claimant would always follow certain prescribed formulae, with either no or limited mark-ups.

14. As to the dates when these discussions took place, the amended particulars of claim say this:

> "26…. The dates of the said discussions, apart from that referred to in paragraph 27 below, cannot be provided pending disclosure of the diaries and email systems of Wendy Holt and Nick Frazer, to which the defendants have access. Upon disclosure further particulars will be provided.
>
> 27. In or around late 2009 the First Defendant's Wendy Holt gave a presentation to the directors of the Claimant where the above formulae were confirmed."

It is then alleged that the terms so agreed were applied in calculating the prices granted to the claimant until January 2013. Paragraphs 30 to 32 then rely on the same material to make alternative allegations of promissory estoppel, estoppel by convention, rectification for unilateral mistake, and rectification for mutual mistake.

15. It is common ground that the PPA came to an end in April 2014, when each side says it accepted the other's repudiatory breach.

(2) Procedural history

16. Pre-action correspondence between the parties' solicitors (then, as now, Milners for the claimant, and Peters & Peters for the defendants) was initiated in January 2014, and proceeded inconclusively until July of that year. There was then a gap of almost three years, until on 7 April 2017 Milners wrote again to Peters & Peters enclosing draft particulars of claim, substantially in the form in which they were subsequently served.

17. The claim form was issued (as I have said) on 31 May 2017, and it and the particulars of claim were served on the defendants on the following day, 1 June 2017.

18. The defendants filed an acknowledgment of service under CPR Part 10, so the period for filing their defence was 28 days after service of the particulars of claim: see CPR rule 15.4(1)(b). Following an agreed extension of time, the defence was in fact filed and served on 17 July 2017, that is, six weeks and two business days after service of the particulars of claim.

19. The amended claim form and particulars of claim were then served on 15 August 2017, and following a further agreed extension of time the amended defence and counterclaim was served on 9 September 2017.

20. On 13 October 2017, the claimant served a reply and defence to counterclaim; and on 27 October 2017, the claimant served its response to a request for further information under CPR Part 18 which the defendants had made on 22 September 2017.

21. Both sides then set in train a series of interim applications, some of which are still unresolved. On 20 December 2017, the defendants made an application for orders striking out parts of the particulars of claim, requiring the claimant to answer Part 18 questions, and for security for costs of nearly £2 million. These applications were supported by the first witness statement of Jonathan Tickner, who is the partner of Peters & Peters with conduct of the proceedings on behalf of the defendants. In the context of the application for further information under Part 18, Mr Tickner said that the defendants had "undertaken a preliminary investigation into the relevant documents and data" for "the proposed disclosure exercise", and for that purpose had identified five "key individuals" who were "likely to have documents relevant to the issues in these proceedings generally". Three of those individuals were Mr Taylor, Mr Frazer and Ms Holt, until their respective departures on various dates in 2014.

22. On 9 January 2018, the claimant provided a supplemental response to Part 18 questions, and on 10 January 2018 it served its own application notice seeking the relief with which we are now concerned, as well as summary judgment for breach of a

confidentiality obligation in the PPA, permission to further amend the particulars of claim, and an order for the defendants to provide further information under Part 18.

23. It is unnecessary to trace the subsequent procedural history in any detail, but a few points should be noted.

24. In a supplemental Part 18 response dated 21 February 2018, concerning the basis on which prices for the products had been calculated by SPI UK on various dates before and in May 2013, the defendants said that the information requested was "not easily available" because it related to historic matters and to "a large matrix of prices". The number of products was substantial, and "the basis on which their historic prices were determined depended on a number of factors which would require appropriate investigation with the benefit of both contemporaneous documents and the assistance of potential witnesses". The requests would therefore be "more appropriately addressed through disclosure and witness statements."

25. A similar point was made in a further supplemental response dated 18 May 2018, to questions asking whether it was admitted or denied that the terms pleaded at paragraph 26 of the amended particulars of claim were applied in calculating the prices granted to the claimant until January 2013, and requesting an explanation of "the precise basis of the price rise in May 2013". The response added that Ms Holt had been identified by the defendants as "the principal individual who had information and documents relevant to the determination of the prices", but she had left the defendants' employment in September 2014, and it appeared that the relevant documents which she possessed during her employment "may have been deleted around the time of her departure, probably by Ms Holt herself." The defendants said it was not yet clear whether the relevant documents could be recovered, but if they could the process of recovery and analysis would require a significant outlay of resources (of the order of 40 working hours) to reconstitute the basis upon which the prices were calculated. It would therefore be preferable to approach the task "in the context of a structured disclosure exercise determined by the Court to be appropriate in scope and nature."

