

Neutral Citation Number: [2019] EWHC 1953 (Ch)

Case No: HC-2017-00189

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 14 June 2019

Before:

Mrs Justice Falk

Between:

1) Abdullah Nasser Bin Obaid, (2) Oh-Na Real Estate
Company Limited, (3) TAQA Investment Company

Claimants

- and -

(1) Khalid Abdullah Al-Hezaimi, (2) OFY Limited, (3)
Latifah Assets Limited

Defendants

Richard Salter QC and William Edwards (instructed by **Baker & McKenzie LLP**) for the **Claimant**
Robert Anderson QC and Andrew Scott (instructed by **Jones Day**) for the **Defendant**

Hearing dates: 12-14 June 2019

APPROVED JUDGMENT

MRS JUSTICE FALK
(10.32 am)

Friday, 14th June 2019

Ruling by MRS JUSTICE FALK

1. This is my decision in relation to the Defendants' application, dated 7 June 2019, for a declaration in relation to the eighth witness statement of the First Defendant, Mr Al-Hezaimi. I will refer to that witness statement as "Al-Hezaimi 8".
2. The application was for a declaration that the Defendants have not made any admission for the purposes of CPR Part 14 that Mr Al-Hezaimi prepared or sent the so-called forged JLL email and forged RLS email, or alternatively permission to withdraw any such admission, for a declaration that they do not require permission to rely on the documents exhibited to Al-Hezaimi 8, or alternatively permission to rely on them, and for an extension of time for serving witness statements for trial until 3 June, when Al-Hezaimi 8 was served.
3. Al-Hezaimi 8 does two key things. First, it purports to correct the First Defendant's previous account in relation to the two emails, explaining that the previous account (that he was responsible for the forgeries) was provided under compulsion and was not correct. Secondly, it exhibits what the Defendants say are relevant documents that have recently come into their possession and which they say provide significant further evidence of the involvement of the First Claimant, Mr Bin Obaid, in corruption in Saudi Arabia, and in particular corruption involving both Mr Bin Obaid and his associate Dr Al Atiyah, and substantial payments to Saudi government officials.

4. The documents exhibited mainly comprise personal bank statements of Mr Bin Obaid between 2004 and 2011. They were received by the Defendants' solicitors, Jones Day, on 29 April from an anonymous sender. The package was sent from Dubai and was addressed to the partner responsible for this litigation, whose direct dial contact number was marked on the package. I would note that that suggests that the sender had some familiarity with the litigation.
5. The Defendants say that the bank statements show enormous receipts, including large cash amounts, into Mr Bin Obaid's accounts and disbursements to Saudi officials. They say that Mr Bin Obaid effectively acted as a middleman for Dr Al Atiyah and that they can demonstrate that Dr Al Atiyah had visibility over Mr Bin Obaid's bank statements. They say the documents go very much further than the evidence previously available in showing payments to government officials via Mr Bin Obaid, and that this is directly relevant to these proceedings.
6. A key plank of the defence is that Mr Bin Obaid was insistent that the true purpose of the disputed payments, being (on the Defendants' case) largely consideration for the sale of shares in an Egyptian company, be concealed from Dr Al Atiyah by being presented as being for property purchases. The Defendants say this is supported by other evidence in the contemporaneous communications where Dr Al Atiyah made it clear to Mr Bin Obaid that no payment should be made for the shares, and that the latter's insistence on covering up the true purpose of the payments is explained by the corrupt nature of the relationship.

7. As I will explain, I have decided that the appropriate course is not to admit the bank statements, and that the change in Mr Al-Hezaimi's evidence in relation to the two emails should be dealt with in a short additional witness statement limited to that issue.
8. Dealing first with the forged emails, the Defendants say that CPR14.1(5), which requires the permission of the court to withdraw an admission of the whole or part of a party's case, does not apply because the forgery of the emails was not pleaded.
9. In my view, it probably does apply, although I do not consider that I need to decide the point definitively. There is no express reference in CPR14.1 to Statements of Case. It was and is clearly part of the Claimants' "case" in a general sense that the two emails were forged and that Mr Al-Hezaimi was responsible for this. I bear in mind that pleadings need to be concise. It seems to me that there is no principled distinction between matters dealt with in and outside a Statement of Case, where the allegation is one of fact and is an important element in the case. The important point is that in both cases, the trial will have been prepared for on the basis of the disputed issues, as they were understood to be, taking account of the admission. That is why permission is needed to withdraw an admission.
10. Even if CPR14 does not apply, the list of factors in Practice Direction 14, paragraph 7, relating to when it is appropriate to permit withdrawal, must at least be relevant by analogy. The court has a general power to control evidence, including by excluding evidence that would otherwise be admissible, see CPR32.1.

