Neutral Citation Number: [2021] EWHC 750 (Ch)

Claim No. BL-2018-001982

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: Wednesday, 24th March 2021

Before:
MR. ROBIN VOS
(Sitting as a judge of the Chancery Division)
(Remotely via Microsoft Teams)

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Between:

BERKELEY SQUARE HOLDINGS LIMITED & OTHERS	**Claimant/ Applicants**
- and -	
(1) LANCER PROPERTY ASSETS MANAGEMENT LIMITED	
(2) JOHN TOWNLEY KEVILL	
(3) DUNCAN ROBERT FERGUSON	
(4) ANDREW JOHN WINDLE LAX	**Defendants/ Respondents**
(5) BYRON HOWARD PULL	
(6) LANCER PROPERTY HOLDINGS LIMITED	

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MR. PHILIP MARSHALL QC, MR. JONATHAN HARRIS QC (HON.), MR. JUSTIN HIGGO QC, MR. OLIVER JONES and **MR. JAMIE RANDALL** (instructed by **Eversheds**) appeared for the **Claimants/Respondents.**

MR. ADRIAN BELTRAMI QC, MR. RICHARD MOTT and **MR. OSCAR SCHONFELD** (instructed by **Reynolds Porter Chamberlain LLP**) appeared for the **Defendants/Applicants**

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Approved Judgment

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR ROBIN VOS:

Background

1. The claimants applied on 24th February 2021 to amend their particulars of claim and their reply. The defendants have agreed to most of the proposed changes, however, there remains one category to which they object. This relates to amendments which require the defendants to prove the authenticity of two key documents which have become known as the "Becker authority" and the "2012 approval".

2. I do not need to say much about the background to the underlying claim. The claimants are BVI companies which own or have owned properties in the UK. The ultimate beneficial owner of those companies is His Highness Sheikh Khalifa bin Zayed Al Nahyan, the President of the United Arab Emirates (or in one case, a family member).

3. The first defendant, Lancer, was appointed to manage the portfolio of properties owned by the claimant companies; the second to fifth defendants are the directors of Lancer; the sixth defendant was until sometime in 2017 or 2018 Lancer's parent company.

4. The claimants appointed Dr. Al Ahbabi as their representative in relation to the property portfolio owned by them. Dr. Al Ahbabi was the chairman of the Department of the President's Affairs in Abu Dhabi. He was assisted by Mr. Ismail.

5. The claims relate to payments made by Lancer to two BVI companies, Becker and Reilly, which are said to be beneficially owned by Dr. Al Ahbabi and Mr. Ismail respectively. The claimants say these payments were arranged dishonestly by Dr. Al Ahbabi and Mr. Ismail without the knowledge or approval of either the claimants or Sheikh Khalifa. The defendants, on the other hand, say that the claimants and/or Sheikh Khalifa knew and approved of the payments and the circumstances giving rise to them.

Procedural Background

6. Turning to the procedural background, the claim was served on 13th December 2018. The defendants requested further information which was provided on 1st April 2019 and then provided their defence on 24th April 2019. The claimants' reply was served on 6th June 2019. They also requested further information which was provided by the defendants on 1st July 2019. The claimants served amended particulars of claim on 7th November 2019.

7. In advance of the first case management conference, which took place on 14th January 2020, the defendants produced a draft amended defence and counterclaim which was approved by the claimants in December 2019. The amended defence and counterclaim was served on 6th May 2020 with further amendments on 26th May 2020. The claimants served an amended reply on 27th May 2020.

8. Disclosure took place on 11th September 2020, although as a result of correspondence this process is ongoing, with further documents recently having been provided by the

defendants to the claimants, and both parties having made applications for further disclosure.

9. On 25th February 2021 Green J allowed an extension of time for filing witness statements to 1st April 2021. The claimants are due to serve expert evidence relating to accounting issues on the same day. Both parties are to serve expert reports from chartered surveyors by 7th April 2021. The pre-trial review is listed for a three-day window starting on 4th May and the trial itself is listed for 18 days in a five-day window starting on 8th June 2021.

Principles to be applied

10. There is some divergence of views between the parties as to the principles which the court should apply in determining whether the proposed amendments should be allowed. This results partly from a difference of opinion as to whether the amendments are late.