26. On 21 May 2018, Peters & Peters wrote to Milners confirming that, wherever words of non-admission were used in the amended defence, they were intended to comply with the substantive requirements of CPR rule 16.5, so "any substantive allegation as to which no admission is made is one which the Defendants are unable to admit or deny." Mr Tickner repeated this explanation in his second witness statement signed on the following day, 22 May. He added:

> "In each case there are unexceptional reasons, for example relating to the relative inaccessibility of particular information, or the ambiguity of the relevant allegation, or both, why the Defendants are unable to admit or deny the relevant allegation."

27. This explanation was not accepted by Milners, who attached to a letter dated 31 May 2018 a table setting out thirteen instances of "matters which your clients are able to answer after making enquiries of relevant witnesses" and therefore could not properly be the subject of a non-admission. This is the table to which I have already referred, by reference to which the argument before the judge and this court was conducted. It is worth noting, as Mr Drake reminded us, that the table post-dated Mr Tickner's

evidence on the present application, so the general comments (quoted above) which Mr Tickner made in his second statement were not specifically addressed to it.

28. The six outstanding applications were all listed for determination by the judge on 13 and 14 June 2018. In the event, he only had time to deal with two of them, including the present application to strike out the defence. On the claimant's application for summary judgment, judgment was entered in favour of the claimant for the breach (by now admitted) of article 14.5 of the PPA, but the determination of any damages resulting from the breach was adjourned to the trial of the action.

29. During the course of the hearing below, the claimant served a further witness statement from one of its directors, Mr Hall. The purpose of this evidence was to show that Ms Holt, Mr Taylor and Mr Frazer were all easily contactable by telephone, and that they would be willing to speak to the defendants if they were approached, which they had not been. Mr Hall said that he had been able to make contact with all three of them, and he obtained such confirmation, in the space of little over an hour.

CPR rule 16.5 in context

30. Where a claim is started under the standard procedure in Part 7 of the CPR, the rules provide a fairly rapid timetable for the service of statements of case. Particulars of claim must either be contained in or served with the claim form, or served separately within fourteen days after service of the claim form: see rule 7.4(1). The time for service of a defence then depends, as I have already said, on whether the defendant files an acknowledgement of service. The basic rule is that a defence must be filed within fourteen days after service of the particulars of claim, but if the defendant is unable to file a defence within that period, he may file an acknowledgment of service, in which case the period for filing his defence is extended to twenty eight days after service of the particulars of claim: see rules 10.1(3)(a) and 15.4(1). Rule 15.5 then provides that the defendant and the claimant may agree that the period for filing a defence under rule 15.4 shall be extended by up to twenty eight days, in which case the defendant must notify the court in writing of the extension. There is no provision enabling further extensions of time to be agreed between the parties, but the court may of course allow further time in an appropriate case on application by the defendant.

31. On the filing of a defence, the court will serve on each party a notice of proposed allocation which specifies a date by which the parties are to file completed directions questionnaires. If the claimant wishes to file a reply to the defence, rule 15.8 requires him to file the reply together with his directions questionnaire. Rule 15.9 then provides that:

> "A party may not file or serve any statement of case after a reply without the permission of the court."

32. CPR Part 16 deals with statements of case, including the contents of the particulars of claim (rule 16.4) and "Content of defence" (rule 16.5). At the start of this judgment, I set out the critical wording of rule 16.5(1) which we have to construe and apply. In order to place it in context, I will now set out the relevant parts of the rule in full:

> "(1) In his defence, the defendant must state –
>
> > (a) which of the allegations in the particulars of claim he denies;
> >
> > (b) which allegations he is unable to admit or deny, but which he requires the claimant to prove; and
> >
> > (c) which allegations he admits.
>
> (2) Where the defendant denies an allegation –
>
> > (a) he must state his reasons for doing so; and
> >
> > (b) if he intends to put forward a different version of events from that given by the claimant, he must state his own version.
>
> (3) A defendant who –
>
> > (a) fails to deal with an allegation; but
> >
> > (b) has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant,
>
> shall be taken to require that allegation to be proved.
>
> …
>
> (5) Subject to paragraphs (3) and (4), a defendant who fails to deal with an allegation shall be taken to admit that allegation."

