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Case No: CL–2017–000266
and CL-2018-000082

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date of hearing:Friday, 14th December 2018

Before:

MR. JUSTICE MALES

- -

Between:

(1) ALEXANDER MAYR **(2) ROUVER INVESTMENTS S.A.R.L** **(3) LIFE SCIENCE PARTNERS LIMITED**	**Claimants**
- and -	
CMS CAMERON McKENNA NABARRO OLSWANG LLP	**Defendant**

And Between:

SPOKANE INVESTMENTS LIMITED	**Claimant**
-and-	
CMS CAMERON McKENNA NABARRO OLSWANG LLP	**Defendant**

- -

JUDGMENT
*** (Approved) ***

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JONATHAN CROW QC and JAMES KNOTT (instructed by **Asserson Law Offices)** for the **Mayr Claimants**

JUSTIN HIGGO for the **Spokane Claimant**

ROGER STEWART QC and **DANIEL SHAPIRO** (instructed by **Simmons & Simmons**) for the **Defendant**

MR. JUSTICE MALES:

1. The experts' evidence in this case is in a most unsatisfactory state. The pre-trial review is taking place today, 14th December, for a trial commencing on 22nd January. There are, for the purpose of this ruling, two areas of expert evidence, both of which bear on the quantum of the claimants' claim which is very substantial, several hundred million Euros. The first area of expert evidence concerns what can be referred to as the LMM issue. For present purposes that is merely a part of the history because it has been resolved in a way with which the parties are prepared to live, although I have to say on behalf of the court that I find it unsatisfactory. The second area of expert evidence deals with what can be referred to as the Turkish issue.

2. What happened is that in relation to both aspects of the expert evidence, the LMM issue and the Turkish issue, conventional directions were given. These provided, in accordance with the usual practice of this court, for a sequence of steps. First there was to be an exchange of the experts' initial reports. This would be followed by a joint meeting of the experts in each discipline. Nobody involved in litigation in this court, whether as client, lawyer or expert, can be in any doubt that the court expects and requires the experts at the joint meeting to take a constructive approach, discussing the contents of their report and the issues on which they are required to express their opinions, reaching agreement where they can and setting out concisely where they cannot reach agreement and why they cannot.

3. That is then recorded in a joint memorandum. It is the experts' responsibility to agree the content of the joint memorandum. This is part of their duty to the court as independent experts and is the basis on which the court gives permission for expert

evidence. While the lawyers may properly assist the experts by ensuring that they focus on the issues which the court will need to determine, neither clients nor lawyers have any role in dictating to the experts what they can or cannot agree.

4. It is only once that joint memorandum is produced that there is scope for supplemental reports which are usually described, and were described in the order made on this occasion, as short supplemental reports. The object of those reports is not simply to repeat what has been said the first time around but to engage with the points, hopefully although not always, the narrowed points on which the experts remain in disagreement after their joint meeting. Sometimes the order will spell this out but, even when it does not, this is implicit.

5. What happened in relation to the LMM issue is that reports were prepared by Professor William Kilgallon on behalf of the claimants and Mr. Jean-Michel Peny, on behalf of the defendants. The joint memorandum which they prepared records this at paragraph 4 under the optimistic heading "Areas of agreement":

> "The meeting of experts did not lead to any further agreement on any of the points addressed in the experts' reports. Each expert continues to fully rely on his own report as a true and accurate statement of his own expert opinions on the issues addressed. However, the situation may change after Professor Kilgallon completes his supplemental report on 21 September 2018, in which case this memorandum can be updated accordingly."

6. The memorandum then continues in paragraph 7 with 18 numbered points in which on every issue which is raised for discussion Professor Kilgallon gives the following response:

> "Has not finalised his thinking on this point. He is due to serve a supplemental report by 21 September 2018, by when he anticipates he

> will have formed a view as to whether he agrees or disagrees with Mr. Peny on this point. If he disagrees, he will at that point be in a position to set out his reasons and to prepare an updated version of this memorandum as per the email from Asserson to Simmons dated 12 September 2018."

7. Those were the parties' solicitors. That response is then repeated under every issue raised for discussion.

8. In the event a supplemental report was provided by Professor Kilgallon, although the joint memorandum never was updated as had been envisaged by paragraph 4 and there has been no further discussion between the experts on the LMM issue. There was instead a sequential exchange of the supplemental reports. As I say, this is not satisfactory. It means that the essential step in the proceeding of a constructive discussion between the experts has simply not happened.

