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IN THE HIGH COURT OF JUSTICE



No. CL-2020-000183

BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
[2021] EWHC 1779 (Comm)

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 13 May 2021

Before:

MR JUSTICE WAKSMAN

B E T W E E N :

ALPHASHARP LIMITED
(a company registered in the Russian Federation)

Claimant

- and -

ADG CAPITAL MANAGEMENT LLP

Defendant

MR F. CAMPBELL (instructed by Gateley Legal) appeared on behalf of the Claimant.

MR M. LAVY and MR I. MUNRO (instructed by Faegre Drinker Biddle & Reath LLP) appeared on behalf of the Defendant.

J U D G M E N T

(Via Microsoft Teams)

MR JUSTICE WAKSMAN:

1 I have before me an application for summary judgment on part, but not the whole, of a claim which is going to trial in March 2022. The claim concerns licences granted by the claimant, AlphaSharp Limited (“AlphaSharp”), to the defendant, ADG Capital Management LLP (“ADG”), to use software and related information, to put it broadly, in which AlphaSharp holds all the intellectual property rights. The relevant written agreement between the parties conferring those licences is dated 17 April 2013. It is deceptively short, at ten pages, and has given rise to a plethora of issues.

2 AlphaSharp is, or is substantially, owned by Mrs Marina Yelnik. Her husband is Mr Igor Yelnik. He has developed a trading strategy for those engaged in investing in a wide variety of instruments, including futures and currencies, principally on behalf of clients. The strategy is called “Quantitative Macro Systems”. Put simply, or simplistically, the “QMS”, as I shall refer to it, would produce a recommended trading strategy, e.g. buy now or do not buy now, or buy x-worth of y, or y-worth, in relation to a given investment, which recommendation is based on an analysis of various economic measures and data, such as interest rates, currency movements and so on, which have an impact on the putative performance of the relevant instruments. If the instrument was not being traded in accordance with the recommendation, it would switch to the recommended position.

3 The definition in the agreement of QMS is as follows, and I quote:
“... the trading strategy, i.e. the set of systematic rules, formulae, algorithms, etc. that may change from time to time, that aims at exploiting risk premia and absolute and relative mispricing of assets in the financial markets globally ...”

4 At around the same time as the making of the agreement, Mr Yelnik joined ADG pursuant to a separate adherence agreement, according to which he would work to develop the original software, and ADG, as a business, would make use of QMS on behalf of its clients. While AlphaSharp owned the intellectual property, it would not trade in its own right. Under the agreement, ADG paid a very substantial variable licence fee to AlphaSharp for so long as Mr Yelnik was working for it, what I will describe as the “pre-termination period”. Thereafter, post-termination, it would pay a reduced fixed fee. Pre-termination, ADG would be the exclusive licensee. Post-termination, it remained the exclusive licensee, save that AlphaSharp was free to grant a separate licence to Mr Yelnik or a company owned by him.

5 On 8 October 2019, Mr Yelnik’s members of ADG ended acrimoniously. Both sides blame each other. Either way, the post-termination licence regime came into force, or purportedly so. On 31 March 2020, AlphaSharp issued these proceedings. Pleadings have now closed.

6 Under the agreement, the key element was the IP rights in the following: the QMS, the software necessary to use the QMS, plus updates etcetera, documentation like user manuals and the Track Record. This application is all about the use of the Track Record. It is defined in the agreement as follows:

“... all quantitative and qualitative information reflecting performance of the Quantitative Macro System including returns, positions, risk levels, assets under management relating to the period during which the Arising IP and the Background IP is used by ADG.”

