Neutral Citation Number: [2021] EWHC 642 (Comm)

Case No: CL-2017-000657

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice,
Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 18/03/2021

Before :

SIR MICHAEL BURTON GBE
SITTING AS A JUDGE OF THE HIGH COURT

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Between :

ANDREW JAMES BARCLAY-WATT & OTHERS	**Claimants**
- and -	
(1) ALPHA PANARETI PUBLIC LIMITED	**Defendants**
(2) ANDREAS IOANNOU & OTHERS	

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Stephen Nathan QC and Nicholas Tell, with Simon Johnson and Oscar Davies (instructed by **Highgate Hill Solicitors**) for the **Claimants**
Paul Parker (instructed by **Spector Constant and Williams**) for the **Defendants**

Hearing dates: 26 February 2021

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Approved Judgment

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SIR MICHAEL BURTON GBE :

1. On February 26 2020, Day 3 of the trial, I heard two applications. The first was made on the Defendants' behalf by Mr Paul Parker, for permission to use the contents of 4 witness statements, otherwise the subject of privilege, but disclosed by the Claimants' solicitors in their lists of documents inadvertently, as confirmed by the 24th witness statement of Dr Alexander on their behalf. The other application was made by Mr Stephen Nathan QC for a decision at this stage of the trial for determination of one of the issues in the case, which both parties agree I can satisfactorily determine now, namely what the proper law is of the torts of misrepresentation, negligent misstatement and breach of duty of care, alleged to have been committed by the Defendants. I heard the two applications sequentially, and, after hearing argument, I gave my decision on each, with reasons later, which I now give. In the disclosure application I found in favour of Mr Parker, permitting the use by the Defendants of the documents. In the second application I found in favour of Mr Nathan, concluding that the proper law of the courts is English law (or, in the case of two of the Claimants, Scottish law, which makes no material difference on the facts of this case) and not Cypriot law, as was contended by Mr Parker.

The disclosure application

2. It was common ground between counsel that the modern approach is for the party who wishes to use the documents to make an application for permission, pursuant to CPR 31.20, and that the most relevant judicial decision is that of the Court of Appeal in **Mohammed Al Fayed and Others v The Commissioner of Police of the Metropolis** [2002) EWCA Civ 780, in which the judgment of the Court is given by Clarke LJ.

3. The principles are set out in paragraph 16 of the Judgment:

> "*16. In our judgment the following principles can be derived from those cases:*
>
> *i) A party giving inspection of documents must decide before doing so what privileged documents he wishes to allow the other party to see and what he does not.*
>
> *ii) Although the privilege is that of the client and not the solicitor, a party clothes his solicitor with ostensible authority (if not implied or express authority) to waive privilege in respect of relevant documents.*
>
> *iii) A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived.*
>
> *iv) In these circumstances, where a party has given inspection of documents, including privileged documents which he has allowed the other party to*

inspect by mistake, it will in general be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief.

v) However, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud.

vi) In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake.

vii) A mistake is likely to be held to be obvious and an injunction granted where the documents are received by a solicitor and:

a) the solicitor appreciates that a mistake has been made before making some use of the documents; or

b) it would be obvious to a reasonable solicitor in his position that a mistake has been made;

and, in either case, there are no other circumstances which would make it unjust or inequitable to grant relief.

viii) Where a solicitor gives detailed consideration to the question whether the documents have been made available for inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but is not conclusive; the decision remains a matter for the court.

ix) In both the cases identified in vii) a) and b) above there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances.

x) Since the court is exercising an equitable jurisdiction, there are no rigid rules."

4. The position here is that it is not suggested that the Defendants' solicitors appreciated that a mistake had been made. The Claimants' case is that it would be obvious to a reasonable solicitor that a mistake had been made.

5. The application relates to four statements made by the Claimants Joyce, White, Gibb and Williams in 2011 or 2012, disclosed by the Claimants' solicitors in the respective lists of documents, and then provided for inspection. Only just prior to the start of the trial was it asserted that this occurred as a result of an error by a junior solicitor, not picked up by anyone supervising, and objection was raised to the Defendants relying on the documents. Now that they have been disclosed, the Defendants wish to rely on the contents of these statements as setting out what they allege to be far more likely to be an accurate reflection of the Claimants' evidence, being nine years nearer to the time in question of 2006–2009, and that such statements are also more likely to give an accurate account, because they will not be influenced, as perhaps they have been, by events occurring and knowledge gained in the subsequent years. They are prima facie therefore relevant to the merits of the case before me. I was not asked to read the statements before resolving the issue, but I am to decide the application as a matter of principle.