9. For present purposes that is the background to what has happened in relation to the Turkish expert evidence where again Professor Kilgallon was the expert on behalf of the claimant. This was an issue which was introduced later in the course of the proceedings and as a result the steps relating to expert evidence took place after the LMM evidence had been produced in the way which I have described. Service of the initial round of reports took place on 30th November 2018, a date which I understand was put back to some considerable extent to assist Professor Kilgallon. The experts meeting did not take place until 5th December 2018.

10. When the experts meeting took place there occurred again what Mr. Roger Stewart QC for the defendant described, with some justification in my view, as the same "stunt" as had happened before. The joint memorandum produced, which is dated 11th December, records this at paragraph 1.5:

> "The meeting of experts did not lead to any further agreement on any of the points addressed in the experts' reports. Each expert continues to fully rely on his own report as a true and accurate statement of his own expert opinions on the issues addressed. However, the situation may change after Professor Kilgallon completes his supplemental report on 21 December 2018."

11. There is then a statement, item by item, of the opinion of the defendant's expert on this issue, Mr. Nuri Kilic to which Professor Kilgallon on every occasion gave this response:

> "Professor Kilgallon is considering his response. He is due to serve a supplemental report by 21st December 2018 by when he anticipates he will have formed a settled view as to whether he agrees or disagrees with Mr. Kilic on this point."

12. Although the joint memorandum states in these unequivocal terms that Professor Kilgallon anticipated that he would have formed a settled view by 21st December 2018, I am told by Mr. Jonathan Crow QC for the Mayr claimants that this was not intended as an indication that Professor Kilgallon would be in a position to complete his supplemental report by 21st December; it was merely a date which happened to be the date which had been ordered for exchange of supplemental reports. If that is so, I have to say that the statement was thoroughly misleading as well as unacceptably cavalier. In fact I am now told that Professor Kilgallon cannot, for whatever reason, produce his further report until 7th January. That is a very short time before the trial, albeit that the experts on this issue are not due to give evidence until some weeks later, towards the latter part of the trial.

13. I do not regard the joint memorandum dated 11th December, only three days ago, or the meeting which it records, as coming close to compliance with the order that the parties' experts should meet and produce a joint memorandum. That is intended to be

produced in the way which I have described earlier. When an expert fails lamentably to comply with that order the whole procedure for further expert evidence in the case is thrown into disarray. The purpose of the supplemental reports is to enable the experts to comment on and express their further views upon the points on which they remain in disagreement, having had the benefit of a proper experts' discussion at which they can properly understand the point of view of the opposing expert.

14. That has simply not happened in this case. It is impossible for the defendant's expert to say anything further in a supplemental report until he knows what Professor Kilgallon has to say about the matters on which he has expressed his opinion.

15. All that the claimants can say in response to this is that the least bad option now is to have sequential exchanges of reports, such as happened in the case of the LMM issue with Professor Kilgallon serving his report on 7th January. Mr. Stewart points out that that is far too late given the preparations for trial which will by then be entering their closing stages with opening written submissions due on 16th January.

16. It seems to me that the position is that the claimants have failed to comply with the terms on which they were given permission to adduce evidence of the Turkish pharmaceutical industry in this case. The burden is on them to provide a workable solution which they have not done. It is for them too to apply for relief from sanctions. Again, they have not done so. They would need, if they were to do so, to give a proper explanation of why it is that Professor Kilgallon has taken this approach on not one but two occasions. He must have been told, he certainly should have been told after the LMM expert memorandum was produced, that this was not an acceptable way to proceed.

17. The order which I make therefore is that as matters stand the claimants do not have permission to adduce evidence of the Turkish pharmaceutical industry at the trial. The burden will be on them to come forward, as I have said, with a proper and acceptable procedure which will include a proper joint meeting and will meet the criteria of relief from sanctions if they wish to pursue this evidence. If they have simply left it too late to do so in an acceptable way then that is something for which they must take the consequences.

(For proceedings see separate transcript)

18. I am invited by Mr. Crow to reconsider the ruling about the Turkish expert evidence which I have just given. He extends that invitation on three grounds, in circumstances where it appears that he was taken by surprise by the ruling which I have made, which was not something for which the defendant had contended. In fact I made it clear in the course of argument before I gave my ruling that the question of permission to rely on the Turkish expert evidence was on the court's agenda, even if it had not been on the parties'. Nevertheless, I will reconsider the three points which Mr. Crow has mentioned.

19. The first is that the outcome was not one which was sought by the defendant who had not issued an application notice to the effect that the claimants should not have permission any longer to rely on that evidence. However, it is undoubtedly the case that the defendants were complaining loudly about the procedure which Professor Kilgallon had adopted and the court has its own interest in the orderly preparation of expert evidence. When the failure is as blatant as it was in this case, that is a matter with which the claimants need to be in a position to deal.

