Neutral Citation Number: [2023] EWHC 1890 (KB)

Case No: KB-2022-003428

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 July 2023

Before:

HIS HONOUR JUDGE BIRD
(SITTING AS A JUDGE OF THIS COURT)

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Between:

AVALON CAPITAL MARKETS LIMITED	**Claimant**
- and –	
(1) JONATHAN ROSE **(2) ROMAIN DUIGOU**	**Defendants**

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Mr Daniel Oudkerk KC (instructed by **Winckworth Sherwood LLP**) for the **Claimant**
Ms Diya Sen Gupta KC (instructed by **Coyne Partners LLP**) for the **Defendants**

Hearing date: 12 July 2023

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Approved Judgment

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HIS HONOUR JUDGE BIRD (SITTING AS A JUDGE OF THIS COURT)

His Honour Judge Bird:

INTRODUCTION

1. The Defendants are experienced brokers in the single stock volatility market. They act as intermediaries who pair counterparties to enable trades to be completed and charge a fee for the successful trades they facilitate. Each has worked for Cantor Fitzgerald ("CF") for more than 15 years. In November 2021 they contracted to leave CF and start work for the Claimant on 1 December 2022. Each was to receive a substantial signing-on bonus (£2m in the case of the First Defendant and £700,000 in the case of the Second Defendant) and, in addition to a basic salary, each would receive commission payments based on the revenue they generated for the Claimant.

2. In June 2022, each Defendant informed the Claimant that they would not be leaving CF, thereby putting themselves in repudiatory breach of contract. By an action issued on 10 October 2022, the Claimant seeks damages for breach of contract including (see paragraph 20 of the Particulars of Claim) directly and indirectly generated losses of profit on the revenues that would have been generated if the Defendants had honoured their contracts. Doing the best it could at that point, the Claimant put its losses at £4,446,894 in respect of the First Defendant's breach and £2,392,451 in respect of the Second Defendant's breach.

3. This is the Claimant's application for specific disclosure in respect of documents said to go to the issue of loss.

LOSSES IN MORE DETAIL

4. An appendix to the Particulars of Claim shows how those losses have been calculated. In essence, to calculate direct losses it is assumed that the First Defendant would create a revenue in his first year of £2,499,996. After account is taken of overheads it is calculated that 27% of that revenue would be retained by the Claimant as profit. Thereafter in year 2 and year 3 it is assumed the revenue will increase by 10% each year. The net effect is that the retained profit in year 2 and year 3 increased to 29% and then 30%. Indirect losses are calculated on the basis that each Defendant would generate work for other brokers. For year 1, the Claimant estimates the First Defendant would generate £1.4m of work for others, 45% of which would be retained as profit. Again an uplift of 10% per year is assumed. The same approach is taken for the Second Defendant with the same uplifts applied. The starting point is that in year 1 he would generate revenue of £1,250,000 of which £398,267 (32%) would be retained as profit. Further profit of £315,000 would be retained in the first year as a result of work generated for others.

5. The Defendants plead that the Claimant's case on loss is "*unsubstantiated and entirely without merit*" (paragraphs 5 and 28) and deny that any loss has been caused by the Defendants' breach (paragraph 24). The Defendants assert that any losses suffered are too remote. A key aspect of their case is that the move would have been speculative. There was no guarantee that traders would continue to deal with the Defendants after they had left CF ("*an established market brand*") and moved to the Claimant ("*a small brokerage with a negligible market presence in the relevant market*").

6. The Claimant pleads to the Defendants' denial that any loss was suffered at paragraphs 30 to 38 of the Reply. The pleas include reference to the fact that the "*parties discussed the*

amounts of revenue that the Defendants were capable of generating at the Claimant in the light of the Defendants' track records as successful brokers at [CF]" (paragraph 30.3).

THE APPLICATION FOR SPECIFIC DISCLOSURE

7. The Claimant seeks three categories of documents:

   i) "All documents evidencing the Defendants' remuneration by Cantor Fitzgerald Services LLP and any company, firm, organisation or other entity (irrespective of jurisdiction) (whether directly or indirectly) controlling or owning Cantor Fitzgerald Services LLP, controlled or owned by Cantor Fitzgerald Services LLP or under common control or ownership with Cantor Fitzgerald Services LLP (collectively, Cantor Fitzgerald) from 1 December 2019 to date (including any bonuses, incentives, grant units, commission, deferred compensation or other payments). This will include employment contracts, partnership agreements, payslips, commission statements, P60 forms or other tax return information indicating the Defendants' income from Cantor Fitzgerald."

   ii) "All documents evidencing the offer of new and/or improved financial terms from Cantor Fitzgerald to the Defendants in or around June 2022 after Cantor Fitzgerald had learned of the contracts of employment entered into between the Claimant and Defendants on 24 November 2021. This will include documents evidencing: (i) any indemnity given by Cantor Fitzgerald to the Defendants in relation to claims brought by Avalon; (ii) any new or amended contracts or deeds or drafts thereof; and (iii) any documents evidencing any negotiations or discussions as to the new terms."

   iii) "All documents evidencing the performance track records of the Defendants' revenue generation at Cantor Fitzgerald from 1 December 2019 to date including any notes taken by the Defendants."