33. The Practice Direction which supplements Part 16 adds nothing of substance to the above provisions, although paragraph 10.2 reiterates that:

> "A defendant should deal with every allegation in accordance with rule 16.5(1) and (2)."

34. In interpreting the provisions of rule 16.5, the court is obliged by rule 1.2 to "seek to give effect to the overriding objective". The overriding objective is formulated in rule 1.1(1) as "enabling the court to deal with cases justly and at proportionate cost", and this is amplified in rule 1.1(2) which states that:

> "Dealing with a case justly and at proportionate cost includes, so far as practicable –
>
> > (a) ensuring that the parties are on an equal footing;
> >
> > (b) saving expense;

> (c) dealing with the case in ways which are proportionate –
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;
>
> (d) ensuring it is dealt with expeditiously and fairly;
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
>
> (f) enforcing compliance with rules, practice directions and orders."

35. Since the CPR introduced "a new procedural code" with the overriding objective which I have just quoted, it is doubtful whether any real help in interpreting the requirements of rule 16.5(1)(b) can be gained from a comparison with the provisions of the RSC which it replaced, or even from the analysis and recommendations of Lord Woolf in his Interim and Final Access to Justice Reports in 1995 and 1996 respectively, important though they are by way of general background. Nevertheless, I think it is instructive to compare the wording of CPR rule 16.5(1) with RSC Order 18 rule 13, headed "Admissions and denials", which provided that:

> "(1) Any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 14 operates as a denial of it.
>
> (2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication.
>
> (3) Every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them."

36. Those provisions thus enabled a defendant to "traverse" any allegation of fact in the statement of claim either by denying it or by not admitting it, and although there was authority to the effect that a defendant ought to admit facts which were not controversial, or were known to him, practitioners whose memory stretches back that far will remember the stonewalling defences, replete with non-admissions, which

obstructive defendants were prone to plead, relying on the choice of response afforded to them by rule 13. This was clearly part of the mischief that Lord Woolf's reforms were designed to address, as may be seen from Chapter 20 of his Interim Report. Similarly, in paragraph 16 of Chapter 12 of his Final Report, Lord Woolf proposed that:

> "The defence must:
>
> (a) indicate
>
> (i) which parts of the claim the defendant admits,
>
> (ii) which parts he denies,
>
> (iii) which parts he doubts to be true (and why),
>
> (iv) which parts he neither admits nor denies, because he does not know whether they are true, but which he wishes the claimant to prove;
>
> (b) give the defendant's version of the facts in so far as they differ from those stated in the claim;
>
> …"

37. It is important to note, however, that these proposals were not adopted in full by Parliament in the CPR, and the concept of being "unable to admit or deny" an allegation forms no part, as such, of Lord Woolf's analysis or recommendations. Hence, as I have said, the assistance to be gained from them is of necessity limited.

The question of principle: is there an obligation to make reasonable enquiries of third parties before a defendant pleads that he is unable to admit or deny an allegation?

38. I now turn to the question of principle which lies at the heart of this appeal, namely whether a defendant is obliged to make reasonable enquiries of third parties before he pleads in his defence that he is unable to admit or deny an allegation in the particulars of claim. By "third parties", in the case of a corporate defendant, I mean persons other than those individuals whose knowledge is in accordance with normal principles to be attributed to the corporation at the time when the defence is filed. Thus a former officer or employee of the corporation, whose knowledge would have been attributed to it at a material time, but who no longer works for the corporation, may be a "third party" for these purposes.

39. In arguing for a positive answer to this question, Mr Sachdeva QC emphasises the structure and language of rule 16.5(1). The defendant is under a positive obligation to state both which of the allegations in the particulars of claim he denies, and which of them he admits. The third option open to the defendant, of requiring the claimant to prove an allegation, is only open to him where he is *unable* to admit or deny the allegation in question. This is entirely different from the option of non-admission which was open to a defendant under the RSC, and the change was clearly a deliberate one, designed to achieve clarity and prevent prevarication. The purpose of statements of case is to narrow the scope of factual disputes and enable the issues to

be identified, thereby saving time and costs and promoting the overriding objective. The clear implication, submits Mr Sachdeva, is that parties must make reasonable enquiries before they can say that their personal or corporate knowledge does not permit them to admit or deny an allegation; and in an appropriate case such reasonable enquiries may require a defendant to correspond with former employees who are potentially aware of the facts in dispute, readily contactable, and willing to speak to the defendant.