- 7 At all times until now, ADG has (according to AlphaSharp) made publicly available some elements of the Track Record. At all times until about February 2019, it also regularly made the Track Record available to AlphaSharp by means of access via a VPN. After that time, it stopped, although there were proposals to supply the Track Record again, or parts thereof, in May 2019. Much of AlphaSharp's claim is about ADG's alleged breach of the licence in connection with the software, however it also alleges that ADG was in breach of contract because it made public part of the Track Record.
- 8 It is also allegedly in breach because it made the Track Record information available to clients or prospective clients. ADG has defended that claim on the basis that the information made public was not part of the Track Record anyway but, even if it was, the making public of bits of it, and also the making it available to clients or prospective clients was part and parcel of the activity of managing assets for clients or potential clients and is what all or many typical players in this market did in order to get business. Showing actual results of your operation when using QMS was an obvious way to attract other investors, assuming of course the performance was shown to be good. Effectively, therefore, one part of ADG's defence is to say that there was, if necessary, an implied extension of the licence to cover at least the disclosure of the Track Record to others apart from itself, which it has done. That claim is for the trial and is not before me. I will call this the "Public Track Record Claim".
- 9 What is before me, however, is a different claim. This is the claim that when ADG stopped supplying the Track Record to AlphaSharp, that was another breach of the licence. This is because, as IP owner of the Track Record, AlphaSharp had an absolute right to access it and there was an implied term of the licence that ADG should, at regular intervals, provide electronic access to AlphaSharp to the Track Record, just as in fact it had done for nearly six years until February 2019. The existence of that implied term is duly denied by ADG, among other things.
- 10 Prior to the termination date, AlphaSharp says that it needed, and used, the Track Record information as relevant data by which to assess the performance of QMS and the associated software to enable it to improve it. At ADG, Mr Yelnik was doing much the same thing. No problems arise over that period because there was an essential identity of interests between AlphaSharp on the one hand and Mr Yelnik, acting on behalf of ADG, for the other. However, after termination, AlphaSharp also needed, or at least wanted, the Track Record information so that it could then licence it to Mr Yelnik as, it says, it was permitted to do so by the agreement for the purposes of his own business. Here, AlphaSharp contends that the full and not merely the published Track Record is needed in order that Mr Yelnik can properly run and expand his asset management business. Now, it is ADG's turn to deny that that is the case. It will be seen that there is a symmetry of issues between AlphaSharp's Public Track Record claim against ADG which is not before me and its Track Record claim which is.
- 11 In relation to its defence of the Public Track Record claim, ADG says that it will call expert evidence on industry practice in relation to the use made and publication of Track Records or the like. Following a CMC on 4 December 2020, expert evidence on quantitative fund management had been permitted. A QMS fund manager had been committed. Thus far, it has not been suggested that any evidence will go to the existence or otherwise of any industry practice as to the use, or the necessary use, of Track Records of actual performance by licensees, licensors or others.

The evidence before me

12 For AlphaSharp, I have two witness statements from its Director General, Mrs Yelnik, dated 18 November 2020 and 21 April 2021. For ADG, I have a witness statement from Mr Abdat, its CEO, dated 13 January 2021, and two from Dr Phillips, its Portfolio Manager, dated 13 January and 28 April 2021.

13 I now need to read portions of the agreement in detail. First of all, in the recital, at (C), it says that:

“AlphaSharp is the owner of all the Background IP and the Documentation arising in relation to it.”

14 As for definitions, “Arising IP” is:

“... any Intellectual Property in or arising out of any of the Quantitative Macro System, the Track Record and the Software and any Documentation relating to any of these, which in each case arises on or after the Start Date ...”

15 Secondly, “Background IP” is:

“... any Intellectual Property (excluding Arising IP) in any of the [QMS], the Track Record and the Software in existence prior to the Start Date ...”

16 “Confidential Information”, as follows:

“... all secret or not generally known information or information which is not easily accessible to others or of a commercial sensitive nature disclosed or made available in any way by one party (the ‘Disclosing Party’) to the other party (the ‘Receiving Party’) in connection with this Agreement (including Know-How and trade secrets of the Disclosing Party) and includes all information relating to or comprised in any of the [QMS], the Track Record, the Software and the Documentation relating to any of these, which is not public knowledge and has not been disclosed to any third party ...”

17 “Intellectual Property” is defined as:

“... all intellectual and industrial property rights of any kind whatsoever, including, patents, registered designs, unregistered designs, rights in Know-How, confidential information and copyright (whether in drawings, plans, specifications, design, computer software or otherwise) database rights, any rights in any invention, discovery or process, and applications for and rights to apply for any of the foregoing, in each case in the United Kingdom and all other countries in the world ...”

