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Neutral Citation Number: [2021] EWHC 1342 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF
ENGLAND & WALES
BUSINESS LIST (ChD)



BL-2018-000016

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

Friday, 30 April 2021

Before:

MRS JUSTICE FALK

B E T W E E N :

(1) JAMES RICHARD SCOTT BREARLEY
(2) JRB AUTOMOTIVE LIMITED
(3) RODGER JOHN DANKS
(4) BLUE SQUARE PENN ROAD LIMITED

Claimants

- and -

HIGGS & SONS (A FIRM)

Defendant

MR D. TURNER QC, MR J SULLIVAN (instructed by Freeths LLP) appeared on behalf of the Claimants.

MR M POOLES QC, MS H EVANS (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE FALK:

- 1 This is my decision, made at the pre-trial review, on an application by the defendant, Higgs & Sons, in relation to the supplemental report of their motor industry expert witness Robert Jones. One part of the application, seeking permission to rely on an erratum report relating to an erroneous spreadsheet, has been consented to and I need not discuss it further. The part of the application that has been in dispute is an application seeking to substitute a fresh version of the supplemental report which removes references that identify a particular provider of information, to whom I will refer as Mr A, or alternatively to redact the existing report to remove identifying details.

- 2 I agreed to the hearing of the application being in private on the basis that it was necessary to proceed on that basis in the interests of justice, taking account of the fact that hearing it in public would be likely to defeat the object of the application. The decision was made under paragraph 2 of Practice Direction 51Y, this being a remote hearing where no arrangements have been made to broadcast it in a court building. However, I gave this judgment in a manner which allows it to be published in an unredacted form in the interests of open justice, and I requested that a transcript be obtained for that purpose.

- 3 The relevant facts are as follows. Following the adjournment of the trial of this action last year for reasons relating to the pandemic, provision was made for the parties' motor industry experts to file supplemental reports covering, among other things, the impact of the pandemic on the viability and profitability of one of the matters in dispute between the parties, namely an alleged lost opportunity on the part of the claimants to participate in a Jaguar Land Rover dealership in Wolverhampton. Both experts filed and served their supplemental reports on 3 March 2021.

4 The general approach of the claimants' expert, Mr Daly, was to refer to conversations with industry sources in generic terms as being conversations with clients. In contrast, in his supplemental report Mr Jones referred to a specific conversation he had had with Mr A on 15 February 2021, and both named him and referred to a particular industry role that he has. Mr A is one of Mr Jones's own clients. It is Mr Jones's position that Mr A was aware at the time of the conversation of its purpose, namely to gather information for his supplemental report, and that Mr A had consented to the discussion being referred to. I understand that he also believes that he had a further conversation with Mr A about the relevant parts of the report before it was served.

5 Mr A was sent a copy of Mr Jones's report on 5 March 2021, after it had been served, although it now appears that at that time Mr A did not read it or realise that he had been named in it, and he may even have then forgotten that he had received it. On 24 March Mr A was approached by a senior executive at Inchcape, Alex Merricks. Mr Brearley, the first claimant, is the CEO at Inchcape. Mr Merricks is not otherwise involved in the case. It seems that Mr Brearley mentioned to Mr Merricks that Mr A's name was referenced in Mr Jones's supplemental report. This led to Mr Merricks speaking to Mr A about it, and this apparently caused Mr A some concern.

6 Later the same day the claimants' solicitors, Freeths, sent Mr A a copy of the report directly. They also provided copies of Mr Jones's notes of a meeting or call with Mr A, and referred Mr A to specific paragraphs in the report where Mr Jones stated that he had relied on information attributed to Mr A. Mr A has not responded to that approach from Freeths, and I note that Reynolds Porter Chamberlain (RPC) for the defendant objected to Freeths about that direct contact. I say no more about it.

7 Based on a report of a conversation on 23 April between Mr A and Mr Sefton, a partner at RPC, Mr A's position is that he was indeed aware of Mr Jones's role in the case, and that the discussion with him was to enable Mr Jones to gather information for the purposes of the case, but that Mr A was unaware that Mr Jones was going to identify him by name. Mr A does not wish to be directly involved in the litigation, has a concern that his involvement could have a negative impact on his own business, and he also stressed to Mr Sefton that he did not regard himself as speaking to Mr Jones in his capacity as holder of the particular industry role that he has, not being authorised to do so. I understand that Mr Jones acknowledges the last point about capacity but believes that Mr A had agreed to the discussion being referred to in the report.

8 As I understand it, the application that I am being asked to consider is being made because Mr Jones feels duty bound to accede to his client, Mr A's, request that Mr A should not be named and is concerned about the potential impact on his relationship with his clients if Mr A's name is not removed. Mr Jones is also said to feel that he has been put under commercial pressure by Freeths' direct approach to Mr A.