11. Mr. Beltrami, on behalf of the defendants, submits that the court should apply the principles derived from the previous authorities by Carr J in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 [at 38] and approved by the Court of Appeal in *Nesbit Law Group v Acasta European Insurance Company Limited* [2018] EWCA Civ 268 [at 41]:

> "38 Drawing these authorities together, the relevant principles can be stated simply as follows :
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> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
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> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
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> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;
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> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation; it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
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> g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

12. Mr. Beltrami also referred to the decision of Jefford J, in *Nua Interiors Limited v Brady* [2018] EWHC 2586 (TCC) in which he agreed [at 18] with Carr J's summary in *Quah Su-Ling* and expressed the view that the same principles should apply to a proposed amendment which, although late, would not necessarily jeopardise the trial date.

13. Mr. Marshall, on behalf of the claimants, however, preferred the approach of Nicklin J in *Hewson v Tomes Newspapers Limited* [2019] EWHC 1000 (QB). Nicklin J's starting point [at 15], was the statement of Peter Gibson LJ in *Cobbold v Greenwich London Borough Council* (unreported CA, 9 August 1999) that:

> "The overriding objective of the CPR is that the courts should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon, provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest and the administration of justice is not significantly harmed."

14. He did, however, emphasise the requirement to have regard to the overriding objective. He also referred to the need for the applicant to show that the amendments have a real prospect of success in the sense understood in relation to a strike out application under CPR Part 24.

15. Nicklin J also acknowledged [at 18] that the later a party seeks permission to amend, the greater the likelihood that his or her amendment may be refused on the grounds of the disruption that it is likely to cause to the litigation, particularly if it risks jeopardising a trial date. On the basis of two of the cases reviewed by Carr J in *Quah Su-Ling* (*Worldwide Corporation v GPT* and *Swain-Mason v Mills & Reeve*), he accepted that, in the case of a late amendment, there is a heavy onus on the applicant to justify it.

16. What Mr. Marshall derived from *Hewson* is that if the amendment is not late (as he says is the case here) it should be allowed as long as any prejudice to the defendant can be compensated in costs. The cases referred to by Mr. Beltrami, he says, do not detract from this as they were all dealing with late amendments.

17. The question therefore is whether Mr. Marshall is right that an amendment to a pleading should be allowed as a matter of course if any prejudice to the defendant can be compensated for in costs as long as the amendment is not late, or whether the principles summarised by Carr J in *Quah Su-Ling* are also relevant.

18. In my mind, there is little difference between the two positions. As Nicklin J observed in *Hewson*, it is in any event still necessary to have regard to the overriding objective and for the applicant to be able to show that the amendment has a real prospect of success. I note that even applying the test in *Cobbold*, the applicant must demonstrate that the amendment is necessary to enable the real dispute between the parties to be adjudicated upon, that there should not be prejudice to the respondent which cannot be compensated in costs and that the public interest in the administration of justice, for example the impact on other court users, is a relevant consideration. I would agree with Jefford J who said in *Nua* [at 18]:

> "It is simply a question of where the balancing exercise starts from or the point around which the balancing exercise pivots. The factors are the same….."

19. Although Jefford J was talking about the distinction between a late amendment and a very late amendment, in my judgment, the same principles apply, whether the amendment is late or not, particularly bearing in mind Carr J's comment that lateness is a relative concept.

20. It may well be that a timely amendment made well before the trial date is less likely to be refused, but that is a function (in the words of Jefford J) of where the balancing exercise starts from, or the point around which the balancing exercise pivots and not as a result of the court taking into account different factors to those which it would take into account in deciding whether to allow an amendment which was either late or very late (in the sense in which Jefford J used those terms in *Nua*).

Withdrawing admissions

21. Mr. Marshall accepts that in respect of one of the documents, the authenticity of which the claimants say the defendants should prove, the authenticity has previously been admitted by the claimants. This is based on the fact that it was the claimants who first produced the document and the statements made about it by the claimants in their pleadings.

22. The parties agree that, in relation to this amendment, the court must also consider whether to allow that admission to be withdrawn. This requires the court to consider the factors set out in Practice Direction 14, paragraph 7.2. However, the only real difference between these factors and the factors which the court should consider in deciding whether to allow a pleading to be amended is the examination of the reason why the applicants now seek to withdraw their admission and, in particular, whether or not new evidence has come to light which was not available at the time that the admission was made. Mr. Beltrami suggested, and I agree, that this should be a particular focus in relation to an application to withdraw an admission.