20. The second point is that the default is not that of the claimants but of their expert who is not the claimants' property or their client. While that may be true, there is in fact no evidence to explain whether what happened was the Professor's own idea or was a course which he was encouraged to adopt by the claimants or their legal representatives. Even assuming the former, however, which is from the claimants' perspective the most favourable interpretation, this was as I have indicated the second occasion on which this has happened. The claimants or those advising them were therefore aware of what Professor Kilgallon had done the first time around and should have made it clear to him that this was unacceptable. If they failed to do so this was itself a serious failing.

21. As to the third point, that the effect of my ruling is to strike out a significant part of the claim without there having been an unless order, a party is not entitled to disregard the rules, secure in the knowledge that until an unless order is made it will always get a second chance. Be that as it may, however, the ruling which I made was not a final striking out of the claim. It put the ball firmly in the claimants' court to come back to court with proposals which will put the situation right and will do so without causing serious prejudice to the trial. Although not expressed as an unless order, that is broadly similar in its effect.

22. I have considered the various matters raised by Mr. Crow but my ruling is not changed.

(For further proceedings see separate transcript. The claimants did make an oral application for relief from sanctions which now included provision for disclosure of their expert's supplemental report by 21 December 2018 as the defendant had

sought. The defendant indicated that it was prepared to accept this and accordingly the order made was as follows)

"The only basis on which there will be permission to the Claimants to adduce Turkish generics pharmaceutical expert evidence at trial is the following:

(1) Professor Kilgallon must serve his supplemental expert report, which must set out his response to the points set out in the Joint Statement of Prof. Kilgallon and Mr Kilic, by 4pm on 21 December 2018.

(2) There must then be a further without prejudice meeting of the experts on a date to be agreed between the parties to produce a joint statement identifying the issues on which they agree and disagree with brief reasons for any disagreement.

(3) Mr Kilic must then have sufficient time to produce his supplemental report, by a date to be agreed between the parties.

(4) In the event that there is any dispute about whether there has been compliance with the procedure set out above in sufficient time to ensure the fairness of the trial it will be for the court to determine whether the Claimants should have permission to adduce expert evidence on this topic."

(For further proceedings see separate transcript)

23. So far as costs are concerned perhaps it is fair to say that on some points this morning Mr. Crow has had a rough ride but nevertheless the costs of the PTR were going to be incurred in any event and the matters we have discussed have not really affected the incurring of such costs. There may be future costs in relation to expert evidence, for example, which will have to be dealt with in due course but the costs of the PTR itself will be costs in the case.

24. So far as potential amendments to the particulars of claim are concerned the position is that there are no applications to amend before the court. There has been an opportunity for any application which was going to be made, but the fact is that none has been and the parties will no doubt be able to make submissions about that if there is an application at some point in the future. I do not think it is really appropriate to say more than that as I have not got to grips with or been asked to get to grips with precisely what the issue was when this topic was previously ventilated before Moulder J.

(For proceedings see separate transcript)

25. The question of the adequacy of the disclosure given by Spokane Investments Limited was last before me on 23rd November 2018 when I made an order for a witness statement to be produced by the claimant's director, Dr. Werner, setting out in short the disclosure process that had been followed. The circumstances in which I made that order are set out in the judgment I gave on that occasion, [2018] EWHC 3353 (Comm), which in brief arose out of the fact that the claimant's documents are now held on a server belonging to a company called HNW Family Office Limited, a Swiss company of which Dr. Werner is also the director. The claimant is a Jersey company. The Spokane documents held on the HNW server were copied as part of a mixed repository of documents on to an external hard drive also owned by HNW and were then deleted from the server which was subsequently destroyed.

26. The parties agreed a list of key words for the carrying out of electronic searches. The evidence before me on the last occasion, as explained in a witness statement from Spokane's solicitor, Mr. Baigel's first witness statement dated November 2018, was

that HNW performed the searches and provided to Spokane documents falling within two categories. The first category was all documents which HNW held as agent for Spokane which were identified by the key word and category searches of the hard drive carried out by HNW. The second category was further documents in the control of HNW and not Spokane but which could be provided to Spokane without a breach of Swiss confidentiality or criminal law.

27. It appears from the witness statement with Dr. Werner has now provided, his third witness statement dated 6th December 2018, that this was not accurate and that in fact a different process was carried out which I shall explain.