18 “Know-How” is defined as:

“... all practical information including knowledge, experience, data and technical information and inventions ...”

19 “Software” is:

“... the application software required for the operation and proper functioning of the [QMS], and all updates, upgrades, releases and versions thereof, including the source code and object code and architecture for it and all other works or material recorded or embodied in the software, including the audio or visual content in any screen displays in the user interface, and all Documentation relating to it ...”

20 “Track record” I have already defined, as I have the “QMS”.

21 The following substantive provisions are relevant:

(1) Under s.2, “Intellectual Property”:

Clause 2.1 states:

“This Agreement does not affect the ownership of any Background IP. Background IP remains the property of AlphaSharp.”

Clause 2.2 states:

“All Arising IP shall vest solely in AlphaSharp. ADG will upon the request of AlphaSharp execute all such documents and do all such acts and things as AlphaSharp may reasonably request from time to time in order to secure the full right, title and interest in the Arising IP and to any Documentation relating to it which belongs to ADG.”

Clause 2.3 states:

“ADG may provide AlphaSharp with preparatory design materials, prototypes, specifications, tests and other material that may be used by AlphaSharp in the process of development of the Arising IP. These will be part of the Arising IP.”

Clause 2.4 says:

“AlphaSharp shall every Quarter as well as upon request, for the duration of the licenses in clauses 3.1 and 3.3, deliver up to ADG electronic copies of all the materials that:

“2.4.1 embody Background IP, Arising IP (including the latest version of the released source and object code forms of the Software) and any Documentation relating to them; and

“2.4.2 required by a reasonable person to properly operate, use and maintain the [QMS] and the Software as well as any Documentation relating to them ...”

(1) In respect of use by ADG,:

Clause 3.1 states:

“AlphaSharp grants to ADG from the Start Date a sole licence to use Background IP and Arising IP and the Documentation relating to them, in

each case for the purpose of allowing [Mr Yelnik] to comply with his obligations under the Deed of Adherence and for no other purpose. ADG may not grant any sub-licence of the licence granted to it pursuant to this clause 3.1, other than to [Mr Yelnik], except with the prior written consent of AlphaSharp.”

Clause 3.2 states that, 3.1 licences shall, , “terminate automatically on the Termination Date.”

Clause 3.3:

“AlphaSharp grants to ADG from the Termination Date a perpetual, irrevocable exclusive (except that AlphaSharp may grant a licence to [Mr Yelnik] or a company fully or partially owned by him) transferable licence to use and adapt the Background IP and the Arising IP and to any Documentation relating to them, with the right to sub-licence, for the purpose of managing assets using the Quantitative Macro Strategy, the Track Record and the Software and for no other purpose.”

Clause 3.5:

“For the avoidance of doubt, the licences granted under this agreement shall not include the right to:

- “3.5.1 publish or otherwise disclose to third party (other than [Mr Yelnik]) any information relating to the Background IP or the Arising IP; and
- “3.5.2 in the case of the licence granted ... under clause 3.1 only, commit deeds that might lead to a transfer of the Background IP or the Arising IP to any third party, [without AlphaSharp’s written consent] ...”

(3) Under “Warranties”,

Clause 5.1 states:

“AlphaSharp warrants ... the Background IP, Arising IP and Documentation relating to them are or will be its or its employees original work, and have not been copied wholly or substantially from any other source, and that the use by ADG of the rights licensed to it under this Agreement will not infringe the rights of any third party ...”

Clause 5.2 states:

“... the legal and beneficial ownership of the Background, the Arising IP and Documentation ... is and will be solely owned by AlphaSharp, free from encumbrances and all other rights exercisable by third parties and all the AlphaSharp employees have contracts such that any [IP] created by them vests ... in AlphaSharp ...”

(4) Under section 6, “Confidentiality”,

Clause 6.1 states:

“The Receiving Party will keep confidential the terms of this Agreement and will use its reasonable endeavours not to disclose to any third party any Confidential Information nor use any Confidential Information for any

purpose except as expressly permitted by this Agreement. The Receiving Party will ensure that its members, employees and sub-contractors will comply with ... clause 6.