8. The application is resisted in its entirety. It is common ground that the Defendants' disclosure does not deal at all with their remuneration at CF, any improved terms offered to them, any indemnity or their "track record" with CF. It is not suggested that it would be disproportionate or unduly arduous to comply with the orders sought and neither is it suggested that no documents exist in any of the specified categories.

9. Mr Oudkerk KC, who appears for the Claimant, accepts that there may be some overlap between the categories of documents. He also accepts (as he must) that the Defendants are not the alter egos of CF so that (unless its purpose is to obtain documents that are or have been in the control of either Defendant) no search of CF's records would be required to fulfil any order I make. He accepts that it may be necessary to put in place confidentiality safeguards in respect of some documents.

THE WIDER PLEADED CASE

10. At paragraph 15 of the Particulars of Claim, the Claimant pleads that CF offered improved financial terms to the Defendants to encourage them to stay and an indemnity in respect of the costs of this action and any damages awarded. The Defendants plead to those assertions at paragraph 21 of the Defence averring that the Defendants remained as members of CF and making no admission as to the existence of the indemnity.

11. Paragraph 1 of the Defence explains that "where an allegation made in the Particulars of Claim is not admitted….. [the Defendants] do not know whether it is true, so the [Claimant] is required to prove it".

12. CPR 16.5 imposes an obligation on a Defendant to "deal with every allegation in the Particulars of Claim" stating which are denied, which admitted and which allegations the Defendant is unable to admit or deny.

13. It is plain that the Defendants know if they have been offered an indemnity. It follows, either by application of CPR 16.5 or by adopting the explanation set out at paragraph 1 of the Defence (which amounts to the same thing), that the Defendants were not entitled "not to admit" the existence of the indemnity.

14. In the course of argument, Ms Sen Gupta KC suggested that the presence or absence of any indemnity was irrelevant to the claim, and that is why its existence was not admitted. In my judgment, that course was not properly open to the Defendants for the reasons set out above. The Defendants might have applied to strike out that part of the Particulars of Claim or might simply have declined to plead to it on the basis that it was irrelevant or was not "an allegation".

GENERAL OBSERVATIONS

15. Before considering the correct test to apply, it is helpful to make some general observations about the claim and the application:

    i) There are two key issues between the parties: first whether the Defendants' breach has caused any recoverable loss at all and secondly, if it has, what is the quantum of the loss suffered. The second issue has been the focus.

    ii) Establishing quantum in a case like this is difficult. Establishing what would have happened if the Defendants had fulfilled their contractual obligations is not a simple matter of calculation and is speculative. In those circumstances, the Court will do the best it can with the available evidence to assess loss. In my judgment this is an important point which must be borne in mind when considering the application before me.

    iii) If the Defendants had started to work for the Claimant, they would have been doing the same job (carrying on the same kind of brokerage) they had carried out with CF.

    iv) The Defendants' pleaded case is that the Claimant had very little (if any) experience of working in the kind of brokerage the Defendants were skilled in. CF on the other hand had a great deal of experience in that work.

    v) Permission has been granted for expert evidence. The evidence filed in support of this application is that the Claimant's expert (Mr David Stern) has confirmed that each category of documents will be relevant to his report (see paragraph 43 of the evidence in support)

THE TEST

16. There was no dispute about the correct test to apply.

17. On an application for specific disclosure, the court will take into account all the circumstances of the case and in particular the overriding objective (see PD31A para.5.4). The rationale for the discretion to order specific disclosure is that the overriding objective obliges the parties to give access to those documents which will assist the other's case: *Commissioners of Inland Revenue v Exeter City AFC Ltd* [2004] BCC 519 at paragraph 15. The relevance of documents is analysed by reference to the pleadings, and the factual issues in dispute on the pleadings: *Harrods Ltd v Times Newspaper Ltd* [2006] EWCA Civ 294, per Chadwick LJ at paragraph 12.

18. The scope of standard disclosure is defined at CPR 31.6. A party must disclose of documents: (i) on which a party relies; (ii) which adversely affect his own case; (iii) which adversely affect another party's case; or (iv) which support another party's case.

19. An order for specific disclosure should be limited to documents which are necessary to deal with the case justly (see the commentary in the White Book at paragraph 31.0.1 and CPR 31.5(7)).

20. The correct approach to the present application is first to identify if any of the categories of documents in respect of which specific disclosure is sought fall within standard disclosure. The next question is to determine if specific disclosure should be ordered. In considering that question I should bear in mind the context of the case and be guided by the overriding objective which is to deal with cases justly and at a proportionate cost. I remind myself that the overriding objective requires the Court, as far as is practicable, to ensure the parties are on an equal footing and can participate fully in proceedings and to ensure that claims are dealt with fairly.

APPLICATION OF THE TEST TO THE FACTS

G1. Category 1

21. The first category of documents goes to the remuneration of each Defendant from 1 December 2019 onwards whilst at CF. From that information the parties will be able to work out the revenues generated by each Defendant for CF. Whilst that detail may not, of itself, provide a complete answer to the issue of the Claimant's loss, it does in my judgment go to that issue and is likely to support the Claimant's case (that loss was suffered) and adversely affect the Defendants' case that no loss was suffered.

