Neutral Citation Number: [2018] EWHC 3084 (Ch)

Case No: C30BM088

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
Business List (ChD)

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 13/11/2018

Before :

HHJ DAVID COOKE

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Between :

Seyed Kamaleddin Nejati Gilani	**Claimant**
- and -	
Mohammed Johngir Saddiq (1)	**Defendants**
Babar Saddiq (2)	
Dobhai (Holdings) Ltd (3)	
MW Retail Brands Ltd (4)	
Wauheed Johngir (5)	
Muhammed Waqaas Babar (6)	

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Lee Schama (instructed by **Cubism Law**) for the **Claimant**
Avtar Khangure QC (instructed by **Aspect Law Ltd**) for the **First to Third Defendants**
Steven Fennell (instructed by **Schofield Sweeney LLP**) for the **Fourth to Sixth Defendants**

Hearing date: 25 September 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ DAVID COOKE

HHJ David Cooke:

1. This is the claimant's application pursuant to CPR 31.22 for permission to use documents disclosed by the defendants in this claim as evidence in separate criminal proceedings, namely a private prosecution brought by him against the first and second defendants ("the Saddiq brothers") on charges of fraud arising out of some of the same matters as give rise to this civil claim.

2. By way of very brief summary of a somewhat convoluted procedural history, in this claim the claimant alleges that he paid £401,000 to the Saddiq brothers pursuant to arrangements under which he agreed to fund (in part) the development of two pubs, which they owned through the third defendant company. His case is that it was a joint venture and he was to have a 50% share in each property. One has been developed and is now a successful Indian restaurant. The other has not but has potential for residential conversion. He claims that in breach of these arrangements he has received no return on his investment and no share of the income of the restaurant, and that the Saddiq brothers have not transferred the properties so as to make him a joint legal owner but have instead (and after he indicated he intended to commence proceedings) caused the undeveloped property to be sold without paying him any of the proceeds and transferred the trading restaurant to the fourth defendant, a company controlled by their sons (the fifth and sixth defendants).

3. I have not been provided with a copy of the indictment in the criminal proceedings, but it is common ground that it contains four counts of fraud relating to the alleged mortgaging of these two properties without the claimant's consent (allegedly imperilling the interest he claims in them) and to the transfers of those properties referred to above. It is a private prosecution instituted by the claimant and it is also common ground that the CPS has exercised its right to review the case and decided not to intervene, being satisfied that it is properly brought as regards the evidential and public interest tests.

4. Various causes of action are pleaded in the civil claim but, as the defendants point out and in contrast to the charges in the prosecution, there is no pleading of fraud.

5. The Saddiq brothers made applications to the Crown Court to stay the prosecution as an abuse of process, alternatively to dismiss the charges for lack of evidence. These came before HHJ Thomas QC in August 2017, when it was argued by the defendants that (quoting from his ruling)

> "the purpose of these criminal proceedings is to put pressure on the defendants in regard to civil proceedings between the same parties in regard to the same facts. The criminal case is said to be merely a continuation of or duplication or re-working of the civil case by other means."

6. HHJ Thomas QC accepted that argument and directed a stay, but his decision was overturned by the Court of Appeal ([2017] EWCA Crim 2119) which concluded that this was not a decision that the judge could reasonably have come to. The application to dismiss the charges for lack of evidence was remitted to the Crown Court with a direction that it be heard by different judge, and I am told that it is listed for a date in November of this year.

7. The claimant's solicitor was asked to specify which documents are sought to be used, and has served a list of 203 documents. It is accepted that this comprises all the documents disclosed by all the defendants, with the exception of witness statements. Inspection has been given of all of these documents; no claim to withhold any of them having been made by any of the defendants, whether on grounds that they would tend to incriminate or otherwise.

8. CPR 31.22 provides as follows:

> "31.22
>
> (1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
>
> (a) …
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree."

9. It is agreed that this provision replaces the former implied undertaking to similar effect, see *Marlwood Commercial Inc v Kozeny* [2004] EWCA Civ 798 at para 9. In that case it was said (para 43 summarising previous authorities and particularly *Crest Homes Plc v Marks* [1987] AC 829) that where permission is sought "it is for the applicant to make good his case, cogently and persuasively, that there are special circumstances which justify permission and that permission will not occasion injustice to the person giving disclosure".

10. Mr Fennell in his skeleton submitted that "the bar is high", following a statement in those words by Eder J in *Tchenguiz v Director of the Serious Fraud Office* [2014] EWHC 1315 (Comm), but I do not consider that Eder J intended those words to add anything to what was said in *Crest* and *Marlwood*; the full sentence is as follows (para 18):

> "However, given the compulsive nature of the disclosure process in legal proceedings and consistent with *Marlwood* and *Crest Homes*, I fully accept that the burden of proof lies on the applicant seeking permission and that the bar is high, i.e. the applicant must show "cogent and persuasive reasons" why any particular document should be released amounting to "special circumstances". In my view it is important that these requirements are not in any way watered-down."

Eder J was thus using the phrase "the bar is high" to summarise or describe the requirement set out in the earlier cases to show "cogent and persuasive reasons" and not to add to it.

11. In *Smithkline Beecham plc v Generics (UK) Ltd* [2003] EWCA Civ 1109 Aldous LJ (with whom the other LJJ agreed) rejected an argument that sought to apply a very high threshold for permission, and particularly one that could not be overcome in favour of a purely private interest, made by reference to a passage in the judgment of

Whitford J in *Halcon International Inc v Shell Transport and Trading Co* [1979] RPC 97 at p 109:

> "However, these authorities to my mind, lead to this conclusion, that the use of a document disclosed in a proceeding in some other context, or even in another proceeding between the same parties in the same jurisdiction, is an abuse of process unless there are very strong grounds for making an exception to the general rule. It does, I think, emerge that some overriding public interest might be a good example, but not the mere furtherance of some private interest even where that private interest arises directly out of or is brought to light as a result of the discovery made"

12. Aldous LJ said in relation to this:

> "36 … that statement was not followed by the House of Lords in *Crest Homes Plc v Marks* [1987] AC 829 at 860. Lord Oliver said:
>
> "Your Lordships have been referred to a number of reported cases in which application has been made for the use of documents obtained under *Anton Piller* orders or on general discovery for the purpose of proceedings other than those in which the order was made… I do not, for my part, think that it would be helpful to review these authorities for they are no more than examples and they illustrate no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery. As Nourse L.J. observed in the course of his judgment in the instant case, each case must turn on its own individual facts."
>
> 37 … it is important under the CPR to have in mind the overriding principles when considering whether to lift an order made under CPR 31.22. The most important consideration must be the interest of justice which involves considering the interest of the party seeking to use the documents and that of the party protected by the CPR 31.22 order. As Lord Oliver said each case will depend upon its own facts."

13. In *Crest Homes*, permission was given to use documents disclosed in one action against a copyright infringer in contempt proceedings against the same infringer but in a separate action, Lord Oliver emphasising the close factual relationship between the two actions and the "purely adventitious" circumstances in which it came about that there were separate actions in the first place. In *Smithkline Beecham*, an order made by a judge under CPR 31.22 in one set of proceedings by a patentee against an infringer was varied so as to permit documents belonging to third parties but disclosed by the defendant to be used by the patentee in a second set of proceedings against a different alleged infringer, it being in the interests of justice that the second action required them to be available, subject to an order protecting the interests of the owners of the documents.

14. As to disclosure for use in criminal proceedings, Mr Schama referred to a number of authorities in which such permission had been granted, even where the circumstances were unusual and suggested special considerations as to whether the order might be unfair to a defendant. In *Bank of Crete SA v Koskotas* (No 2) [1992] 1 WLR 919 Millet J granted permission for documents disclosed in English proceedings to be provided by the claimant to investigating authorities in Greece. He said (p 926-7):

> "It is frequently the case that material produced by a party to English civil proceedings may be required to be produced in criminal proceedings in England. By a parity of reasoning, I see no reason why the English court should be astute to prevent a party who has obtained material in this country by the use of the coercive powers of the English court from producing such material in a foreign jurisdiction if compellable to do so"

15. This passage seems to me to recognise that in the balancing exercise that is to be conducted, the public interest in the proper conduct of criminal proceedings will be a material, and often a decisive, factor in favour of allowing disclosed documents to be used by a prosecuting authority. This is so if the prosecution is in England, and in principle also if the prosecutions abroad, subject to any particular considerations that may arise from the nature of the foreign jurisdiction.