Clause 6.2 states

“Clause 6.1 shall not apply to confidential information which is....

6.2.4:

“... independently developed by the Receiving Party (other than to the extent it is Arising IP); or is approved for release in writing by an authorised representative of the Disclosing Party ...”

The nature of this application

- 22 The order sought by AlphaSharp pursuant to Ord.24 is as follows: that the respondent is required to provide to AlphaSharp all quantitative and qualitative information in ADG’s possession or control reflecting performance of the QMS as defined in the IP agreement, including but not limited to returns, position, risk level, factor values and assets under management, and then a particular date is given so far as the historic information is concerned and thereafter on a daily basis for so long as ADG uses the QMS and/or Track Record and/or Software.
- 23 This is effectively a final order for specific performance of part of the agreement. Accordingly, even if AlphaSharp was entitled to summary judgment on liability, as it were, namely that ADG’s contractual obligations on the Track Record are as it claims, there must also be a clear case of entitlement to specific performance, which of course is a discretionary remedy. This is not an application for a mandatory interim injunction pending trial, to be assessed on the usual *American Cyanamid* principles, therefore; it is for a final order.
- 24 I do not need to recite the principles behind summary judgment at any length. The claimant must show that there is no real prospect of a successful defence and no other compelling reason for a trial. “Real” here means not fanciful, and while the court does not have to accept every factual assertion made by the defendant, nor must it engage in a mini-trial. The court must also consider what other evidence might reasonably be expected to be available at trial that is not available now.

The principal issues

- 25 AlphaSharp’s essential case is this:
- (1) It owns the Arising IP.
 - (2) The Arising IP or “AIP” includes the Track Record.
 - (3) The Track Record includes, apart from the items expressly referred to, the following:
 - (a) strategy settings;
 - (b) portfolio settings;
 - (c) factors or factor values;
 - (d) ranges;
 - (e) positions; and
 - (f) trades

- (4) The agreement contained an implied term requiring ADG to give regular access to the Track Record as defined in relation to its own assets that are being managed, either for identified (sic?) or for identified clients or funds.
 - (5) ADG is in breach of that implied term.
 - (6) As a matter of discretion, the court should now order specific performance of that obligation.
- 26 ADG disputes virtually all of those propositions and contends that there is a real prospect of successfully rejecting them at trial. Moreover, summary judgment is, in any event, inappropriate because ADG's defence on the claim here overlaps with its defence and the issues raised in respect of the Public Track Record claim in particular. This is probably best seen as allegedly constituting a compelling reason for a trial but, in any event, AlphaSharp did not dispute its relevance to the summary judgment application.
- 27 Accordingly, the following issues arise: ownership of the AIP, inclusion of the Track Record in the AIP, content of the Track Record, existence of the implied term, appropriateness of specific performance as a remedy and in relation to the final point that I mentioned, which I will describe as the "overlap point".

The ownership of AIP

- 28 It is plain from the agreement at cl.2.2 that AlphaSharp owns the Arising IP, which is why it is the licensor and ADG is the licensee. That is what the agreement is about. Thus far, there is common ground between the parties. There is, however, a dispute between the parties to be resolved at trial as to whether the intellectual property in the software for the QMS, now said to be independently developed by ADG, as opposed to pre-termination original software, is within Arising IP (see para.22 of the particulars of claim and para.23 of the defence). This is not directly relevant to the issues before me, but it does have a resonance with some of ADG's arguments below.