28. The defendant was complaining on the occasion of the previous hearing that the disclosure provided by Spokane was inadequate and, indeed, Mr. Higgo on behalf of Spokane accepted that there were evident problems apparent from the disclosure which had been provided which he said that Spokane was itself anxious to get to the bottom of in order to avoid any scope for an inference that its disclosure had been selective. The witness statement which I ordered was intended to resolve these problems – to provide the defendant with the disclosure to which it is entitled, to explain what had been done, and to give the claimant the opportunity to get to the bottom of the matter as it indicated on that occasion that it wished to do.

29. As part of the order which I made I directed that Spokane should set out to the extent that Swiss law was relied upon as a reason to prevent the provision of documents to Spokane by HNW, proper particulars of the Swiss law relied upon. In fact, although there is some reference in Dr. Werner's third witness statement to advice which he has been given by a Swiss lawyer, as to which he makes clear that he does not waive

privilege, there is, in my judgment, nothing which could be described as proper particulars of Swiss law.

30. The position as it appears from Dr. Werner's statement is that it was his colleague, Mr. Berghoff, who carried out the review of documents. Dr. Werner explains that HNW had overseen investments in 15 separate investment structures of which the Spokane portfolio was just one. He describes the filing system which was operated. At paragraph 17.3 he says:

> "So far as concerns documents sent to and from my email address, my practice is to diligently file my incoming and outgoing sent emails into sub-folders on Microsoft Outlook, with separate sub-folders for each investment vehicle and usually sub-sub-folders to each such sub-folder. In respect of Spokane, I used a sub-folder on my email called 'Spokane', which contained various sub-sub-folders, and which was just one of around 40-50 sub-folders I was using at the time."

31. He emphasises in that paragraph the diligence with which the filing was carried out and refers at a later paragraph, paragraph 33, to the way in which "the HNW staff maintained files in an orderly fashion." He makes that point in order to explain why there is no reason why documents relating to Spokane would have ended up in a folder relating to another client, investment or asset class. He makes the point also that it has been established that there is no document relating to Spokane in any other folder remaining at HNW. That appears to confirm what is said about the diligent and orderly nature of the filing system operated.

32. It seems to me that the converse is likely to be equally true, that is to say that there is no reason, given that practice, why another client's document would end up in the Spokane sub-folder.

33. Dr. Werner says that as of 2016 he viewed the Spokane investment as no longer active. He said Spokane was effectively dormant. He directed that the email sub-sub-folders relating to certain active elements be removed to the file but otherwise they should be retained and copied to the separate HNW hard drive. He says at paragraph 17.8 that that is what he did with various sub-sub-folders under the Spokane sub-folder, although he cannot now recall why he decided to retain some and discarded others.

34. The process of disclosure in this action is described at paragraph 31 of the statement as follows:

> "The precise process used for our review of the documents contained within the Spokane folder was as follows:
>
> 31.1 Mr. Berghoff copied all of the documents within the Spokane email and document folders to a new folder (the 'Upload Folder').
>
> 31.2 The reviewer (either Mr. Berghoff or I) opened each document within the Upload Folder and read its contents.
>
> 31.3 If the document contained any HNW client related information the document was deleted from the Upload Folder.
>
> 31.4 If the content of the document related to Spokane and did not contain any HNW client related information the document was left in the Upload Folder. The Upload Folder was subsequently uploaded to Spokane's e-disclosure platform."

35. He goes on to say that given that he and Mr. Berghoff were reviewing every document in the Spokane email sub-sub-folders and electronic documents folder, there was no need to narrow the search by reference to the key words or categories of documents which had been agreed in the disclosure statement.

36. He says that he then crosschecked that exercise by asking Mr. Berghoff to search across the entire HNW hard drive excluding the Spokane folders and it is in that

context that he said, as I have already mentioned, that no further document relating to Spokane was turned up.

37. It is striking that the process described by Dr. Werner has the effect that if a document contained within the Spokane folder and therefore initially copied to the upload folder, contained any HNW client-related information, that document was deleted from the upload folder and, therefore, not disclosed as part of Spokane's disclosure no matter how relevant or even critical the remaining content of the document may have been to the issues in this action. Suppose for example a highly relevant document, perhaps strongly adverse to Spokane's case, which contained a single discrete and severable paragraph referring to the affairs of another HNW client. Such a document would not have been disclosed and, given the process described by Dr. Werner, would not even have been provided to Spokane's solicitors. It is impossible to say, therefore, that the example I have described is unrealistic. That is hardly a satisfactory basis on which to conduct disclosure in a very substantial claim where several hundred million Euros are claimed.

