Case No:
Case No: CL-2017-000676
NCN: [2018] EWHC 1407 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building
7 Rolls Buildings
London EC4A 1NL

Friday, 11 May 2018

BEFORE:

MR JUSTICE ANDREW BAKER

BETWEEN:

(1) GABRIEL ROTHBART
(2) DEXTER ESTATES LIMITED

Claimants

- and -

BRIDGE LEISURE MANAGEMENT LIMITED
& OTHERS

Defendants

MR J COHEN QC appeared on behalf of the Claimants

MS T OPPENHEIMER appeared on behalf of the Defendants

JUDGMENT
(Approved)

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victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

1. MR JUSTICE ANDREW BAKER: There is always a sense in which, when asked to order some degree of splitting of issues, the court cannot predict with certainty the future and so is concerned that hindsight might show that whichever way the court jumps at the stage at which the decision has to be made will turn out ultimately to be a direction that does not work out for the best. But one has to judge these applications on the material as it stands at the time when the decision needs to be made if there is to be any prospect of improving the efficiency and cost-effectiveness of the resolution of the dispute overall.

2. In this case it seems to me that it is not possible to say now that splitting the issues as proposed by the claimants, should both the trials that might then be required have to take place, will not come at some additional cost overall. That is to say, in my view, there is a risk that if both trials are required, dealing with the matter in the two stages will be somewhat more expensive overall than having had a single trial of all issues.

3. However, it does seem to me that that possible degree of aggravation of the overall costs is a modest downside to set in the scales against what seems to me to be very clear, very significant and very beneficial upsides. In particular, I agree with Mr Cohen that the split between issues 1 to 4 on the one hand and issue 5 on the other hand, as set out in the list of issues, even if not analytically and hermetically perfect, is a very clear one with very little, if any, overlap. I also agree that the factual findings that will necessarily have been made at trial in relation to issue 4, if the claimants succeed, will become entirely desirable and helpful fixed starting points for the consideration of remedies to the extent that remedies are said to be based upon the claimants' loss of opportunity. Thus how precisely, by what means, on what terms, the claimants have demonstrated at Trial 1, if they do, that they were in a position to have purchased the Park will become fixed by the findings at Trial 1 rather than experts considering remedies potentially having to run loss of opportunity and loss of profit calculations on a range of hypotheses by reference to what would then be pleaded positions or factual evidence giving rise to different possibilities as to how the claimants might have financed the purchase.

4. I also agree with the self-evident proposition that were the claimants to fail at Trial 1 so that Trial 2 was not then required there would be a very significant saving in costs to

the parties, and I also agree that the nature of this case is one that holds out a significant prospect of an agreed resolution after Trial 1, without therefore the need for a second trial, if the claimants succeed at that first trial.

5. Finally, I am significantly influenced by the fact that on both sides, but particularly on the defendants' side, albeit bearing in mind that I have not yet engaged in the process of approving the costs budgets, the suggested likely costs of engaging experts to deal with the hypotheticals involved in considering remedies are extremely high. If the prospective costs saving by separating out issue 5 was much less significant and if the overlap between aspects of issue 4 and the question of remedies was greater or worked in a different way to that which I have indicated, it may have been a finer judgment whether the appropriate course was to split the trial. For the reasons I have given, however, it seems to me that this is a relatively plain case in which the interests of justice are best served by splitting in the manner proposed by the claimants.

6. I should for completeness say that Ms Oppenheimer suggests that the splitting of issues in that way is unhelpful in the context of any attempts to resolve the matter amicably prior to a contested first trial on the basis, she says, that without detailed work including expert work in relation to what would be the remedies issues at a second trial, the parties will insufficiently know where they stand as to the likely downside for the defendants of losing this litigation, which is of course a key variable in any potential settlement discussions.

7. It seems to me that is a legitimate concern but overstated in a case where the defendants are the ones in a position to know without significant input from experts how profitable the Park in question has been to date and is likely to be in the near future. In those circumstances, the defendants are well able, with the sophisticated legal advice they have, to assess the range of downsides of losing the litigation without the need to engage in the very expensive pre-trial processes that will be involved in setting up now a pre-trial timetable leading to a trial of all issues including issue 5.