16. In *Cobra Golf Inc v Rata* [1996] FSR 819 Laddie J set out (at page 830) a number of considerations that he found likely to be relevant to the exercise of discretion, derived from the previous case law, including the following:

> "10. On any application to relax the [implied] undertaking, the court has a discretion which must be exercised to achieve justice on the basis of all the circumstances of the case.
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> 11. The circumstances which may be taken into account include the following:
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> (a) The extent to which relaxation of the undertaking will cause injustice to the party which provided the discovery.
>
> (b) Whether the proposed collateral use is in court proceedings or outside litigation … prima facie if it is for use outside litigation, it is not the court's function to release for that purpose.
>
> (c) Whether, if the collateral use is in aid of criminal or civil proceedings, those proceedings are in this country or abroad.
>
> (d) In so far as the satellite proceedings are in this country … if they are criminal proceedings, the court must take into account the possibility of the application being a method of bypassing the privilege against self-incrimination.
>
> Insofar as the documents are to be used in [criminal] proceedings abroad… the court here should be wary of doing anything in this country which may subject the disclosing party to an unfair disadvantage in those proceedings."

17. That case did not involve criminal proceedings, so the decision on the facts to refuse permission (which would in any event merely be an example of the exercise of discretion and not a precedent) is of no assistance.

18. The cases I was referred to that do involve criminal proceedings all seem to have some special feature taking them out of the norm, such as a foreign element. Nevertheless, it is pertinent to observe that no counsel cited a case in which permission to use documents in criminal proceedings was refused, and the special features in the reported cases which may have been said to provide greater than normal weight against permission did not outweigh the public interest in effective prosecution.

19. Thus in *Marlwood v Kozeny* [2004] EWCA Civ 798 the defendants were Azerbaijani nationals sued by US nationals in the English courts, where they were compelled to give disclosure. US prosecuting authorities obtained the co-operation of the SFO in issuing notices directed to the solicitors of both parties requiring the disclosed documents to be handed over to them. No such notice could have been served on the defendants themselves, as they were not in the jurisdiction. The documents were only in the jurisdiction because the defendants had been compelled to disclose them through their solicitors. It was held that nevertheless the SFO's notices were properly issued, and that once that was established the public policy in favour of investigation of serious fraud which gave power to do so was such that the requirement to obtain permission under CPR 31.22 should not obstruct compliance with them. I accept that, as Mr Fennell said, the fact that the investigation was of fraud sufficiently serious to engage the powers of the SFO, and the safeguards built in to the relevant legislation, were also special factors in favour of permission on the facts.

20. In *A-G for Gibraltar v May* [1998] 1WLR 998 the Attorney General for Gibraltar himself had brought civil proceedings in this jurisdiction, in the course of which the defendant had been compelled to swear an affidavit of assets disclosing receipt of certain payments. The Attorney wished to use that affidavit for the purposes of prosecution in Gibraltar in which it was alleged the payments were corrupt. It was argued that the evidence, which had been given under compulsion, was inevitably protected by the privilege against self-incrimination in the criminal proceedings, would accordingly be inadmissible in Gibraltar and therefore permission should be refused. It was held, following *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, that there was no such rule since, among other considerations, if there were there would be no need for a privilege against giving evidence in civil proceedings which might tend to incriminate. Further, it would handicap the conduct of the criminal proceedings if the prosecutor was not allowed to put forward material of which he was aware, and the appropriate forum to determine whether there was any unfairness in that material being deployed in the criminal trial was the court in Gibraltar with conduct of that trial, which would not be prevented from excluding the material, if otherwise appropriate to do so, by the decision of the English court to release it.