11. Specifically, in relation to witness statements, CPR32.5(3) contains provisions to the effect that a witness giving oral evidence may obtain the permission of the court to amplify his witness statement and give evidence on new matters which have arisen since the witness statement was served. But the following paragraph, CPR32.5(4), states that the court will give permission “only if it considers that there is good reason not to confine the evidence of the witness to the contents of his witness statement”. So, the court clearly has a discretion in the matter, but good reason is required to go beyond a witness statement.
12. The Chancery Guide at paragraph 19.8 contemplates that matters not dealt with in an original witness statement should be covered in a supplementary witness statement, and notes that permission is required to adduce such a statement if there is an objection. There is a similar comment in the Commercial Court guide, to the effect that a supplemental witness statement should normally be served where a witness proposes to add to, alter, correct or retract from what is in an original statement. It says that the application should be made at the PTR, and if made later the applicant must provide compelling evidence explaining the delay.
13. Looking at the factors listed in paragraph 7 of PD 14, in deciding whether to give permission for an admission to be withdrawn the court must have regard to all the circumstances of the case, including the grounds on which the applicant seeks to withdraw the admission (including whether new evidence has come to light which was not previously available), the conduct of the parties, prejudice to any person if the admission is either withdrawn or the application is refused, the stage in the proceedings at which the application was made, the prospects of success of the

relevant claim or part of it if the admission is withdrawn, and the interests of the administration of justice.

14. Al-Hezaimi 8 was served at an extremely late stage, on 3 June, very shortly before skeleton arguments were due (reading for the trial commenced on 7 June), and well after the PTR. There would be prejudice to the Claimants if the admissions about the forgeries were withdrawn. I accept that, if the admissions had not been made, the Claimants would have taken further steps to investigate, including in relation to forensic examination of the metadata, examination of the telephone records, and so on. It is quite clear that a late change of tack of this nature can be an injustice.

15. However, the Claimants rightly accept that Mr Al-Hezaimi cannot be forced to continue to say that he was involved in forging documents. He must be entitled to provide at least oral evidence of what he now says is the truth of the matter. The interests of justice require this.

16. So as a minimum, it is appropriate to permit Mr Al-Hezaimi to give oral evidence on these matters. The Claimants also accept that an appropriate course would be for the court to grant permission, or to require, a limited further witness statement to be put in evidence, confined to correcting Mr Al-Hezaimi's story about the two forged emails.

17. The reality is that there will be a conflict in the evidence between what Mr Al-Hezaimi is now saying and what he said in earlier witness statements, and indeed with what his lawyers have previously accepted on his behalf. That conflict, together with the explanation Mr Al-Hezaimi gives for the late change in story, go to wider issues to be decided in this case: they go to

credibility, and they go to the nature of the relationship between the protagonists which is at the core of this case.

18. This is, to my mind, effectively an additional complicating factor. The change in story and the reasons it is said to have occurred are directly relevant to the issues to be decided. Credibility is at the core of this case. In my view, the court must be able to take account of changes in story and effectively compare evidence in assessing that credibility.

19. So even if there were admissions and withdrawal were permitted under CPR14, it certainly cannot be the case that the court must then simply ignore the earlier evidence in reaching its overall assessment.

20. In my view, the appropriate way in which to deal with this is under CPR32.5, permitting Mr Al-Hezaimi to amplify his evidence. For the assistance of the court, this should be accompanied by a short additional witness statement limited to those parts of Al-Hezaimi 8 that address the change of position in relation to the forged emails.

21. The position in relation to the documents exhibited to Al-Hezaimi 8, and in particular the bank statements, is not straightforward and I heard detailed submissions on this issue. In summary, the Defendants say that those statements are very relevant and probative. Although they were received on 29 April, their significance was not appreciated until the First Defendant arrived in the UK on 26 May, which was the first time he was able to give instructions in person, following events discussed in detail in connection with the stay application I decided at the PTR, related to

the First Defendant's imprisonment in Saudi Arabia for a brief period earlier in the year and an ongoing criminal investigation in Saudi Arabia.

22. In this case standard disclosure was ordered on 15 December 2017 and made at the end of June 2018, with inspection in mid-July. As from 1 January this year, the disclosure pilot set out in Practice Direction 51U applies, and it applies to this case, see *UTB LLC v Sheffield United & Others* [2019] EWHC 914. Under PD51U, there is a continuing duty to disclose known adverse documents, as well as a duty to continue to comply with existing orders for disclosure: see paragraph 3.1(3) and paragraph 3.3 in particular. The general touchstone is fairness. "Known adverse documents" is a fairly broadly defined concept, as set out in paragraphs 2.7 and 2.8. A document will be adverse if it or any information it contains contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party.