6. The facts so far as disclosure and inspection are concerned are as follows:

   i) Joyce. The list of documents completed by the Claimants' solicitors included under paragraph 2 that "*the extent of the search that (I/we) made to locate documents that* [the Joyces] *are required to disclose was as follows….16) Witness Statements*". Then in Schedule A , under the heading "*The claimant....has control of the documents numbered and listed here. The claimant… does not object to you inspecting them….Witness statement of Claimants dated 22/2/2011*". Attached was a document headed "*File of Stephen Joyce Disclosure of Documents*", and as the second category there was "*Witness statement pages 7–15*". Pages 7–15 of the bundle of documents supplied on inspection indeed constituted a witness statement by Mr Joyce dated 22/02/2011.

   ii) White. The list of documents had a similar statement under paragraph 2, namely "*16) Witness Statements*". There was then listed in Schedule A "*Witness Statement why they bought the property*". As for the File of Stephen White Disclosure of Documents, no witness statement was listed, but under the heading "*Correspondence*" there were listed "*email from Stephen White attaching response to questionnaire 25/10/2010 (3 pages*)" and "*email from Stephen White with answers to questions on 25/10/2020* (sic)." In the bundle of documents there were no such emails, but there was the White witness statement. This had the pagination 96–99. In the listed items, Assignment of contract of sale was said to be paginated 92–99, but it was only four pages, and was in fact paginated 92–95 and the White statement, when produced, was paginated as 96–99.

   iii) Williams. This Claimant's list of documents again included under paragraph 2 "*16) Witness Statements*". And in Schedule A there was listed "*Witness statement of Claimants undated*". In the File of Williams Disclosure of Documents, there was no listing of such witness statement. When produced, the witness statement had two forms of pagination, 26–29 in manuscript and 92–94 in printed form, neither of which corresponded to the numbering set out in the File.

iv) Gibb. Once again, paragraph 2 of the list of documents for standard disclosure contains the words "*16) Witness Statements*" and included under schedule A "*Witness statement of Claimants undated*". The file of Gibb Disclosure of Documents makes no mention of a witness statement in listing out the documents paginated, but when disclosed the witness statement of two pages had pagination 120–121, which again did not coincide with anything listed, there already being pages 120–121.

v) When the Inspection lists were uploaded onto the Teams site for the Defendants to download, the witness statements of White, Williams and Gibb were specifically identified as separate documents.

7. Turning to the principles set out by Clarke LJ, given that there is no case made that the Defendants' solicitors appreciated that there had been a mistake, I must decide whether it was, on the basis of the above facts, obvious to a reasonable solicitor in the position of the Defendants' solicitors that a mistake had been made in disclosing the four witness statements. Although there was obviously some apparent muddle in relation to the pagination with regard to White, Williams and Gibbs, I am entirely satisfied that a reasonable solicitor was entitled to assume that there had been an intentional disclosure of the relevant witness statements, all referred to in terms in paragraph 2 and schedule A l to the list of documents, in the case of Joyce specifically referred to in the paginated list, and in all four cases specifically provided on the inspection. There seems to me to be nothing which would put the Defendants' solicitors on notice of any mistake, particularly in a case in which it could well have been that claimants might wish to disclose earlier witness statements to complete the chronology and/or to emphasise consistency, and the existence of such witness statements was expressly listed without objection to disclosure. The disclosure was apparently deliberate, and there was no reason or them to assume incompetence.

8. I turn them to consider whether there are any other circumstances, which would make it *unjust or inequitable* to grant relief. Mr Nathan had difficulty in identifying any particular matter, because, as discussed in the course of argument, any case that there should not be disclosure, in the circumstance when there has been production, can cut both ways, dependent upon whether the contents favour one side or the other. Mr Nathan referred simply to the need for a level playing field and to the Overriding Principles enshrined by the CPR.

9. Clarke LJ does not indicate on whom the onus should be in resolution to this last question, particularly where the disclosure was not of the kind occasionally occurring of a completely accidental inclusion in documents produced for inspection, but rather of a deliberate inclusion in the list as a result of some incompetence, whether of execution or supervision or both. But even on the assumption that the onus lies upon the Defendants, I am satisfied that there are no grounds for my refusing them permission to use the documents. I therefore grant the Defendants permission.

Proper law

10. The proper law of the torts is determined in accordance with the provisions of the Private International Law (Miscellaneous Provisions) Act 1995 ("the Act"), which it is common ground applies to the facts of this case. The relevant sections are as follows

> *"11 Choice of applicable law: the general rule.*
>
> *(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.*
>
> *(2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—*
>
> *(a) for a cause of action in respect of personal injury caused to an individual or death resulting from personal injury, the law of the country where the individual was when he sustained the injury;*
>
> *(b) for a cause of action in respect of damage to property, the law of the country where the property was when it was damaged; and*
>
> *(c) in any other case, the law of the country in which the most significant element or elements of those events occurred.*
>
> *...*
>
> *12 Choice of applicable law: displacement of general rule.*
>
> *(1) If it appears, in all the circumstances, from a comparison of— (a)the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and (b)the significance of any factors connecting the tort or delict with another country, that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.*
>
> *(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."*

11. By virtue of these provisions, the general rule is that the applicable law is the law of the country in which the events constituting the tort in question occur. It is then

amplified to deal with cases where the events constituting the tort in question occur in different countries. These general rules however can be displaced as a result of s12. If it appears, in all the circumstances, from a comparison of the significance of the factors which connect the tort with the country whose law is applicable under the general rule and the significance of any factors connecting the tort with another country, that it is *substantially more appropriate* for the applicable law to be the law of the other country, then the general rule is displaced and the applicable law is the law of the other country.