21. The discretion is thus a general one, to be exercised in the interests of justice in all the circumstances of the case, having particular regard to the fact that documents are disclosed under compulsion and are prima facie to be kept confidential and used only for the purpose of the proceedings so that some good reason has to be shown for permitting any other use, but this does not mean that the grant of permission is rare or exceptional if a proper purpose is shown, and use in other proceedings such as

criminal proceedings brought in the public interest may be such a purpose. The court must be satisfied there is no injustice to the party compelled to give disclosure.

22. In applying that discretion to the facts before me, the following matters seem to me to be particularly relevant. Firstly, there is considerable public importance in facilitating the effective prosecution of serious crimes such as fraud, whether or not the fraud amounts to "serious fraud" for the purposes of the legislation relating to the SFO. Although this is a private prosecution, and therefore relatively unusual, that does not mean it is a purely private matter between the claimant and the Saddiq brothers; the prosecutor proceeds in and is bound to have regard to the public interest, and although the civil court is no doubt entitled to have regard to any evidence that the prosecution might be being brought improperly, no such allegation has been made before me and in any event that very question has been addressed both in the investigation by the CPS, which determined that it was proper to allow the prosecution to proceed, and before the Court of Appeal which found, overruling the Crown Court judge, that it was not an abuse of process.

23. Secondly, I agree with Mr Schama that the prosecutor has the duty to lay before the criminal court all the evidence relevant to the offences charged, and would be hindered in doing so if evidence that would otherwise be relevant has to be withheld because this court refused permission.

24. Thirdly, as regards privilege against self-incrimination, no such issues arise before this court. No such issues could arise in any event (at least at present) in relation to any defendant other than the Saddiq brothers, since they are the only defendants in the criminal proceedings. The Saddiq brothers had the opportunity to assert such privilege in the civil proceedings during the disclosure process but have not chosen to do so. If they seek to contend that it would be unfair for the purposes of the criminal trial for the documents disclosed to be used, the proper forum to determine that issue is the Crown Court. I should say that Mr Schama argued before me that the privilege against self-incrimination would not apply in any event to pre-existing material such as contemporary documents, as distinct from evidence that a potential defendant was compelled to create himself (such as the affidavit of assets in issue in the Gibraltar case) but in the circumstances of this case it seems to me that is not a matter I have to determine and if it arises it should be dealt with by the Crown Court.

25. Fourthly, in relation to whether there would be any injustice to the defendants in giving permission, or factors weighing against doing so, the history of the parallel conduct of the civil and criminal cases and the defendants' own conduct in relation to them is unusual and striking. It is of course not uncommon that the same individuals face both civil and criminal proceedings, and in my experience it is often the case that those defendants will seek to delay the civil proceedings on the grounds that they may occasion some prejudice to them in the criminal case. Similar arguments are often advanced by police or prosecuting authorities to resist disclosure of documents or evidence from the criminal proceedings for use in the civil courts.

26. In this case, the claimant evidently anticipated such an argument by the Saddiq brothers, and invited them to make any application they wished to stay the civil case behind the criminal one. When no such application was forthcoming, he made his own application in the civil proceedings for those proceedings to be stayed, arguing that he did not wish to face any risk that it might be argued that a subsequent criminal trial was unfair because the Saddiq brothers had been prejudiced by the civil proceedings, and specifically that he wished to avoid any risk that the defendants

would argue that it was unfair that they had been compelled to disclose documents in the civil case that were later used against them in the prosecution.