Inclusion of the Track Record in the AIP

- 29 The relevant Track Record here is that relating to transactions undertaken by ADG and, in particular but not limited to, the termination date. AlphaSharp says that it clearly is, because intellectual property includes confidential information and all of the Track Record itself constitutes confidential information for these purposes. It is not suggested by AlphaSharp that any other intellectual property rights, like copyright, are in the Track Record, at least not for present purposes. AlphaSharp contends that the Track Record must constitute confidential information in the hands of ADG and indeed when it was in the hands of AlphaSharp, because neither party would seriously contend, for example, that particular settings or trades, or the results of those trades, would be regarded as available for public use. Indeed, to the extent that ADG has made available to the public, or to potential clients, as it has, returns information falling within the Track Record, AlphaSharp says that it was not entitled to do even that, hence the Public Track Record claim.
- 30 For its part, ADG says that the position is much more nuanced. First, not all of the Track Record can be confidential, since at least a high level description of returns are used by many of those involved in asset management in the position of ADG so as to promote generally their investment. Secondly, it says that confidential information in this context must be viewed narrowly, especially given its position as to where it lies in the definition of intellectual property, sandwiched between know-how rights and copyright, so as to be confined to something akin to industrial know-how or trade secrets. Third, it argues that this

narrow interpretation is meant to reflect what is and has always been AlphaSharp's intellectual property, but not to cover the product of the efforts of ADG and its employees. For these purposes, ADG relies, in part, on the first warranty of cl.5.1, which I have already read out. I disagree with that particular point. The focus of cl.5.1 is the notion that, as a licensee, ADG will not be troubled by third parties claiming the IP now licensed to it, which is a familiar type of warranty. I do not believe it was intended, itself, to suggest that any further work done on the licensed IP by ADG's employees is therefore simply outwith the licensed IP altogether. I take AlphaSharp's point that this an expansive definition of IP and that if the Track Record was not regarded as something which would, and should, be the subject of a licence, it would not be included at all. However, all of that said, it seems to me that it is at least reasonably arguable that it does not follow that all of the Track Record necessarily constitutes confidential information for the purpose of falling within IP. Which part is and which part is not within it is then, in my judgment, related to the next question, which is what the Track Record actually consists of. This is important because of what AlphaSharp is seeking primarily by reason of the terms of the order sought.

Content of the Track Record

- 31 Its content expressly includes returns, positions, risk levels and assets under management. "Returns" are self-explanatory, i.e. the details of how particular investments governed by the QMS have fared. That sort of information has appeared publicly in material that is produced by ADG. "Position" refers to the positions taken on the particular assets or instruments invested. "Risk level" reflects risk factors which affect a particular instrument's performance and data about it, for example, volatility. It is not, as might otherwise have been thought, something to do with any particular client's risk parameters which would affect what investments could be made. As Dr Phillips notes, and this part is not in dispute, this risk level can in fact be deduced from the positions, returns and general market data. "Assets under management" is meant to be a reflection of a particular fund manager's fund's success or otherwise, because the greater the number and the more substantial the assets under the control of the fund manager or in the fund, the more it could be said that the investment strategy is successful.
- 32 All of those can conveniently be described in my judgment as outward facing elements of the investments in question. They obviously reflect the performance of QMS when it is utilised. However, that is not essentially what AlphaSharp is interested in here. It wants to see other information, which although relevant to the performance, is not necessarily reflective of it. These are more inward-facing elements. I deal with those specified by AlphaSharp other than expressly covered, which have been set out in Mrs Yelnik's first witness statement, and then I comment on them and whether they clearly fit within the Track Record or not.
- 33 First, there is strategy settings. As I understand it, these are the settings as to how the QMS itself will run for any particular investment. The settings here may not change much over time, but they can be changed. ADG contends that the full history of all the settings which is sought by AlphaSharp and is contended to be part of the Track Record to see how the system is configured each day and what ADG may have changed. That is what ADG says is involved here.
- 34 The second is portfolio settings, which will be the translation of the client's or the fund's particular requirements into the relevant instructions for the purpose of the operation of the QMS in relation to that particular portfolio. Those settings also can obviously vary. As to those and others, AlphaSharp contends that it is necessary to have that information and it

necessarily falls within Track Record because, otherwise, the performance of the QMS cannot be fully or comprehensively assessed. That may be right, strictly, because settings can change, but those sorts of input are at least arguably far removed from the sort of outward features reflecting performance which are expressly stated. In addition, of course, they are the product, at least to some extent, of ADG's own and/or its clients' particular requirements and choices in adjusting how the QMS will run.