9 There is some background to this. This is not the first time that Mr Jones's clients have been approached in respect of his reports in this case. In the first hearing before me, before the trial was adjourned last year, I expressed some concerns about approaches that had been made to Mr Jones's clients and contacts at that stage. I was concerned about a risk of perception of inappropriate pressure. I am told that matters have moved on since, but I mention this because some sensitivity on the part of Mr Jones against that background is not particularly surprising.

10 Following some submissions by both parties today, Mr Turner very helpfully put forward a suggested accommodation which has been agreed on the part of the defendant by Mr Pooles. I appreciate their assistance, and the willingness of the parties to co-operate. What is agreed is that the defendant should have permission to substitute the expert report in the way it wishes without naming Mr A or otherwise identifying him. However, the order would not go further than that in terms of suppressing references to Mr A or making it impossible to refer to him in any way. Furthermore, provision would be made to enable the witness statement produced by Mr Sefton in support of this application to be made available at trial for the purpose, potentially, of cross-examining Mr Jones. That is because the claimants say that it raises some points that might go to Mr Jones's credit. To facilitate this, Mr Sefton's witness statement would be re-filed on a redacted basis, the precise form of the redactions to be agreed.

11 I have concluded that it is appropriate to agree this compromise, and to reflect it in an order. Briefly, my reasons are as follows.

12 I note that there is no specific provision in the CPR that covers this situation. CPR 39.2(4) contemplates the anonymisation of a party or witness if it is necessary to secure the proper administration of justice, and to protect the interests of that party or witness. However, Mr A is neither a party nor a witness, and there is no proposal that he himself be made a witness.

13 The order that I am being asked to make at least potentially engages the principle of open justice. To the extent that it does, then any question of derogation from it must be decided based on what is necessary in the interests of justice: see the judgment of Lord Sumption in *Khuja v Times Newspapers* [2019] AC 161 at [14] in particular, where he referred to the inherent power of the court to make orders for the conduct of proceedings in a way that

would prevent disclosure in open court of the names of parties or witnesses “or of other matters” if the interests of justice requires it. He also made clear that “necessity remains the touchstone” of the jurisdiction.

14 If and to the extent that the principles of open justice are engaged, then the position is clear. If the test of necessity is met, I should grant the application under the court's general case management powers. If not, I should refuse it. I take into account that confidentiality arrangements are frequently put in place in commercial cases, to safeguard commercial information, and indeed in respect of other aspects of the expert evidence such arrangements have been put in place in this case. However, confidentiality considerations alone are not a sufficient answer to permit a derogation from open justice, and furthermore there is a potential real distinction between confidentiality arrangements put in place as they have been in this case to protect confidential information obtained by the experts in the course of their normal day to day business, and information specifically obtained for the purposes of an expert report, which is the category that the information from Mr A falls into.

15 Having said that, this is not a straightforward case of derogation from open justice. We are not yet at trial. What is really being asked for is essentially a correction of an expert report to address a misunderstanding between Mr Jones and Mr A, who thought that he would not be named in the report. This is being dealt with before trial, before the documents have been made available at trial, and before documents are referred to at trial. This is a long way from the facts of *Khuja*, where the subject matter of the dispute related to reporting restrictions in respect of an individual who had actually been named at the trial.

16 I am also conscious of the fact that expert reports or other material of the nature I am dealing with may be available for inspection during the trial, but subject to that would not

automatically be made available to non-parties. There would need to be an application to the court.

17 I also have to weigh up very carefully my confidence in the ability of Mr Jones to give his evidence freely and without a sense of commercial pressure. I do have real concerns about any perception that Mr Jones may have developed, whether with or without material justification, of commercial pressure being placed on him. It is vital to the interests of justice that expert witnesses feel that they are able to give their assistance to the court freely, and to the best of their ability, without any potential concern about the impact of doing so on them personally, other than in respect of such matters as the need to adhere to any relevant professional standards.

18 There is also a possible concern that Mr A's experience, if he is named, might lead others to be less willing to provide assistance to experts in future.

19 Either of those points, one going to the interests of the parties in this case and the other to wider considerations, might have an adverse impact on the administration of justice. I have to balance these considerations in deciding what is necessary in the interests of justice.

20 I have satisfied myself that the accommodation that the parties have arrived at protects Mr Jones sufficiently in terms of his commercial position, and any perception he may feel of being under commercial pressure, whilst properly preserving the claimants' ability to cross-examine him fully, including on matters of credit, should that become relevant.

21 For these reasons I am satisfied that the order is appropriately made.

22 As agreed by the parties, the costs of this application are being reserved.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge