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Case No: LM-2021-000086

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2023

Before :

Mr. Nigel Cooper KC sitting as a High Court Judge

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Between :

(1) FLOWCRETE UK LIMITED **(2) FLOWCRETE GROUP LIMITED** **(3) TREMCO CPG UK LIMITED**	**Claimants/Respondents**
- and -	
(1) VEBRO POLYMERS UK LIMITED **(2) VEBRO POLYMERS HOLDINGS LIMITED** **(3) JOHN WATSON** **(4) ROBERT GRAY**	**Defendants/Applicants**

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Mr. Charles Dougherty KC (instructed by **Kennedys**) for the **Claimants/Respondents**
Mr. Matthew Bradley KC (instructed by **JMW**) for the **Defendants/Applicants**

Hearing dates: 16 December 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 11th January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR NIGEL COOPER KC

Mr. Nigel Cooper KC sitting as a High Court Judge:

Introduction

1. The dispute in this action centres on the polymer flooring industry. In essence, the Claimants assert that various former employees of the First Claimant set up business in competition with their former employer and that in doing so those employees misappropriated and misused confidential information belonging to one or other of the Claimants with the Third and Fourth Defendants acting in breach of covenants found in their employment contracts in the process. The Defendants deny the claims and counterclaim relying on a cross undertaking in damages provided by the Claimants when they sought injunctive relief in a springboard form.

2. The dispute described above is listed for a trial of 14 days in April and May 2023.

3. In the present application, the Defendants seek injunctive relief (i) to prevent the Claimants' use of certain communications, which the Defendants say are privileged and were inadvertently disclosed, (ii) to require the destruction by the Claimants of those communications and (iii) ancillary orders. The Defendants also seek an order that the Claimants pay the costs of this application on the indemnity basis and invite the Court to consider making a wasted costs order against the Claimants' solicitors.

4. At the beginning of the oral hearing for this application, both parties asked me to order that the hearing should be in private in order to prevent inadvertent publication of the contents of communications which are or might be privileged. In this regard, the general rule is that hearings are to be in public (CPR Rule 39.2(1)) and that a hearing should only be held in private if and only to the extent that the Court is satisfied that one or more of the matters set out in CPR Rule 39.2(3)(a) to (g) are satisfied. I was not satisfied that it was appropriate to order that the hearing generally should be held in private. However, I was satisfied that it was appropriate to make a less restrictive order to protect any privilege that might exist in the communications, which are at issue on this application taking into account the matters listed at Rule 39.2 (a) and (c). Accordingly, on 16 December 2022 I ordered that:

    i) No transcript and no report of the hearing on 16 December 2022 is to be released without the permission of the court pending the hand-down of this Judgment or further order.

    ii) Pursuant to CPR 31.22(2), other than for the purposes of these proceedings, no use could be made of any document which has been disclosed on the basis that it has been read to or by the court, or referred to at the hearing on 16 December 2022, without the permission of the court or further order.

The Procedural Background

5. Proceedings in this action were issued on 18 March 2021. Simultaneously, the Claimants applied for certain interim relief, some of which was granted by HHJ Pelling QC (as he then was) sitting as a Judge of the High Court on 19 April 2021.

6. As part of the order of 19 April 2021, the Defendants were required to carry out searches for certain documents. The Defendants did not identify or provide any documentation

pursuant to these searches. The searches were undertaken by Ms. Rebekah Jones, Vebro's marketing director and formerly a senior employee of the Claimants without the assistance of the Defendants' solicitors, JMW. The Claimants say that Ms. Jones is implicated in the misappropriation of the Claimants' confidential information.

7. Extended disclosure was exchanged on 14 June 2022. The Defendants disclosed some 3,788 documents, which were then reviewed by the Claimants' solicitors, Kennedys.

8. The Claimants say that there are manifest deficiencies with the Defendants' disclosure. The Claimants' complaints include a failure by the Defendants to disclose native documents and attachments, a failure to disclose documents, which the Claimants deduce must exist and the provision of documents by way of extended disclosure, which should properly have been disclosed at the time of the injunction hearing or pursuant to the 19 April 2021 order. The Claimants' complaints are the subject of a disclosure application issued on 22 September 2022 and due to be heard on 18 January 2023.

9. The Defendants' extended disclosure included two pdf documents, titled JMW3546 and JMW3547 respectively, which were both compilations of other documents and totalled 800 pages. The two documents included documents which were not disclosed elsewhere in the Defendants' disclosure and documents which were only provided in the pdf documents but not in their native format.

10. Kennedys accordingly wrote to JMW on 19 July, 22 July and 01 August 2022 setting out their concerns about the Defendants' disclosure, including JMW3546 and JMW3547.

11. JMW responded to Kennedys almost a month later on 17 August 2022 asserting in relation to documents JMW3546 and JMW3547 that both documents were subject to legal advice privilege and litigation privilege. The Claimants say, and I find, that JMW provided no proper explanation in their letter of 17 August 2022 as to the bases for the claims to privilege or how the documents came to be inadvertently disclosed. JMW also asserted that all otherwise relevant documents within JMW3546 and JMW3547 had been disclosed elsewhere although the Defendants now accept that this assertion was incorrect. In their letter of 17 August, JMW asked that the Claimants delete JMW3546 and JMW3547 and that any reference to their contents should be redacted from any correspondence placed before the Court.

12. Kennedys responded to JMW on 24 August 2022 saying that it did not appear that the documents had been provided by mistake or that they were obviously privileged. They sought a further explanation of the reasons privilege was claimed in the documents. JMW responded on 26 August 2022 saying that their letter of 17 August 2022 *addressed the inadvertent disclosure of privileged documentation*. Kennedys also asserted that in any event privilege had been waived.

13. As already noted, the Claimants issued their application in relation to the Defendants' disclosure on 22 September 2022. In a letter sent on 21 September 2022 prior to issuing the Claimants' application, Kennedys made clear their intention to refer to JMW3546 and JMW3547 for the purposes of their application and pointed out that if the Defendants wished to prevent the Claimants from referring to the documents, the Defendants were at liberty to make a cross-application.

14. The first occasion on which the Defendants specifically set out which individual documents in JMW3546 and JMW3547 they alleged were privileged was 26 September 2022.

15. On 30 September 2022, the Defendants agreed to review JMW3546 and JMW3547 and gave notice of their intention to issue the present application. The Defendants gave disclosure of non-privileged documents in JMW3546 and JMW3547 (which should have been disclosed previously) on 11 November 2022.

16. The Defendants issued their present application on 04 October 2022.

The scope of the present application

17. By the time of the hearing before me, the scope of the Defendants' application had narrowed so that I was only concerned with the following individual documents within JMW3546 (collectively referred to hereafter as "the Disputed Documents"):

    i) Pages 145 – 146 of JMW3546 – e-mails addressing projects lost as a consequence of the injunction put in place on 19 April 2021 for the purpose of the return hearing on 21 June 2021, the Counterclaim and compliance with the Order of 19 April 2021.

    ii) Pages 366 – 371 of document JMW3546 – e-mails relating to the identification of projects to be carved out of the undertaking put in place on 19 April 2021.

    iii) Pages 364 – 365, 391 – 392, 399 and 474 – 480 of JMW3546 – emails relating to the drafting and execution of the Fourth Defendant's witness evidence for the purpose of the Claimants' applications for injunctive relief.

Legal Principles

18. Where a party alleges that a document has been disclosed by mistake, there are essentially two issues:

    i) Was the relevant compilation or document privileged? and

    ii) If so, what is the consequence of the inadvertent disclosure to the other party?