- 35 I then turn to factors and factor value. These relate to the relevant sets of data that are analysed by QMS. Apparently, Mr Yelnik had chosen forty such sets of data, although they are capable of being changed. Dr Phillips says that they are the internal workings of the system, whereas Mrs Yelnik says they are intermediate outputs, although in part dependent on user choice. At this stage, I cannot determine which. I can see that, at a fundamental level, they could be the settings for the actual operation of the QMS. Again, technically, it could be said that this is a variable, even if not often changed, against which the overall performance of QMS for a given fund or a set of transactions could be measured, but, again, this is, at least arguably, too far removed from a reflection of performance in my judgment.
- 36 Ranges are said to relate to the maximum investment in any market, and are said by ADG to be, again, part of the fixed internal workings of the QMS and even if these involve a user choice as well, again, they are not obviously, to my view, information reflecting performance.
- 37 It seems to me that, overall, there is a real question as to whether such matters count as matters reflecting performance or not. If AlphaSharp's interpretation is right, then every single potential variant in a QMS-run trade or investment would have to be disclosed since it is theoretically possible for it to affect the ultimate performance. Perhaps that is right, but I am not persuaded that it is clearly so at this stage. The question of trades I have already dealt with.
- 38 Pausing there, that conclusion is, for the most part, an end to AlphaSharp's application in terms of the order it principally seeks. There is a real prospect at trial of ADG arguing successfully that the data sought is outwith the meaning of Track Record. That is added to the argument as to whether every part of Track Record is confidential information for the purpose of Arising IP to begin with. In so far as parts of the Track Record relate to particular settings and adopted and devised by ADG for its own client, there is the point that it is questionable whether that information which is confidential to ADG is indeed included in the relevant Arising IP. That is the parallel point to the arguments which will be made at trial that, to the extent that ADG has now developed the software itself, rights to that cannot simply be regarded as Arising IP. Moreover, I cannot rule out that there will be expert evidence on industry practice here, as evidence reasonably available at trial, though that has not been put in yet. Present directions do not bar the experts from dealing with that issue, assuming an application is made in good time.
- 39 These arguments, in my view, are all bound up with the dispute as to what "Track Record" as a definition already covers. As a whole, therefore, the arguments as to what Arising IP covers and what Track Record covers are bound up together and there is a real prospect of ADG succeeding on all or part of them at trial. I should mention here, of course, that, for its part, ADG had suggested that there is a short answer, at least in the confidential information exception point, if I can put it that way, which is that cl.6.2.4 really answers it and shows that all the relevant confidential information belongs to the receiving party which it has independently developed, and that would be outwith the express restrictions on the use of confidential information in cl.6.1 because of the expression, "other than the extent to which

it is Arising IP” in cl.6.2.4. So it is said, on any view, ADG’s confidential information belongs to AlphaSharp.

- 40 It is not necessarily that simple, in my judgment. First, this is in the context of “Confidential Information” which is only used in cl.6 and where either party could be the receiving or disclosing party. Secondly, the proviso to 6.2.4 really begs the question at issue here in my judgment.
- 41 I should add that I did canvass with the parties what the position would be if I were to find that some of the data sought, for example, positions and trades, were within the Track Record, and hence the subject of an implied term if I was to find such a term. In that case, and as a fall-back, AlphaSharp invited me to direct a much more limited order and ADG accepted that I would have the power to do so, though of course its position was that one would never reach that stage. For those reasons, as well as the fact that the existence of the implied term has been fully argued, I will now deal with that implied term.
- 42 AlphaSharp’s overall position is simple: it is the owner of the Arising IP, which, for these purposes, includes the TR (the Track Record). Leaving to one side what the latter consists of, it then says that, as owner, it must obviously have the right to its own intellectual property; therefore, it is obvious and/or necessary that there should be an implied term to that effect.
- 43 Further, there is a real need for that access in order that AlphaSharp can (a) use the Track Record for the purposes of developing the software; and (b) so as to provide it to Mr Yelnik pursuant to his licence, and thereby earn its full licence fees.
- 44 Yet further, it is said that ADG did provide full access to the Track Record through the VPN in the pre-termination period in February 2019. As against that, ADG contends that AlphaSharp’s status as IP owner is not directly relevant. If it is the IP owner, then that gives it proprietary rights to the Track Record anyway, subject only to any restriction on the exercise of that right by the licence agreement, i.e. the implied term is not necessary to give AlphaSharp access *qua* IP owner if, in truth, there are no contractual restrictions.
- 45 Further, ADG contends that AlphaSharp does not actually need the Track Record for software development if indeed it was intended to have any role as a software developer as opposed to that as licensor after the termination date (see Dr Phillips’ first witness statement at paras.45 to 56 and his second at paras.27 to 30). For her part, Mrs Yelnik maintains that such information was necessary for AlphaSharp (see para.18.53 of her first witness statement and paras.25 to 28 of her second witness statement). However, that is not a difference which I can resolve at this stage. For example, there is a detailed dispute between the two of them whether one or more bugs in the software were or were not, or could only have been, truly resolved by reference to the Track Record and nothing else or not. That is not suitable for summary judgment.
- 46 There is then a further debate as to whether the Track Record was necessary for the purpose of Mr Yelnik’s business pursuant to the licence granted to it by AlphaSharp. It is not suggested by ADG that sight of the Track Record, dealing as it does with actual performance, would not be useful for him, but the question is whether it is necessary or obvious for him to have it via AlphaSharp so as to support the alleged implied term. Dr Phillips says it is not and back-testing or simulated performance is sufficient, together with publicly available information as to ADG’s fund. Indeed, Mr Yelnik has done just that to date. All strategies have to use some sort of back-testing, at least at first, because,

originally, there would be no data as to performance carried out pursuant to it by definition (see paras.59 to 61 of Dr Phillips' first witness statement in particular). That is opposed by Mrs Yelnik at paras.18.5.1 and 2 and 4 of her first statement, and paras.23 and 24, and the point is also made that Mr Yelnik has done what he can with the sources available to him, but that does not mean that is all that he really needs.

47 In Mrs Yelnik's second witness statement, she relies on para.72 of Mr Abdat's witness statement, which in fact was in the context of the overlap point, where he said:

“Without [a fund manager] disclosing performance [in a public way], there is virtually no prospect of [that manager] attracting business.”

48 Quite so. But this is a reference to the need of managers to make public at least some aspects of their fund's performance so as to attract clients, but that is no real support for the argument that Mr Yelnik needs the Track Record as defined by AlphaSharp in order to build and develop his business, which goes way beyond public statements of performance according to AlphaSharp. Moreover, the reason why Mr Abdat made the point there was as part of the illustration of the effect of the Public Track Record claim which would, if successful, he says, prevent any fund manager in the position of ADG from saying anything about the performance of the funds they manage, which he says is against industry norms. That point is relevant to the overlap argument I discussed below.

49 Again, this sort of debate about necessity of Track Records as defined by AlphaSharp for Mr Yelnik is not something that I can resolve at this stage, and Mr Yelnik himself, of course, did not adduce any evidence. The existence of the implied term, in my view, becomes even more debatable if I was wrong in my prior conclusions and the Track Record indisputably included all the elements contended for by AlphaSharp. In that event, there is then the further problem of how that could affect ADG's client confidentiality because of data relating specifically to individual requirements and objectives and choices and strategies and so on.

50 AlphaSharp's riposte is that this potential problem is taken care of by AlphaSharp agreeing not to see or be shown the details of the identity of any particular client. That might assist on the suitability or otherwise of an order for specific performance, but it does not really go to the question of construction or implication. Of course, it could be said that if there was an implied term in principle, then any reasonable iteration of it, for it has to be reasonable, would have to exclude details pertaining to clients, but I did not understand that in fact to be AlphaSharp's position and, if it was, there would need to be a very considerable drafting exercise in relation to the implied term, which again would not be straightforward at this stage.

51 ADG also questions how the implied term could sit with it being able to maintain its competitive edge. AlphaSharp retorts that this is precisely what ADG signed up to because it knew that, post-termination, Mr Yelnik could and would, and did, become a competitor, quite lawfully, through the license granted by cl.3.3. All of that I follow, but whether this means that Mr Yelnik could have access to all the features of the Track Record which show particular strategies' settings, client requirements, initiated by ADG and so on as contended for by AlphaSharp, so, in effect, to mimic or then improve upon the particular business being conducted by ADG to that level of detail is another matter altogether in my view.