12. The Claimants contend that there is nothing whatever to displace the general rule, and that, notwithstanding that some events occurred in Cyprus, the "*most significant element or elements of the events*" occurred in England, or, because of the immaterial impact of Scotland, I shall. for convenience, say the United Kingdom (UK). The Defendants submit that s12 applies and that the law of Cyprus is "*substantially more appropriate*" for determining the issues and is consequently the proper law.

13. The Claimants rely on the following matters:

    i) The Claimants are English and resident in England or, as I shall now say, the UK.

    ii) All of the salesmen who induced the Claimants to purchase the properties were UK based.

    iii) The main agents, UVR and ROPUK, operated from offices in the UK, and worked under agreements by which it was provided that their territory was in each case the UK.

    iv) The representations etc. were made and communicated to the Claimants orally or in writing (by virtue of brochures and leaflets) and/or by playing, or leaving to be played, DVDs, at the homes of the Claimants in the UK or at the offices in the UK of the relevant salesman or agents (save that it is said that the Joyces were given a brochure by the Second Defendant on one occasion, on a visit to Cyprus).

    v) Of the present Claimants, save that one of the contracts, that of Mrs White, was signed in Cyprus when she was visiting, all the relevant reservation agreements and purchase contracts were signed by the Claimants in the UK, as were the documents which led on to the subsequent obtaining of mortgage loans in Cyprus from the Alpha Bank.

    vi) The Claimants' financial loss was suffered in the UK by their payment of the reservation fee and the deposit, paid to the Defendants' UK bank account (and there is no evidence adduced by the Defendants which supports Mr Parker's assertion in his Skeleton Argument that the monies they paid "*went to Cyprus*").

14. The Defendants refer to the following:

i) The properties which the Claimants were induced to purchase were in Cyprus (and some of the Claimants travelled to Cyprus to inspect them. claiming travel costs as part of their damages).

ii) The representations etc. are alleged to have been made on behalf of the Defendants, being a Cypriot-based developer. The Claimants allege that the entire marketing strategy or "Master Plan" was devised and driven by the Defendants.

iii) The purchase contracts which the Claimants were induced to enter into are governed by Cyprus law, as were the mortgage loan agreements with the Alpha Bank of Cyprus, which they subsequently entered into in order to fund the purchases.

iv) The alleged failure of performance by the Defendants, by the Cyprus bank and by the Cypriot solicitors were all in Cyprus, as was the subsequent litigation brought against the Claimants by the Alpha Bank in respect of the unpaid mortgages.

v) The Claimants claim substantial financial loss when they had to enter into a settlement of Cyprus litigation in 2018 with the Alpha Bank to compromise their indebtedness for the unpaid mortgage loans.

15. The Defendants point to the fact that by s12(2) of the Act the relevant factors to be taken into account as connecting the torts with Cyprus include "*any of the circumstances or consequences*" of the events. I have no doubt that there may be cases in which the facts are such that the 'tail may wag the dog' by virtue of the significance of the consequences, or that there may be a case in which all the financial loss is suffered almost immediately and in one place. But, in my judgment, if the proper law of the tort was otherwise English law in 2006 to 2009 (and when these proceedings were issued in 2011), and further (substantial) financial loss is then suffered in 2018 in Cyprus, the significance of such further financial loss 10 years on cannot displace that conclusion, particularly given the need for the s12 fallback only to apply if "*substantially more appropriate*".

16. Mr Parker submitted in his Skeleton Argument that the connection with Cyprus is "*overwhelming*". Mr Nathan submits that, given that the Claimants' case is that the representations were made by the Defendants' agents in the UK, it would appear beyond doubt that the torts committed by those agents would be governed by English law, and it would be eccentric if the acts of the Defendants as joint tortfeasors were governed by a different law: and insofar as the Defendants are alleged to have been personally liable by virtue of a breach of their own duty, that breach would have been committed in the UK when the statements were communicated to the Claimants, irrespective of where the Master Plan was devised. Mr Nathan also submits that because the property purchase was expressly marketed as an "*armchair investment*", i.e. one which could be entered into and subsequently operated by the purchasers from the UK, the location of the properties was of less significance.

17. This is a simple weighing exercise, at a time when I had, after a full week's reading, a sufficient grasp of the (highly contested) facts, and in any event both parties agreed that I should resolve the issue now. I am entirely satisfied that, although the events

constituting the torts may be said to have occurred in more than one country, the most significant element or elements of those events occurred in the UK. I bear in mind not only the heavy burden prescribed by s12 (1) as "*substantially more appropriate*", but also the words of Moulder J in **Dili Advisors Corp v Production Investment Management Ltd** [2020] EWHC 2669 (Comm) at [89] when, noting "*the high threshold*", she in the event concluded in that case that there was a "*clear preponderance of factors declared relevant by s12(2)"*. I am certainly not so satisfied in this case. I am in no doubt that the proper law of these torts is English law (or Scottish as appropriate).