Privilege – Litigation Privilege

19. The only relevant privilege now relied on by the Defendants is litigation privilege. In this regard, the question is whether the individual Disputed Documents are privileged. There is no wider privilege in the compilation documents JMW3546 and JMW3547; see Sumito Corp. v. Credit Lyonnaise Rouse Ltd [2001] 1 WLR 479 and *The Supreme Court Practice 2022* at 31.3.11.

20. There was on the face of the parties' skeleton arguments a debate as to whether the Disputed Documents fell within the scope of litigation privilege on the basis that they were not documents passing between the Defendants or their solicitors and third parties. However, by the time of the hearing, the Claimants were prepared to proceed for the purposes of this application on the basis that the Documents were to be treated as being covered by litigation privilege.

21. This concession by the Claimants means that I do not have to determine finally whether the Disputed Documents are each covered by litigation privilege. It is also a stance which I consider to be sensible in circumstances where:

    i) Litigation privilege is not dependent on the involvement of a lawyer; see WH Holding Ltd & Anr v. E20 Stadium LLP [2018] EWCA Civ 2652 at [10];

    ii) The modern test for litigation privilege is that set out in the following passage from the speech of Lord Edmund-Davies in Waugh v. British Railways Board [1980] AC 521 at 543 – 4:

    After considerable deliberation, I have finally come down in favour of the test propounded by Barwick CJ in Grant v Downs, 135 C.L.R. 674 in the following words at p. 677:

    > *Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the courts should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.*

    Dominant purpose, then, in my judgment should now be declared by this House to be the touchstone.

    iii) The preparatory materials of a party may fall within the scope of litigation privilege even if they do not involve communication with a third party; see the discussion of the 'materials for the brief' exception in *Thanki, The Law of Privilege*, 3rd ed at paragraph 3.28.

Documents revealing wrongdoing

22. One of the key areas of dispute between the parties was the approach I should take to documents, which potentially reveal wrongdoing. In this regard, I accept Mr. Dougherty's submissions that two situations need to be distinguished.

    i) The first is where the allegedly privileged document evidences iniquity;

    ii) The second is where, as a result of the potential wrongdoing or inappropriate conduct revealed in the material, or as a matter of justice, it would be wrong to restrain use of inadvertently disclosed material by injunction.

23. In the first case, privilege never attaches to the document as there is no confidence in iniquity; see the summary in *Hollander, Documentary Evidence*, 4th ed at paragraph 25-11. The principle applies to criminal and civil fraud and is also engaged in relation to other forms of dishonesty; see the discussion in *Hollander* at paragraph 25-12. The Claimants do not allege that there is iniquity of this type on the present application.

24. In the second case, it is clear from the authorities that the nature of the wrongdoing, which may be relevant to the exercise of the court's discretion as to whether to grant injunctive relief to restrain the use of inadvertently disclosed material, does not depend on dishonesty and is wider in scope; see Pickett v Balkind [2022] EWHC 2226 (TCC) (discussed further below). The Claimants do rely on the test as outlined in Pickett for the purposes of resisting the claim for injunctive relief.

Inadvertent Disclosure

25. I am concerned on this application with the situation where a receiving party reads documents without being told that the documents are or are alleged to be privileged and inadvertently disclosed.

26. The action is one to which paragraph 19 of CPR PD57AD, Disclosure in the Business and Property Courts, applies in place of CPR Rule 31.20. However, I do not understand that paragraph 19 of CPR PD57AD to change the position, which applied in relation to CPR Rule 31.20; see the discussion in *Hollander on Documentary Evidence* at paragraphs 25-02 and 25-03.