Should the amendments be allowed?

23. With this background in mind, I turn to consider the proposed amendments. I need to consider the amendments relating to each of the two documents separately given that the circumstances in which they have been produced are different and the fact that it is accepted that the 2012 approval has previously been admitted. I will start with the Becker authority.

The Becker authority

24. This was referred to in the defendants' initial defence. It became clear from the claimants' subsequent request for information that it had been provided to the claimants as part of the defendants' initial disclosure. The document is said to be signed by Sheikh Khalifa and is put forward as evidence of his knowledge and approval of the arrangements giving rise to the payments to Becker.

25. Mr. Marshall submits that the claimants have never admitted the authenticity of this document. He points out that the claimants' reply contains the usual statement that "save as expressly admitted below the claimants join issue with the terms of the re-amended defence and in respect of such matters the defendants are required to prove them". This, he says, is consistent with CPR rule 16.7(2), which provides that:

> "(2) A claimant who –
>
> (a) files a reply to a defence; but.
>
> (b) fails to deal with a matter raised in the defence,
>
> shall be taken to require that matter to be proved."

26. Mr. Beltrami, however, suggests that the claimants have implicitly admitted the authenticity of the Becker authority. This is based on the fact that, although in their reply they do not expressly admit the authenticity of the document, they plead to it in the sense of denying that it authorises the relevant actions or payments. Coupled with the fact that they do not expressly deny the authenticity of the Becker authority, he submits that the claimants should be taken to have admitted the authenticity of the document.

27. In support of this he refers to CPR rules 16.5(2) and (5). These rules require a party to state their own version of events if they intend to put forward a different version of events from that given by the other party and that a defendant who fails to deal with

an allegation should be taken to have admitted it. Although CPR rule 16.5 relates to a defence rather than a reply, Mr. Beltrami submits that the same principles should be applied to any responsive pleading.

28. Mr. Beltrami also referred to paragraph C1.3(a) of the Commercial Court Guide which states that:

> "Particulars of claim, the defence and also any reply must comply with the provisions of rule 16.4 and 16.5".

29. The underlying principle which Mr. Beltrami identifies is that, in accordance with the overriding objective, it is not acceptable for a party to fail to plead a positive case in respect of a matter which is within their own knowledge; that would be contrary to the principle that a party should not be taken by surprise.

30. I do not accept Mr. Beltrami's submissions, attractive though they are. CPR rule 16.7(2) is clear that, if a claimant does not deal with a matter in their reply, they are to be taken as requiring that matter to be proved. It seems to me that these clear words cannot somehow be overridden by the provisions of CPR rule 16.5, which is stated to apply to defences and not to replies. Whilst the provisions of the Commercial Court Guide of course reflect best practice it cannot affect the consequences of the CPR.

31. As Mr. Marshall has pointed out, this is reinforced by the fact that a reply is voluntary and that CPR rule 16.7(1) specifically provides that a claimant who does not file a reply to the defence shall not be taken to admit the matters raised in the defence.

32. Another consequence of the terms of CPR 16.7 is that any admission must be an express admission. The claimants have clearly not made any express admission as to the authenticity of the Becker authority. Even if an implied admission were enough, the content of the claimants' pleadings does not, in my view, amount to an implied admission in relation to the authenticity of the Becker authority. The fact that the pleadings contain statements relating to the contents of the Becker authority cannot be taken to be an implied admission that the document itself is authentic, even though the claimants might have been able to establish the authenticity of the Becker authority by making appropriate enquiries of Sheikh Khalifa.

33. I am fortified in this conclusion by the existence of CPR 32.19, which provides that the authenticity of a document produced to a party is deemed to be admitted unless that party serves a notice that he wishes the document to be proved at trial. Such a notice must be served by the latest date for serving witness statements or within seven days of disclosure of the document, whichever is later.

34. I should make it clear that I have not been asked to determine whether it is still open to the claimants to give such a notice and I do not do so. However, the existence of this mechanism for establishing the authenticity of documents or for challenging them, in my view, means that a court should be less ready to imply that the authenticity of a document has been admitted as a result of pleadings in relation to the document, unless that implication is clear.

35. The need for an admission to be clear was highlighted by Mr. Marshall by reference to the observation of Green LJ in *Ash v Hutchinson* [1936] Ch.489 [at 503], that:

> "A plaintiff who relies for the proof of a substantial part of his case upon admissions in the defence must, in my judgment, show that the matters in question are clearly pleaded and as clearly admitted. He is not entitled to ask the court to read meanings into his pleading which upon a fair construction do not clearly appear in order to fix the defendants with an admission."

36. My conclusion is that the claimants have not admitted the authenticity of the Becker authority.

37. I therefore need to decide whether the amendments relating to the Becker authority should be allowed but not whether any admission needs to be withdrawn.

38. Mr. Marshall identifies two reasons why the claimants now seek to require the defendants to prove the authenticity of the Becker authority. The first is a criminal investigation in the United Arab Emirates. The claimants have been told that Dr. Al Ahbabi was summoned before the authorities on 4th February 2021, that he produced three original authorisation documents to them, including the Becker authority, but that on the basis of a statement apparently made by Sheikh Khalifa that he did not recognise the Becker authority or the 2012 approval, and evidence given to the investigators by a Mr. Abbas, a lawyer who worked in the same department as Dr. Al Ahbabi, the investigators are not satisfied as to the authenticity of the Becker authority. Dr. Al Ahbabi was remanded in custody in the United Arab Emirates. He has been charged with an unspecified offence but has apparently now been released.

39. The second reason for questioning the authenticity of the Becker authority put forward by Mr. Marshall relates to a number of emails which form part of the defendants' disclosure in September 2020. One email between the defendants, for example, refers to the Becker authority as potentially being a "cut and paste-type fake". This does, however, beg the question as to why the claimants have not challenged the authenticity of the Becker authority until now, given that they have had the defendants' disclosure documents since last September.

40. Mr. Marshall's response to this is that the criminal investigation in the United Arab Emirates had more impact on the claimants than the disclosure documents. However, this is difficult to accept given that the claimants first raised concerns about the Becker authority in a draft amended particulars of claim at the end of January 2021, which was before the public prosecutor questioned Dr. Al Ahbabi on 4th February 2021 and therefore before the claimants could have known about the criminal investigation.

41. In my view, this means that the claimants' application is a late application, in the sense that it could have been made significantly sooner than it was. It is also late in relation to the stage which the proceedings have reached. It is now only two and a half months until the trial. Witness statements still have to be served, experts reports exchanged and the PTR on 4th May has to be prepared for. Therefore, even if the amendments requiring the defendants to prove the authenticity of the Becker authority would not result in the trial date being lost, they will, at the very least, disrupt the preparations for the trial.

42. An important question is how the defendants would go about proving the authenticity of the Becker authority. They have pointed out that this would normally be done by instructing a handwriting expert. However, this requires a sufficient number of genuine signatures from Sheikh Khalifa and Mr. Marshall has stated on behalf of the claimants that such comparative signatures cannot be obtained.

43. Therefore, the only way in which Mr. Marshall suggests that the defendants might be able to satisfy the burden of proof is to approach Mr. Ismail or Dr. Al Ahbabi in order to give evidence as to the authenticity of the Becker authority. He suggests that this would be in their interests, particularly in the case of Dr. Al Ahbabi given his current position in the UAE. This, however, seems to me to be unrealistic for two reasons.

44. First, until now there has been no suggestion that either of those individuals would appear as witnesses for the defendants. Indeed, Mr. Ismail has been listed as a possible witness for the claimants. Given the circumstances, it seems to me to be questionable, to say the least, as to the extent to which they would be willing to co-operate.

45. Although Mr. Marshall tells the court that Mr. Ismail is in London, it is not clear that he had any significant involvement in relation to the Becker authority. Clearly, the main witness in relation to this would be Dr. Al Ahbabi. In order to secure his evidence, it may well be necessary to issue letters of request under the treaty for judicial assistance between the UK and the United Arab Emirates. While this is theoretically possible, it is difficult to have any degree of confidence that such a process could be completed before trial.

46. There would therefore, in my view, be a very significant prejudice to the defendants if the pleadings are amended so as to require them to prove the authenticity of the Becker authority. Any prejudice to the defendants would of course have been significantly less had the claimants questioned the authenticity of the Becker authority at a much earlier stage after they had received disclosure from the defendants.

47. I accept that there is also some prejudice to the claimants if the Becker authority is to be taken as authentic. However, as Mr. Beltrami has pointed out, it purports to be signed by the ultimate beneficial owner of the claimants and it might therefore have been expected that the claimants could, had they wished to do so, have established the authenticity of this document at the outset. In that sense, it could be said that the claimants are the authors of their own misfortune if the amendment is not allowed.

48. Whilst I make no decision as to whether the claimants are in a position to give a notice to the defendants under CPR 32.19 requiring them to prove the authenticity of the Becker authority, the fact that this is a course which has been open to them is another reason why, in my judgment, there is little prejudice to the claimants if the proposed amendment is refused.

49. Mr. Marshall urges that it would not be in the interests of justice to allow the trial to proceed on the basis of a document which may not be genuine. He refers to the comments of Walden-Smith J in *Lionwalk v Singh* [2018] EWHC 1513 (QB) [at 11] in support of this. However, as Mr. Beltrami has pointed out, the facts in that case were very different. A challenge to the genuineness of documents had been made at the outset. A handwriting expert had been appointed to review those documents and

the documents which were now being challenged were in a similar category to those which the handwriting expert was already reviewing. In the circumstances, it is perhaps not surprising that the judge reached the conclusion that the amendments should in that case be allowed.

50. So, taking all of this into account, while I would accept that there is a reasonable prospect of success, in the sense that the defendants might be unable to prove the authenticity of the Becker authority, I do not believe that it would be in accordance with the overriding objective to allow the amendments in relation to the Becker authority.

The 2012 approval

51. The case in relation to the 2012 approval is, in my view, significantly weaker than the case which the claimants were able to put forward in relation to the Becker authority. The reasons for this are as follows.

a) The claimants had previously admitted the authenticity of the document. This imposes a heavier burden on them to explain the reason why they now wish to withdraw that admission and to amend their pleadings.

b) On the face of it, it is a much more formal document than the Becker authority and was produced in connection with the settlement in a dispute resolution process. As part of that process it passed through the hands of the claimants' solicitors at the time, who remain the claimants' solicitors in relation to this action. It would perhaps be surprising if such a document, not having been questioned at the time, were not authentic. Mr Marshall points out that the document was provided to the claimants' solicitors by Mr Ismail who, following the defendants' disclosure, is now believed to be an accomplice to Dr Al Ahbabi and that the original of the document cannot be located. However, it is difficult to see how this gives rise to any inference as to a lack of authenticity given that it would have been surprising if anybody else (other than Dr Al Ahbabi) had provided the document to the claimants solicitors, Mr Ismail and Dr Al Ahbabi being the people who were, at the time, responsible for dealing with matters on behalf of the claimants. There could of course be numerous explanations for the inability to track down the original of the document.

c) The main reason put forward by Mr. Marshall to doubt the authenticity of the 2012 approval is the criminal investigation in the United Arab Emirates. However, the documents disclosed to the authorities by Dr. Al Ahbabi in relation to that investigation do not include the 2012 approval. It is therefore difficult to understand why this should call into question the authenticity of that document. The fact that one document may have doubts cast on it as a result of the investigation cannot, in my view, be taken to mean that any other document produced by the same person also runs the risk of not being authentic.

d) I accept that if the criminal investigation has triggered a concern about the 2012 approval, the application is not late, as it could not have been made earlier. However, it is still late in relation to the current stage of the proceedings for the reasons which I have already explained in relation to the Becker authority.

e) Similar comments can therefore be made about the prejudice to the defendants if the authenticity of this document is called into question and the difficulties they would face in the time available in demonstrating its authenticity.

f) As far as prejudice to the claimants is concerned, the issues may well be different as it may not be possible for the claimants to give a notice under CPR 32.19 requiring the defendants to prove the authenticity of the document given that they have admitted its authenticity (although, again, I express no view on this). However, the same points apply about their ability themselves to have checked the authenticity of that document with Sheikh Khalifa, a step which they might have been expected to take before producing the document even if they had no suspicions as to its authenticity given its clear importance to the issues raised in the claim.

52. My conclusion is that, based on the evidence which has been put forward, the proposed amendments to the pleadings relating to the 2012 approval have no realistic prospect of success. There is insufficient basis on which to doubt the authenticity of the document. That is enough to justify a refusal of the application to amend. However, even if there were a realistic prospect of success, the significant prejudice to the defendants in having to gather evidence to prove authenticity in the time available and the ability of the claimants to have verified authenticity, together with the potential for disruption to the preparations for trial, have led me to the conclusion that this application to amend should also be refused.

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