23. The Defendants say that if, as the Claimants maintain, these bank statements should have been handed over to the Claimants as confidential information belonging to Mr Bin Obaid, their relevance would mean that they were known adverse documents and there would be an immediate obligation to disclose them. Confidentiality is obviously not a defence to disclosure where documents are relevant.

24. Both parties relied on *Imerman v Tchenguiz* [2010] EWCA Civ 908. The Claimants said it supports their position that the Defendants owe a duty of confidence in relation to the bank statements. It is plain that under English law a banker owes a duty of confidence: see *Tournier v*

National Provincial [1924] 1 KB 461. Bank statements are inherently confidential. No Saudi law evidence has been led, so the presumption applies that the position is the same in Saudi Arabia as under English law, which the Claimants say also accords with common sense. The Claimants say that the *Tchenguiz* case made it clear that they were entitled to have the documents returned to them, and that that meant the Defendants were not entitled to make use of them and the Claimants would not be subject to an obligation to disclose them.

25. The Defendants point to the different facts in *Tchenguiz* and the order actually made in that case.

The confidential documents related to a husband and had been unlawfully obtained by his wife's brothers. They were obtained before any duty to disclose arose in divorce proceedings, and the Court of Appeal was concerned to ensure that no benefit was obtained from unlawful pre-action disclosure. The Court of Appeal made an order effectively requiring the ring to be held pending proceedings, with the relevant documents kept with the husband's solicitors pending any requirement to disclose them in the usual way once the proceedings commenced. Mr Anderson also submits that the case is support for the point that any remedy for breach of confidence is a discretionary one. Here, he said the court could, if necessary, hear the relevant part of the cross-examination of Mr Bin Obaid on the bank statements in private and any prejudice to him was outweighed by the prejudice to the Defendants if the bank statements could not be used.

26. I have decided, as already indicated, that I am not prepared to permit the bank statements and related documents exhibited to Al-Hezaimi 8 to be relied on by the Defendants in evidence.

27. As already discussed with counsel, it is very difficult to determine the question of relevance at the outset of a trial with confidence. Mr Anderson suggested that I effectively proceed on the assumption that the documents were relevant, and therefore known adverse documents, and allow cross-examination *de bene esse*. However, I do not consider that that is an appropriate course. The documents should either be admitted in evidence and made the subject of cross-examination, or they should not.
28. I have reached my decision mainly on the basis of procedural fairness, but I have also had regard to the fact that whilst Mr Anderson urges on me that the documents would be highly relevant, it is not clear to me that that is the case.
29. Starting with the procedural points, the Defendants say that Jones Day acted promptly in the circumstances following receipt of the documents on 29 April. I do not agree. The documents were in Arabic, but I understand they were accompanied by a summary in English. It should have been readily apparent what they were, namely bank statements of Mr Bin Obaid, and therefore in principle confidential.
30. The appropriate course of action would have been to inform the Claimants' solicitors promptly of their receipt and hand them over and, if it was considered that they were known adverse documents, take prompt steps to ensure that an application was made to require their disclosure if the Claimants disagreed that they should be disclosed. That would have allowed the court to reach a decision on the status of the documents in the proper manner. Alternatively, if Jones

Day were uncertain what to do with the documents, they could have sought guidance from the court.

31. Instead, providing no prompt notice and instead waiting to 3 June, and then providing the documents in the form of an exhibit to a witness statement, purportedly mainly produced for another purpose, when it appears that the real aim was to use them in cross-examining Mr Bin Obaid, was not the appropriate way to proceed.

32. I explained in detail in relation to the stay application that I did not accept that Mr Al-Hezaimi was unable to focus on this case after his detention earlier this year in Saudi Arabia, and instead considered that he had chosen to focus on the Saudi investigation rather than on these proceedings. No evidence has been led to explain that he was only free to travel to the UK on 26 May and was unable to deal with important matters such as these documents at an earlier stage.

33. In any event, Jones Day would not have needed Mr Al-Hezaimi's instructions to appreciate that the documents were bank statements of Mr Bin Obaid and inherently confidential. I therefore do not consider that the delay was acceptable. In my view, this is an important consideration in deciding whether it would be in the interests of justice to allow the documents to be produced in evidence at this very late stage.

34. A further point is that the standard disclosure ordered in this case did not lead to disclosure of any bank statements. An application was made for specific disclosure, among other things of Mr Bin Obaid's bank statements covering the years 2012 to 2016. This was compromised on the

terms of an order of Deputy Master Henderson on 3 December 2018. That order required disclosure of statements covering the period 1 September 2012 to 30 June 2015, a period falling outside the period to which the bank statements exhibited to Al-Hezaimi 8 relate. In the circumstances, I am not persuaded that the existing disclosure orders would cover these documents, but furthermore, as a matter of procedural fairness, the parties have proceeded on the basis of the limited disclosure covered by that order.

35. By providing documents at such a late stage, on the eve of the trial and without making a further disclosure application, the Claimants have not been left with any proper opportunity to respond to them or to investigate the subject matter of the challenges that Mr Anderson for the Defendants would undoubtedly wish to make in cross-examining Mr Bin Obaid. In my view, this would result in procedural unfairness. I accept they are Mr Bin Obaid's bank statements so he might be expected to have some familiarity with them, but the period covered is not at all recent and he has not had a proper chance to consider them, take steps to remind himself what the various payments relate to or put together evidence that he might wish to lead in respect of them.

36. It is also relevant to note that the nature of the allegation being made against Mr Bin Obaid is one of corruption, akin to fraud or at least akin to dishonesty. Any such allegation must be made with specificity and in sufficient time to enable the allegation to be met. I agree with Mr Salter that Mr Bin Obaid would need to be given some chance to identify evidence in relation to the

transactions on which he would be cross-examined, and I do not consider that he has had such an opportunity.

37. I note that under paragraph 18 of PD51U, an additional order for disclosure of specific documents may be made but only if it is necessary for the just disposal of the proceedings and is reasonable and proportionate. Paragraph 2.4 also makes clear as a general principle that the court will be concerned to ensure that disclosure is directed to the issues in the proceedings and that its scope is not wider than is reasonable and proportionate.

38. Given the procedural unfairness of the late disclosure and the manner in which it was done, in my view the relevance of the evidence would need to be of a compelling nature to justify admitting it at this late stage. Relevance would need to be obvious.

39. I am not persuaded that this is the case. The evidence is certainly not a knockout blow. Whilst the Defendants say the documents are highly relevant in demonstrating a corrupt relationship between Mr Bin Obaid and Dr Al Atiyah, and explain why Mr Al-Hezaimi decided that he needed to extract himself from the Egyptian business having discovered alleged financial irregularities and not having obtained a proper response from Dr Al Atiyah, it is not apparent to me that evidence related to the alleged corrupt relationship would be determinative or even highly relevant to the issues I need to decide.

40. The alleged corrupt relationship is not pleaded in the Defendants' case. I accept that it is reflected in the First Defendant's witness evidence. However, it cannot decide the key issue, which both parties agree is the purpose of the disputed payments made by Mr Bin Obaid to Mr

Al-Hezaimi. That will be determined based on contemporaneous documentary evidence and the oral evidence of the key protagonists.

41. At most, the corruption allegations regarding Mr Bin Obaid and Dr Al Atiyah provide support to the suggestion that Mr Al-Hezaimi needed to be able to explain the payments to Dr Al Atiyah, but it does not explain why the “cover story” of Mr Bin Obaid investing in real estate would have been acceptable to Dr Al Atiyah, but paying Mr Al-Hezaimi for shares would not, or indeed why Dr Al Atiyah would not share any concern Mr Bin Obaid had about a need to extract Mr Al-Hezaimi from the Egyptian business after he uncovered any financial irregularities.
42. It is also worth noting that the period covered by the bank statements falls before the period during which the key events occurred in this case, which is essentially 2013 to 2016. None of the statements are related to the disputed payments, the Egyptian business or the particular matters the subject of the pleadings.
43. I should clarify that I accept the Defendants' submission that the concept of known adverse documents is relatively broad and can cover matters not addressed in pleadings. However, it is clear from the principles in PD51U that the overall approach is to require disclosure not to be wider than is reasonable and proportionate, and that the key aim is to achieve a fair resolution of the proceedings. Procedural aspects, including avoiding ambush and allowing parties a proper opportunity to respond to allegations, are an important part of ensuring fair resolution.
44. I would also refer again to CPR32.1 and the court's general power to control evidence. I do not consider that the provisions relating to known adverse documents in the new practice direction

mean that such documents must necessarily be admitted. It is clear that the court has a power to exclude evidence that would otherwise be admissible. That power must be exercised in accordance with the overriding objective to deal with cases justly.

45. Of course, it will be open to Mr Anderson in cross-examination to ask Mr Bin Obaid whatever questions he wishes to ask about the nature of the relationship with Dr Al Atiyah and, for example, why Dr Al Atiyah was insistent that no payment be made for the shares. The bank statements might, from the Defendants' perspective, have provided further ammunition but they cannot be determinative, as indeed illustrated by the fact that the Defendants did not even know of their existence until 29 April but had already made allegations about the corrupt relationship.

46. Accordingly, I have concluded that it is not appropriate to admit the bank statements and related documents.