27. The principles governing inadvertent disclosure in circumstances where a receiving party has read the documents without being told that the documents are or are alleged to be privileged and have been inadvertently disclosed are those set out in Al Fayed v Commissioner of the Police of the Metropolis [2002] EWCA Civ 780. The decision of the Court of Appeal in Al-Fayed was reached having considered the effect of CPR Rule 31.20 and the Court observed that no-one suggested that different principles apply to the operation of that rule from those applicable to the question of what, if any, injunction should be granted. Neither party before me submitted that a different approach applies in respect of PD57AD, paragraph 19. On the contrary, both parties relied on the principles in Al Fayed. The relevant principles are as follows (at [16]):

> *"[…] 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." (emphasis added)*

28. In applying the principles laid down in Al Fayed, the Court must distinguish between two points: first, whether the document was privileged and, second, whether even if privileged the document has obviously been disclosed by mistake. It is only if the court is satisfied of the latter that it will consider whether to prevent the use of the document in the litigation; see Rawlinson v. SFO [2014] EWCA Civ 1129 at [15].

29. In other words, the relevant question is not whether it was obvious that the documents in question were privileged. Rather, the question is whether a reasonable solicitor would have realised that an obvious mistake had been made in disclosing the documents. On the question of whether the mistake is obvious, the court will apply the two-limbed test set out in Al Fayed at [16(vii)].

30. As to what is an obvious mistake, the dicta of Mann LJ in Pizzey v Ford Motor Company [1994] P.I.Q.R. P15 (1993) are instructive:

> *"Cases of mistake are stringently confined to those which are obvious, that is to say those which are evident. This excites the question,: Evident to whom? The answer must be to the recipient of the discovery. If the mistake was evident to that person then the exception applies, but what of the case where it was not evident but what of the case where it was not evident but would have been evident to a reasonable person with the qualities of the recipient? In this context, the law ought not to give an advantage to obtusity, and if the recipient ought to have realised that a mistake was evident then the exception applies."*

31. Even where there is an obvious mistake, the court still has to consider whether ultimately it is just and equitable to prevent the use of material; see Mohammed v. Ministry of Defence [2013] EWHC 4478 (QB) at [31] per Leggatt J. This will include consideration of issues such as whether there has been delay, a lack of clean hands and

public interest; see Istill v Zahoor [2003] CP Rep at [90], [93] and [94] per Lawrence Collins J (as he then was). However, in determining whether it is just and equitable to prevent the use of material, I keep in mind that I am not carrying out a balancing exercise in order to weigh up the privilege on the one hand and the importance of the document being before the court at trial on the other.

32. More recently, in Pickett v Balkind [2022] EWHC 2226 (TCC), the court considered whether a party should be restrained from relying on a privileged document, which revealed potential wrongdoing. The alleged wrong was that an expert had received comments and suggestions on the joint report from the claimant's lawyers in what the court described as a *"potentially serious breach of the TCC Guide"* [49]. The court (Judge Paul Matthews sitting as a High Court Judge) held at [45]:

> *"the document concerned reveals some wrong by the disclosing party such that an injunction ought not to be granted, so that the wrong may be righted. In some cases, we may say that the document discloses iniquity and there can be no confidence in iniquity. But the use of that old-fashioned, now somewhat pejorative word suggests that the wrong disclosed must amount to a serious crime, or at least a serious tort. I prefer to think in terms of whether in such circumstances it would be unconscionable for the recipient in the circumstances to seek to rely on the document to protect its (or possibly the public's or a third party's) interests. If it would not be unconscionable then it would not be appropriate to grant an injunction.*

33. Mr. Bradley submitted that there was no basis for the test of unconscionability as laid down in Pickett, that it set the bar too low and that the test was inconsistent with the authorities in this area. I do not accept these submissions.

    i) The court in Pickett was dealing, as am I, with the question of whether to exercise its discretion to restrain the use of otherwise privileged documents. It was not concerned with the different question of whether the documents were not privileged in the first place because they evidence iniquity of the type discussed in paragraphs 22(1) and 23 above.

    ii) The decision in Pickett is consistent with the principles laid down in Al Fayed at [16] and in the authorities referred to in paragraph 31 above.

    iii) I consider that the approach laid down in Pickett is correct as a matter of principle when one looks to the equitable jurisdiction which the Court is exercising.

    iv) The court in Pickett is a court of equivalent standing and is one which I should in usual circumstances follow.