38. In those circumstances the defendant seeks an order that in effect the upload folder should be reconstituted. Because of the deletions described by Dr. Werner it no longer exists in the form in which it was initially created, but it can readily be reconstituted by copying all of the documents within the Spokane email and electronic documents folders and sub-folders to what would be in effect a new upload folder. The defendant says that that reconstituted folder should then be provided to the claimant's solicitors for review and that disclosure of relevant documents should take place. They say that in the event that there is material held within relevant documents which relate to other

clients and is not relevant to the issues in the proceedings, that could be dealt with by way of redactions.

39. The response of Mr. Higgo (who struck me, if I may say so, as being rather less enthusiastic about getting to the bottom of disclosure issues than he had been at the previous hearing) on behalf of Spokane is essentially twofold. His first point is that the documents within these Spokane email and document folders are not Spokane's documents or are not all Spokane's documents and therefore, to the extent that they are not Spokane's documents, are not within Spokane's power or control. His second point is that it would be contrary to provisions of Swiss law for documents which contain HNW client-related information to be disclosed and that redaction is not an answer to that point.

40. So far as I read Dr. Werner's third witness statement the material contained in the Spokane folders to which he refers are Spokane's documents. That is the effect of the careful filing system which he describes. They are equivalent to what would be the position of hard copy documents in a Spokane filing cabinet. His evidence is, in essence, that Spokane documents were filed in the Spokane folders. I do not accept, given the very careful filing system which Dr. Werner describes, that documents belonging to Spokane and documents belonging to HNW or other clients have been mixed and jumbled up in the way which is now suggested.

41. So far as the question of Swiss law and the possibility of redaction are concerned I have not paid regard to a statement of Swiss law which the defendant has provided. I rest my decision on the fact that Spokane was directed to give proper particulars of Swiss law that it relies upon. So far as I can see there is nothing in Dr. Werner's

statement which has the effect of showing that Spokane is not even entitled to provide its own documents to its solicitors for review in this litigation. As the documents contained in the Spokane folders are, in my judgment, Spokane's documents, it is entitled to require HNW to hand them over if those documents are under the physical control of HNW. As Dr. Werner is the director of both companies there should be no difficulty with that.

42. So far as Swiss law is concerned, what Dr. Werner says in paragraph 22 is this:

> "I do not waive privilege over the content of my discussions with Adv. Klein or his advice, but following our discussions, I understood that I had to be very careful about which HNW documents would be provided to Spokane."

43. I pause to say that the order which I propose to make does not require Spokane to hand over HNW documents. It will be concerned with what I have found on the evidence to be Spokane's own documents. Dr. Werner goes on to say:

> "My understanding is that the 'business secrets' that are subject to Article 273 have been interpreted very broadly by the Swiss Courts and include information relating to the identification of clients or client's business partners, client's financial data, correspondence with clients, calculations regarding client's investments and any other personal client data. I was advised that this is not a trivial matter and a breach of this provision could lead to fines and/or imprisonment, none of which I take lightly."

44. There is no explanation there or indeed anywhere in Dr. Werner's evidence that a process of redaction is unacceptable in order to avoid what is said to be prohibited, that is to say the handing over of other people's business secrets or the identification of clients or business partners. Mr. Higgo protests that the question of redaction was only raised in the Swiss law statement served a few days ago by the defendant. As I have said, I am not relying on that. In my judgment the question of redaction was an

obvious point which would need to be dealt with and it was for Spokane, if it wanted to say that it could not provide its own documents in redacted form as a matter of Swiss law, to make that point and to give proper particulars of it in compliance with my order.

45. I do not regard the order which I propose to make as putting Spokane in breach of its obligations under Swiss law on the basis of the very limited evidence which has been provided by Dr. Werner. Ultimately, however, if I am wrong about that, that is a problem which Spokane will have to face. It is a Jersey company which has chosen to litigate in this court. It is subject to the rules of disclosure of this court. If it is unable to produce documents which are necessary in order to ensure a fair trial of this action in which, as I have said, a very substantial sum is claimed, then that would be a most unsatisfactory position.

46. The order which I make in these circumstances is as follows. I will hear submissions about the timing. Spokane must cause the HNW hard drive to be searched so as to reconstitute the upload file. That file, as reconstituted, must be provided to Spokane's solicitors for review. Documents which are found to be relevant to the issues in this action must be disclosed subject to any claim for privilege. There will be liberty to redact any parts of those documents which relate to other clients and are not relevant to the issues in this action.

47. I have not in that proposed order referred to searching the documents by reference to the key words because that is not, as it turns out, the process which has been undertaken. If the volume of documents on the reconstituted upload folder is such that it is not practicable to review all of them before whatever date for disclosure I will be

ordering, then a solution may be to narrow the documents required for review by reference to the agreed key words.

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