22. Knowledge of the Defendants' remuneration with CF (and so of the revenue generated) is a good starting point. I note in *Tullett Prebon PLC v. BGC Brokers LP* [2010] EWHC 484 (QB), Jack J found that a successful broker must have natural ability, experience and "*relationships, or connections, with the traders…It takes time to build up such relationships so that a trader has the trust and confidence in the broker to use him on a regular basis….such relationships are primarily relationships between the individual broker and the individual trader and so are the broker's rather than the [institutions]*…". In my judgment, if the trial judge in the present case reaches the same conclusion, evidence of revenues generated at CF will be of very real assistance because such a finding is likely to lead to the conclusion that the move from a large institution to a smaller one would have a limited impact on revenue generation.

23. I am satisfied that specific disclosure of these documents should be ordered. In my judgment such an order is not only compatible with the overriding objective, but required by it. In my

judgment these documents are necessary to deal with the case justly. Without them, the Court may well find itself in real difficulties when attempting to assess the Claimant's loss.

G2. Category 2

24. The second category of documents concerns the new and improved terms offered to the Defendants. These are dealt with at paragraph 15 of the Particulars of Claim, and I refer them to in section D of this judgment above. The existence or absence of new terms (including whether an indemnity was offered) is a clear issue between the parties. It follows that the category 2 documents fall within the ambit of standard disclosure as they will effectively resolve the issue.

25. I then turn to consider if specific disclosure should be ordered. I will consider the general category of documents and the indemnity separately.

26. As to the general category, I am satisfied that documents evidencing new remuneration terms and documents dealing with negotiations should be disclosed. Those documents will assist in the understanding of the category 1 documents because they will explain how remuneration was calculated.

27. Further, in my judgment these documents will provide an insight into the value CF (who are of course not a party to the claim) saw in retaining the Defendants and the lengths (and costs) they were prepared to go to, to buy off the risk of losing revenue and potentially losing the opportunity to do business with traders with whom the Defendants had an established relationship. A new and improved remuneration package may therefore be an indication that CF recognised that if the Defendants left, it would lose revenue. That in turn may support the view that traders would follow the Defendants as a result of established and strong personal relationships and not stick with CF simply because it was an established business. (This point is likely to be a key issue at trial. It is raised by the Claimant at paragraph 31 of the Reply and disputed by Mr Coyne at paragraph 10 of his third witness statement). These documents in my judgment are therefore necessary to deal with the case justly.

28. Dealing with the indemnity, Miss Sen Gupta KC referred to a decision of David Steel J in *West London Pipeline and Storage v Total UK* [2008] EWHC 1296 (Comm). There the court refused to order disclosure of an insurance policy the existence of which had nothing to do with the issues in the case (see paragraph 21 of the judgment). I do not agree that the indemnity should be treated in the same way simply because its practical effect may be to "insure" the Defendants against litigation risk.

29. It is clear that the existence of the indemnity is an issue in the case. The Defendants have failed to admit or deny that there is an indemnity when they should have done one or the other or declined to plead to the point. In my judgment disclosure of the indemnity is likely to cast further light on the points raised at paragraph 27 above. A generous indemnity may well support the conclusion that there was a very real possibility that traders would follow the Defendants.

30. I am satisfied that the indemnity should be disclosed and that such disclosure is in accordance with the overriding objective and necessary to deal with the case justly.

G3. Category 3

31. The third category of documents deals with the Defendants' "track record". The Claimant's pleaded case is that reference was made to the Defendants' track record during pre-contractual discussions (see paragraph 6 above). In my judgment these documents fall within the scope of standard disclosure because they are likely to support the Claimant's case on loss.

32. I am persuaded that disclosure of these documents would be in accordance with the overriding objective and is necessary if the case is to be dealt with justly. It will obviously be helpful for the trial Judge to understand when dealing with loss what information may (depending on findings of fact) have been provided to the Claimant by the Defendants before the contracts were entered into.

33. An issue as to time frames was raised by Miss Sen Gupta KC. She suggested that the search period for category 1 and category 3 documents back to 1 December 2019 was inappropriate. I am unable to accept that submission. Disclosure statements form each party show a search for relevant documents back to that date. I can see no reason why I should alter that date.

CONCLUSION

34. I am therefore satisfied that each aspect of the application should succeed. I accept that there will be an overlap between the categories, but the parties will I am sure deal with that in a proportionate and sensible way.

35. In reaching my conclusions I have carefully considered the written evidence, the skeleton arguments prepared by Leading Counsel and the focussed oral submissions I heard. I have not rehearsed each argument that was advanced but have taken each into account.

36. I am grateful to Leading Counsel for their helpful and focussed submissions and express the hope that the order I have made will assist the parties to reach a compromise in this case and thereby avoid a trial. I am confident that each side is fully aware of its obligations and will engage appropriately in efforts to settle the claim or to narrow the issues

37. The parties should agree an order if possible. I am content to extend time for the exchange of witness statements until specific disclosure has been dealt with.