Discussion

34. The burden is on the Defendants to establish that the Disputed Documents were inadvertently disclosed.

35. On this question, the evidence before me from the Defendants is limited and unsatisfactory.

36. I have no evidence from Ms. Jones, who apparently created the compilations JMW3546 and JMW3547 as to why the Defendants included the individual disputed documents within the compilations. Ms. Brown does address the question of inadvertent disclosure in her second witness statement but there is a tension within her evidence as to the purpose for which the two compilation documents were produced. In paragraph 14 of her second witness statement, Ms. Brown gives evidence that the compilations were created in order to assist JMW (and to the extent later relevant, counsel) in the conduct of the ligation and the provision of advice. On first reading, this might be thought to suggest that the purpose of the compilations was to assist with the conduct of the litigation generally. However, each document within the compilation bears the heading 'disclosurexercise1@outlook.com', suggesting that the compilations were in fact compiled for the purposes of the disclosure exercise, which the Defendants were required to carry out. On instructions, Mr. Bradley informed me that the advice being sought was advice as to whether the documents in the compilations should be disclosed. However, this is not what Ms. Brown's statement says and would seem inconsistent with paragraph 15 of her witness statement which is to the effect that she was instructed by Ms. Jones that all constituent correspondence or documentation within the pdf compilations had been made independently available to JMW for the purposes of assessing which documents ought ultimately to be disclosed. There is no evidence before me as to whether Ms. Brown or one of her colleagues reviewed JMW3546 and JMW3547 to see whether those documents contained within them individual documents which were privileged or to explain more generally how JMW3546 and JMW3547 came to be disclosed.

37. Ms. Brown also says that it was not intended that the pdf compilations themselves be disclosed within Extended Disclosure and refers to the Defendants' Disclosure Certificate, which she says asserts privilege in documentation of this nature. Ms. Brown's evidence is clearly referring to JMW3546 and JMW3547 as compilations. I cannot accept her evidence in this regard for three reasons:

    i) The Defendants did disclose other non-native documents, for which they have not claimed privilege or inadvertent disclosure;

    ii) It is now accepted by the Defendants, and clear from a brief perusal of JMW3546 and JMW3547, that the majority of the documents within those compilations are not privileged. Nor are the compilations, ones which show the trend of legal advice being given to or sought by the Defendants such that the compilations would independently attract legal privilege.

    iii) There is nothing in the wording of the Defendants' disclosure certificate which can be read as specifically identifying an intention not to disclose JMW3546 or JMW3547 or compilations of the same type.

38. Overall, I have no good evidence as to why the Defendants and Ms. Jones originally included the Disputed Documents within JMW3546 or as to why the compilations were disclosed in circumstances where the Defendants cannot properly say that JMW3546 was privileged as a compilation.

39. Accordingly, I find that the Defendants have not established that the Disputed Documents found within JMW3546 were inadvertently disclosed.

40. Even if I had been satisfied that the Disputed Documents had been inadvertently disclosed, I would still refuse the Defendants the injunctive relief sought both because (i) I do not regard the inadvertent disclosure as having been an obvious mistake and (ii) because I consider it would be unjust and inequitable to grant the relief sought.

41. On the question of obvious mistake, I do not agree with the submissions of the Defendants that this is a case where just looking at either JMW3546 and JMW3547 would raise a red flag. While one might expect to receive native e-mails and associated attachments in a disclosure exercise, I do not consider that provision of a pdf compilation would be a sufficient reason to put the Claimants on notice that privileged material might be contained within those documents and have been disclosed by mistake.

42. Nor do I consider that the reference to 'disclosureexercise1@outlook.com' indicates that the documents were potentially privileged and in a format unintended for the final stage of inspection. The reference is equally consistent with an intention that the documents should be disclosed.