40. Mr Sachdeva referred us in this connection to the judgment of this court in Al Rawi v Security Service [2010] EWCA Civ 482, [2012] 1 AC 531, at [18], where Lord Neuberger MR said:

> "First, a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance, so that the trial can be fairly conducted and, in particular, the parties can properly prepare their respective evidence and arguments for trial."

41. Mr Sachdeva also referred us to the observations of Mann J on an application for particulars of a pleading in Madonna Ciccone v Associated Newspapers Ltd [2009] EWHC 1108 (Ch), where he said at [29]:

> "The question really is: Is that non-admission appropriate in the circumstances? In my view, it is not appropriate in relation to matters which have not otherwise been dealt with and which are matters which, on their face, can be seen to be within the knowledge of the defendant and therefore within its abilty to plead. There are matters in respect of which it may have no particular knowledge and in respect of which a non-admission and putting to proof explicitly in those terms is appropriate …A defendant might have admitted all he really wants to admit but if his pleading, nevertheless, falls short of the standard required by CPR 16.5 then he is going to have to go beyond what he was otherwise minded to do or to say."

42. We were also taken to the familiar observations of Lord Woolf MR in McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 at 792-3:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In

> particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules."

43. Although Mr Sachdeva did not rely on it, a further comment made by Lord Woolf at 793 should also be noted:

> "Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged. In this case the distinct impression was given by the parties that both sides were engaged in a battle of tactics."

44. Mr Sachdeva sought further support for his argument, by way of analogy, from the principles which in his submission the court now applies when deciding whether to order the provision of further information under CPR Part 18, and which were formerly applied under the RSC when deciding whether to direct answers to interrogatories under Order 26 rule 5. In the latter context, we were referred to the judgment of Sir Robert Megarry V.-C. in Stanfield Properties v National Westminster Bank [1983] 1 WLR 568 at 570-571. Although dealing with what is now an obsolete procedure, Mr Sachdeva submitted (and I would provisionally accept) that similar principles should guide the court today when exercising its discretionary power to order the provision of further information under CPR Part 18. It is, however, important to note that there is no parallel between the discretionary language of rule 18.1 ("The court *may* at any time order a party to – (a) clarify any matter which is in dispute in the proceedings; or (b) give additional information in relation to any such matter, …") and the mandatory terms of rule 16.5(1) which we have to construe. The passage is also of interest because Sir Robert Megarry considered the position of former officers, employees or agents of a corporate party.

45. Sir Robert said, beginning at 570E:

> "From the authorities put before me, I think it is clear that a limited company in answering interrogatories must procure the making of proper inquiries from the company's officers, servants and agents: see, for example, *Southwark and Vauxhall Water Co v Quick* (1878) 3 Q.B.D. 315, 321. The position about inquiries to be made from former officers, servants or agents is less clear. In *Bolckow, Vaughan & Co v Fisher* (1882) 10 Q.B.D. 161, 169 Brett LJ suggested that such inquiries need not be made; but this was plainly obiter, and with all due respect I cannot agree with it. I do not think that any categorical answer can be given, simply turning on whether the employment has ended. I do not see why inquiries should not be made of a servant who left or retired a few days or a few weeks before the interrogatories are being answered even though the company no longer has any control over him; the

> lack of any power to compel an answer is no reason why the question should not be asked. But if the departure or retirement was a long while ago, it might well be unreasonable to expect inquiries to be made, especially if the company does not know where the officer or servant is. The making of reasonable inquiries is one thing, pursuit of ancient history may be another: consider *Alliott v Smith* [1895] 2 Ch. 111. In the end, I think it came to be accepted on all hands that the test was one of reasonableness, and not whether or not the employment had been terminated; and this plainly seems to be right."