27. That application was resisted by all the defendants, and was as a result dismissed with costs by DJ Kelly at a hearing on 26 April 2017. I have been provided with a transcript of that hearing in the course of which Mr Khangure QC, who also appeared for the Saddiq brothers and their company, the third defendant, on that occasion, said:

> "If I understand my learned friend's submissions correctly what he says is this, that we may disclose a document which we then possibly use to argue that a fair trial in the criminal proceedings is not possible. If we have documents which are to be disclosed pursuant to the CPR we will disclose them. If we have documents which are relevant to the criminal proceedings we will disclose those also. We are alive to the risks that are posed by disclosure in the civil proceedings and in the criminal proceedings so there is nothing to that point either. No safeguards, we are not asking for any safeguards. In a roundabout way what this application appears to be is the claimant saying that the defendants might be prejudiced and therefore we want a stay… whereas the defendants are saying 'we are not concerned with any prejudice, we want to continue'…"

28. In his submissions to me, Mr Khangure said that this did not amount to any consent to use of documents for the purpose of CPR 31.22 or the waiver of the right to object to permission being granted by the court, but I am bound to say that it is very difficult to see how the above submission can be consistent with the maintenance of any such objection. What Mr Khangure plainly told DJ Kelly was that the Saddiq brothers were alive to the risk that documents disclosed in the civil proceedings might be produced in the criminal proceedings, they sought no safeguards against that happening and were not concerned to raise any argument that they might be prejudiced in the criminal proceedings by the use of such documents.

29. Mr Gupta, appearing for the fourth to sixth defendants before DJ Kelly, noted that there was no prosecution of his clients and therefore no reason to impose a stay for their benefit.

30. Fifthly, it cannot be said that use of the documents in criminal proceedings is in any respect an "improper" purpose. It is no doubt a "collateral" purpose, to use an expression referred to in some of the cases, in that the criminal proceedings are separate from the civil proceedings, and no doubt some issues will arise in those proceedings that are not the same as those before the civil court. But the facts are closely related (as the Saddiq brothers themselves argued before HHJ Thomas) and the bringing of the prosecution has, as noted above, been determined by the Court of Appeal to be appropriate.

31. In the circumstances, in my judgment the grant of permission would not cause any injustice whatever to any of the defendants. Even if it could be maintained that it was in some way unjust to the Saddiq brothers that the prosecution case against them is strengthened by production of documents disclosed by them, that is a result which they brought upon themselves by opposing the application to stay the civil proceedings, and indeed expressly assented to in the course of that opposition. The

grant of permission would not prevent them from pursuing an argument to similar effect before the criminal court; if they do so that will be a matter for the criminal court to determine.

32. There can be no injustice to defendants other than the Saddiq brothers, if documents disclosed by those other defendants are used in the prosecution of the Saddiq brothers.

33. It was argued that releasing the documents might prejudice defendants other than the Saddiq brothers on the basis that the claimant as prosecutor has not ruled out the possibility of an application to amend the indictment and join other defendants to the criminal proceedings. Conceivably of course it may be alleged that some or all of the other defendants are implicated in the fraudulent acts alleged against the Saddiq brothers. But none of those defendants relied on that risk when they also opposed the application to stay the civil claim, and since there is no application at present to join any of them to the prosecution it seems to me that any risk of prejudice to them is speculative. If any such application is made to the Crown Court in due course, it will be for that court to consider whether any unfairness results from it being based on documents the proposed new criminal defendants were compelled to disclose in this case.

34. For the reasons given above, in my judgment the balance lies in favour of the grant of permission.

35. Finally, I should say that it was argued that the permission sought was too general in nature and did not seek to identify the particular documents that would be used or the issues in the criminal trial to which they would be relevant. I do not doubt that in an appropriate case it would be a relevant factor for the court considering permission if it were shown that the documents sought to be released could not possibly be relevant for the purpose for which permission was being sought, as in that case the application would be an abuse. But no such argument has been raised before me, and given the clear relation between the facts of the criminal case and those in the civil case, it cannot be said that it is obvious without investigation that the documents concerned cannot properly be sought for use in the criminal proceedings. It is not, it seems to me, for this court to embark on any detailed consideration of the issues that will arise in the criminal trial and whether individual documents may be relevant to those issues (and no argument was addressed to me about such relevance). The right place for any such argument is in the criminal court. I do not therefore consider it appropriate either to refuse permission on the grounds that the claimants have not addressed in detail why the individual documents are relevant to particular issues in the criminal trial, or to seek to limit the permission in any way by reference to those issues. That will be for the Crown court judge to consider in due course.