43. There is more force to the Defendants' submission that the nature of the Disputed Documents relating to the formation of the Defendants' response to matters in the injunction and in the counterclaim and to preparation of Mr. Watson's witness statement would have suggested that the documents were disclosed by mistake. However, I do not consider that this factor alone was sufficient to put the Claimants or their solicitors on notice that there had been an obvious mistake. The documents were included within a compilation of obviously non-privileged documents and I accept the submission made on behalf of the Claimants that there are reasons why a party may choose to disclose documents that are otherwise privileged and that it is not for a recipient to second guess why disclosure has been made unless an obvious mistake has been made. Such reasons may include an attempt to evidence a point that is not otherwise supported, an attempt at openness or to show consistency or a result of taking a broad approach to disclosure to reduce time and costs on the disclosure review process.

44. I also accept that the question of whether a mistake had been made that was obvious both to the solicitors actually reviewing the disclosure and to a reasonable solicitor needs to be reviewed in context. In this regard, it is relevant that:

    i) The review was of 3,700 documents (and many more pages) for their relevance and not whether they had been disclosed by mistake.

    ii) The Disputed Documents were to be found at various places in JMW3546 and JMW3547 with no indication that the compilations or documents within them were privileged.

    iii) None of the documents were marked privileged or without prejudice or were of a type that was obviously privileged and unintended for disclosure.

    iv) The documents were internal Vebro documents and no lawyers were copied in on the correspondence.

45. It is also relevant when addressing the question of obviousness that the Defendants did not immediately raise the question of privilege and inadvertent disclosure when Kennedys wrote to JMW on 19 July 2022. Privilege was only raised nearly a month later and then only with an assertion of legal advice privilege and litigation privilege made in respect of JMW3546 and JMW3547 generally rather than in relation to the Disputed Documents. Specific documents for which privilege was claimed were only identified for the first time on 26 September 2022. In other words, it took the Defendants and their solicitors some time to identify that a mistake had been made and the potential basis of the mistake.

46. It also appears that one of the documents within JMW3547 for which the Defendants claim privilege was also disclosed by the Defendants separately in its native form. In other words, it had been reviewed twice. Although no longer a document in issue (because the Claimants have agreed not to refer to it before the court), it is relevant to the question of obviousness that documents which the Defendants allege were inadvertently disclosed were reviewed twice and still disclosed.

47. Despite the criticisms made by the Defendants of the evidence of Mr. Steel, I accept his evidence that he and his colleagues undertaking the review of the Defendants' disclosure were unaware that the Disputed Documents had been inadvertently disclosed.

48. It follows that I find that there was no obvious mistake justifying injunctive relief in respect of the Disputed Documents.

49. Finally, I turn to consider the question of whether it would be unjust and inequitable to grant the Defendants the injunctive relief sought.

50. Under this heading, the Claimants rely on two grounds to challenge the Defendants' entitlement to the injunction sought. The first is delay and the second is that some of documents in issue disclose prima facie wrongdoing or inappropriate conduct.

51. Taking delay first, it does seem to me that when a party is put on notice that potentially privileged material has been disclosed it is incumbent on that party to act without delay in asserting and identifying the privilege claimed. On the facts before me, the Defendants did delay in properly asserting privilege in the Disputed Documents. Kennedys wrote to JMW on 19 July 2022 raising concerns about, inter alia, documents JMW3546 and JMW3547. They wrote again on 22 July and 01 August 2022. The Defendants first responded on 17 August 2022 and did so asserting both legal advice privilege and litigation privilege in both compilations without providing any proper explanation as to why privilege was claimed or the basis for the claim of inadvertent disclosure. No better response was provided in JMW's letter of 26 August 2022. It was only in their letter of 26 September 2022 that the Defendants specifically identified which documents within the two compilations they asserted were covered by privilege. Further documents were added to the Defendants' list of individual documents when they made their application on 04 October 2022. In the meantime, the Claimants issued their own application in respect of the Defendants' disclosure on 22 September 2022.

52. Nevertheless, if I had otherwise been satisfied that the Disputed Documents were inadvertently disclosed pursuant to an obvious mistake, I would not have held that the

Defendants' delays identified in the previous paragraph were sufficiently culpable to justify refusing injunctive relief.