46. Sir Robert went on to hold that the person answering the interrogatories was bound to make all reasonable enquiries likely to reveal what is known to the company, and that the answers should include a statement showing that the person swearing the answers has applied his mind to the duty and attempted to discharge it. He added, at 571C:

> "If the answers do not at least state in general terms that the person swearing to them has made diligent inquiries of all officers, servants and agents of the company who might reasonably be expected to have some knowledge relevant to the questions, the parties administering the interrogatories may justifiably question whether the company has discharged its obligations in answering the questions. In particular, if any person is an obvious source of knowledge, he must be questioned. If he is not, the company should say why."

47. Mr Sachdeva also relied on some features of the procedural history which I have outlined above. He emphasised that draft particulars of claim had been sent to the defendants in the pre-action period, but had received no response although one was invited within 28 days. After service of the actual particulars of claim (in materially similar form) on 1 June 2017, an extension of time was agreed for service of the defence, and the defendants then had a further opportunity to make reasonable enquiries following service of the amended particulars of claim. When the amended defence was finally served on 8 September 2017, some fourteen weeks had elapsed since service of the particulars of claim. The claimant also relies on the fact that Mr Taylor, Mr Frazer and Ms Holt were key individuals in possession of highly material information, and could have been contacted with ease by the defendants, but they had failed to do so.

48. These submissions were persuasively advanced by Mr Sachdeva, but I find them unconvincing. I do, however, agree with his starting point, which is the significant difference between the language and structure of rule 16.5(1) on the one hand, and the position which obtained under the RSC on the other hand. Continuing use of the language of non-admission, convenient though it may be, must not be allowed to blur the distinction, or still less to encourage a reversion to the bad old days when a defendant could get away with a stonewalling defence full of indiscriminate non-admissions. Clearly, a defendant is now under a positive duty to admit or deny

pleaded allegations where he is able to do so, and he may only put the claimant to proof of a fact where he is unable to admit or deny it. But that does not answer the question of what "unable" means in this context.

49. In my judgment, a number of factors point towards the conclusion that a defendant is "unable to admit or deny" an allegation within the meaning of rule 16.5(1)(b) where the truth or falsity of the allegation is neither within his actual knowledge (including attributed knowledge in the case of a corporate defendant) nor capable of rapid ascertainment from documents or other sources of information at his ready disposal. In particular, there is no general obligation to make reasonable enquiries of third parties at this very early stage of the litigation. Instead, the purpose of the defence is to define and narrow the issues between the parties in general terms, on the basis of knowledge and information which the defendant has readily available to him during the short period afforded by the rules for filing his defence.

50. There are two main reasons which in my view support this conclusion. The first reason has to do with the procedural timetable laid down by the CPR for all Part 7 claims, whatever their magnitude or value, and whether commenced in the High Court or the County Court. The default position is that a defence must be filed within fourteen days after service of the particulars of claims, extended to twenty eight days if more time is needed and an acknowledgement of service is filed. This is, deliberately, a relatively short period, designed to encourage expedition and the rapid progress towards trial of an action once it has been started. Within such a short period, it does not seem to me practicable to impose a general obligation on defendants to make all reasonable enquiries of third parties who may be in possession of relevant information before filing the defence. That is not to say, of course, that a defendant is prevented from making such enquiries, if he chooses and has the time to do so. Nor would I wish to discourage claimants from granting, or not opposing, reasonable extensions of time for that purpose, if satisfied that this would further the overriding objective. But that is a very different matter from saying that, as a matter of obligation, a defendant is precluded from putting the claimant to proof of an allegation until all reasonable third party enquiries potentially relevant to it have been pursued. The action is still at its earliest stages, and in most cases the preferable course will be for the parties to follow the strict timetable prescribed by the CPR, leaving the making of wider enquiries and further refinement of the issues to subsequent stages in the pre-trial procedure, including requests for further information under Part 18, disclosure and the exchange of witness statements.

51. My second main reason is to do with the difficulty of drawing a sensible line if a general duty of the type I have mentioned were held to exist at the stage of filing the defence. There would be endless scope for disagreement about the enquiries which the defendant ought reasonably to make in the limited time available to him, particularly as there is no relevant guidance in Part 16 itself or its associated Practice Direction, nor is there any requirement for a defence to be accompanied by a statement explaining what enquiries have been made. By contrast, where an application for further information is made under Part 18, the focus will be on a specific request for clarification or additional information in relation to a matter in dispute in the proceedings, evidence relevant to the application will usually have been filed on both sides, and the court should be well placed to decide whether or not to make an order.