8. For all those reasons, the order will be that there be a split trial with, at this stage, pre-trial directions and listing directions and so on for a first trial to be a trial of issues 1 to 4 in the now approved list of issues and a second trial in relation to loss and remedies

(issue 5) to be held subsequently if required, directions in relation to which would be a matter for the trial judge at Trial 1.

(After further submissions)

9. It seems to me, in the light, in particular, of Ms Oppenheimer's very helpful indication of the concerns on her clients' side as to what she anticipates they will be looking for for a mediation to be meaningful, that they are either exclusively or almost exclusively wholly independent of the nearly £300,000, which her clients propose to spend on their disclosure. And, by contrast, it seems to me Mr Cohen makes a most forceful point that if there is to be, all things being equal, the best chance of mediation succeeding, it should be encouraged to occur before very substantial further costs have been incurred which themselves then have the prospective possibility of becoming an impediment.

10. It will be well-recognised on the claimants' side, without my needing to express any view (and I do not) as to whether all elements of what Ms Oppenheimer has indicated the defendants will be potentially seeking ought necessarily to be required by way of some species of early disclosure within the context of the mediation, and they will bear in mind, that if a mediation is to be successful there is likely to be a degree of need to be constructive and cooperative where requests for information about the case are concerned, going beyond it may be what would be required in the context of the litigation.

11. With those observations having been made, it does seem to me that, in principle, the better time in this case to encourage the parties to seek to resolve the matter through mediation is sooner rather than later. It may be that, in the light of some, at least, of what Ms Oppenheimer has said, there is room to consider whether a little more time needs to be allowed than from now until the end of June, even if that might have a knock-on effect on other dates currently proposed for pre-trial steps following ADR efforts if they are not successful. But in principle, it seems to me, the appropriate order to make, and the order I will make, is that the parties, in the form proposed by the claimants, exchange lists of available individuals and endeavour in good faith to agree, with restoration of the CMC if agreement cannot be reached, all on the timetable proposed, but then we may just briefly consider whether the drop-dead date for that

process of 29 June 2018 is satisfactory or whether that needs to be extended, effectively, to the end of the summer term, even if that does then mean that subsequent pre-trial steps get pushed back.

(After further submissions)

12. It seems to me that, in relation to the Colliers file, on the one hand Mr Cohen QC, with respect, is probably right to say, without necessarily precluding him from making an application ultimately if he so chooses if his clients so instruct him, that the court would not welcome a third party disclosure application in the circumstances of this case. On the other hand, it seems to me that from the purview of this as a piece of contested litigation, there is no real or substantial case made why the claimants have any real need to see this particular file earlier than as part of ordinary disclosure and inspection whenever that now takes place.

13. Essentially what is said, and which echoes submissions made against Mr Cohen in the context of ADR, is that seeing what is in there might be of real assistance in moving the matters on towards an amicable resolution. It seems to me, under the ADR order I have made, that it is better to leave that to be dealt with, if the parties so wish, as part of requests and counter requests for what they feel they wish to see as part of making the mediation fully effective, that being the early means I have now encouraged so far as the court can encourage it, by way of assisting the parties to resolve the matter, and it is not appropriate to require (and an insufficient case has been made out to require) the defendant to hand that over within, as it were, the scope of the contested litigation.

(After further submissions)

14. In relation to WhatsApp, and noting Ms Oppenheimer's **in terrorem** observations as to costs, unlike the response given in relation to the workplace platform, the information as it stands in relation to WhatsApp is only that relevant custodians use it primarily (it is not said exclusively) for personal messaging, and I agree with Mr Cohen also that there may be a distinction to be drawn between, on the one hand, what the custodians might regard as a business use of the WhatsApp Messenger service as distinct from personal use and, on the other hand, the content of what they might be telling people

using WhatsApp, albeit in a personal context. It does seem to me in principle that WhatsApp as a messaging system used by the relevant custodians should be searched to an equivalent extent to any searching of email on the part of custodians.

15. I am not going to pretend that it is for me now to start trying to settle precise search terms or protocols or methods, and I do not necessarily pretend even to have the knowledge of the degree to which actually engaging in a WhatsApp search is an equivalent method to the searching of emails, but in principle it should be covered by the reasonable searches to be undertaken.

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This transcript has been approved by the Judge