53. Turning to the issue of wrongdoing, I keep in mind that I cannot reach any final conclusion about allegations of wrongdoing at this stage. The question is whether the Disputed Documents disclose sufficient evidence of wrongdoing that it justifies the refusal of injunctive relief to the Defendants. To answer this question, it is necessary to consider each category of Disputed Documents.

54. In relation to pages 145 – 146 of JMW3546, the Claimants submit that these pages demonstrate that the basis on which the counterclaim is put forward is inconsistent with the way in which the Defendants have collated the evidence in support of their counterclaim. They also submit that prima facie the documents show that the Defendants sent material covered by a confidentiality agreement made for the purposes of these proceedings to a Mr. Steve Jenkins who was outside the confidentiality ring established by the agreement.

55. If I had otherwise considered that it was appropriate to grant injunctive relief, I do not consider that these pages evidence conduct on the part of the Defendants which is sufficiently unconscionable to justify refusing that relief in respect of these documents. The documents do not show conduct which outweighs the level of protection against the admissibility of evidence subject to litigation privilege even where those documents have been accidentally disclosed; see McE v. Prison Service of Northern Ireland [2009] 1 AC 908 at [8].

56. In relation to pages 366-371 of JMW3546, the Claimants submit that the documents implicitly suggest that the Defendants always intended to use a confidential spreadsheet covered by the Springboard Injunction of 19 April 2021 if and when the injunction came to an end and notwithstanding the confidentiality agreement which had been entered into after proceedings had been issued.

57. Again, for essentially the same reasons as given above for pages 145 – 146, if I had otherwise considered that it was appropriate to grant injunctive relief, I do not consider that these pages evidence conduct on the part of the Defendants which is sufficiently unconscionable to justify refusing that relief in respect of these documents.

58. In relation to pages 391, 399 and 478 – 480 of JMW3546, the Claimants submit that these documents apparently show Ms. Jones having an inappropriate role in the preparation of Mr. Watson's evidence and that it may also show that the Defendants were acting in concert. I do regard these documents as falling into a different category to the others. They do raise questions as to the extent to which Mr. Watson's evidence is his own and as to the extent to which the content of his witness evidence has been influenced by Ms. Jones and the other Defendants. As such, I do consider that there is sufficient evidence of unconscionable conduct in connection with the preparation of Mr. Watson's witness statement to justify refusing injunctive relief in respect of these pages if I had otherwise been minded to grant such relief; see in this regard PD32.18 and My Fotostop Ltd v. My Fotostop Group Ltd [2007] FSR 17 at [20] and [22] both of which emphasise the importance of a witness' evidence being in their own words and going to matters on which they can speak from their own knowledge.

59. In reaching this conclusion, I have had regard to Ms. Brown's explanation in her fourth witness statement for the exchanges seen in pages 391, 399, and 478 - 480. However, those explanations, which rely on her investigations and conversations with various individuals do not persuade me that there is no sufficient evidence of unconscionable conduct, which the Claimants should be entitled to explore at trial with the relevant witnesses.

Wasted Costs

60. It follows from my conclusions above that I also reject the Defendants' submissions that this is a case where I should order that the Claimants' solicitors should show cause as to why the court should not make a wasted costs order against them. I would add that even if I had found that on balance it was appropriate to grant the Defendants the injunctive relief they sought, I would still have rejected the application for wasted costs. I do not consider that there is any criticism to be made of the Claimants' solicitors, Kennedys, in relation to the Defendants' disclosure of JMW3546 and JMW3547 which justifies an application for wasted costs.

Conclusion

61. For the reasons set out above, I dismiss the Defendants' application for injunctive relief in respect of the Disputed Documents and grant the Claimants permission to use the Disputed Documents.

62. I would be grateful for the assistance of counsel in drawing up an appropriate order reflecting the terms of this judgment.