52. A related point, of equal importance, is that a defence has to be verified by a statement of truth signed by the defendant or their legal representative: see CPR rule 22.1(1)(a) and (6)(a). There should be no difficulty in complying with this requirement where the contents of the defence are based on the defendant's own knowledge, but the position may be very different where an admission or denial is based on information obtained from a third party. In such a case, making contact with the third party may be only the first step in a complex process which will require the information obtained to be evaluated, tested and correlated with other information which is or becomes available to the defendant. It would often be completely unrealistic to expect such a process to be completed within the short period allowed for the filing of a defence, and it is correspondingly difficult to believe that this is what rule 16.5(1)(b) on its true construction really requires.

53. Again, the appropriate stage for dealing with issues of this kind is not when the defence is being drafted, often under considerable time pressure, but at later stages when the court has ample tools in its armoury to review and refine the issues, and to require the provision of relevant information or documents by a reluctant or obstructive defendant. What is unreasonable, in my opinion, is to accuse a defendant of acting improperly and in breach of rule 16.5(1) merely because he does not make allegedly reasonable enquiries of third parties before stating in his defence that he is unable to admit or deny an allegation.

54. For these main reasons, which largely reflect Mr Drake's cogent submissions for the defendants, I have little hesitation in concluding that the wording of rule 16.5(1)(b) does not import any duty to make reasonable enquiries of third parties before putting the claimant to proof of an allegation which the defendant is "unable to admit or deny". But that is not the end of the matter, because Mr Drake advanced a further argument against the claimant's approach which I find equally compelling. The argument was, in short, that rule 16.5(1) does not import a "process" requirement, of which the defendants were arguably in breach and which could for that reason alone have arguably justified striking out the defence (or parts of it) if the offending non-admissions were not remedied. In order to justify such a draconian remedy, submits Mr Drake, it would have been necessary for the claimant to establish, to the civil standard of proof, that the defendants actually could have had available to them knowledge (whether or not derived from third parties) which meant that they were in fact able to admit or deny specific allegations which they had chosen not to admit. In other words, it would not be enough merely to show that the defendants failed to make reasonable enquiries of third parties which they ought to have made. It would be necessary to go further, and to establish that the impugned non-admissions were in fact improper because the relevant allegations should have been either admitted or denied.

55. I would accept this submission, to which in my view Mr Sachdeva had no convincing answer. More generally, the present case seems to me to provide a good example of the disadvantages inherent in the claimant's approach to rule 16.5(1)(b), generating unnecessary and expensive inter-solicitor correspondence and satellite litigation at a time when the energy and resources of the parties should be devoted to getting on with the action in a proportionate and cost-effective manner.

The individual allegations of breach

56. In view of the conclusions which I have reached on the issue of principle, it would be a dispiriting and disproportionate exercise to go through the thirteen alleged instances of non-compliance with the requirements of rule 16.5(1). Some of the complaints, as Mr Sachdeva all but admitted, are ones of no real substance – or, as I would prefer to say, of the utmost triviality. Others are examples of a probably unnecessary, but harmless, tendency to err on the side of caution by pleading a residual non-admission after the defendants' positive case in response to an allegation has been set out.

57. Potentially of more significance are the complaints made about the defendants' response to the allegations about prices contained in paragraphs 26-30 of the amended particulars of claim. It is said that it was the defendants' duty to find out what their former agents, Ms Holt and Mr Frazer, actually said to the claimant, and it is not enough to deny that they "would have made" any representations etc of the nature alleged, combined with a non-admission of the claimant's allegations. As Lewison LJ pointed out in oral argument, a defence framed in such terms is open to objection on the ground that it is embarrassing, although it is only fair to add that the defendants' stance on these points has now been elucidated in replies to requests for further information: see paragraphs [24] and [25] above. But that is not the ground upon which the claimant has based its attack on these paragraphs of the defence, and (if it had been) the defendants have in my view now sufficiently clarified their position for the purposes of the present application. The nub of the complaint was that the defendants should have made appropriate enquiries of Ms Holt and Mr Frazer before filing their defence; but for the reasons which I have already given, I am unable to accept that argument.

Conclusion

58. I would accordingly dismiss the appeal.

Lewison LJ:

59. I agree.