52 There are other items thrown into the mix by ADG here, for example in relation to regulatory concerns, but I do not consider it necessary to delve into them here. Suffice it to

say that, even taken by itself, there is sufficient doubt about the contention that the implied term, especially in relation to the Track Record as contended for by AlphaSharp as to its existence, for there to be a real prospect of AlphaSharp successfully contending otherwise at trial.

- 53 I should add that it is clear that finding a legal way for AlphaSharp to be able to access the Track Record it contends for has clearly not been straightforward. Initially, it advanced a bailment argument, which has now been abandoned, certainly for today, save so as to create some kind of supporting argument for the implied term. Also, AlphaSharp relied upon cl.2.2, the balance of it, as the basis for that access. It has wisely dropped that argument, which was clearly wrong. Clause 2.2 is all about positive steps which ADG could be obliged to take to ensure that AlphaSharp's IP rights were secure in the sense of being recognised, registered, etc. It was not about the exercise or operation of those rights.
- 54 In the light of all of that, it does not seem to be possible to me to go on to find some sort of much attenuated implied term in terms of what Track Record contents it covers, as I postulated may be a possibility at the hearing. In any event, any such attenuated implied term would probably not cover the Track Records that AlphaSharp is really and commercially interested in.
- 55 In the light of all of that, it I not necessary for me to deal with the next issue, which is whether specific performance could clearly be ordered as a matter of discretion. It does not arise. However, I do go on to deal with the overlap point, even though, strictly, it is not necessary for me to do so.
- 56 All of the above, as I say, would have been sufficient for me to conclude that there should not be summary judgment at this stage, and the present issue should be left to a trial, along with all the others. However, in my view, the position is put completely beyond doubt by the overlap point. I have already summarised some of the other claims made by AlphaSharp and the defences by ADG above. Just in a little more detail, paras.39 to 46 of the particulars of claim allege that ADG was in breach of the licence by, first, allowing people other than Mr Yelnik to access the Background and Arising IP and the Software. That then forms the basis for an allegation that it was only because ADG did and would continue to act in breach of the licence in that way that it was able to afford to terminate the agreement with Mr Yelnik; thus the breach was committed to enable ADG, unlawfully, to wrongfully springboard its own business (see paras.48 and 49).
- 57 Then, at para.51 is the Public Track Record claim. It is said that ADG is in breach of the licence because it published some Track Record information to Bloomberg, to banks and other platforms, potential clients and indeed even its existing clients. In answer to those claims, ADG alleges, among other things, that it was an implied term, and it was entitled to carry out work on the software, preparatory to termination and the advent of the cl.3.3 licence if such work would otherwise be a breach of the licence as a matter of business efficacy.
- 58 As to the Public Track Record claim, ADG takes the point, as it does here, that the Track Record, or at least that part of it which was made public, was not confidential information anyway and fell outside of the Arising IP. Accordingly, it was entitled to publish such information and give access to clients and potential clients in order to enable Mr Yelnik to comply with his duty to promote ADG's business while he was there and afterwards, when he was not there, because publication of such information or disclosing of it was a necessary part of the business of managing assets with QMS, hence Mr Abdat's point at

para.72 of his witness statement. Put another way, there was another implied term, creating a carve-out to any restrictions otherwise in the agreement for these purposes.

- 59 Accordingly, quite apart from the overall context in which the claims will be dealt with at trial on the basis of the full evidence, one has ADG taking the point about the extent to which Track Record consists of confidential information and the extent to which there are implied terms of the contract. I find it quite impossible to see how AlphaSharp's present claim, made in the application before me, can be tried, fairly, especially on a summary basis, separately to and before all of those other matters will be dealt with, with the full evidence and facts and context, at trial, and, in all likelihood, before a different judge. All the claims can only be fairly determined in the overall context of the facts and any expert evidence to be explored at trial.
- 60 AlphaSharp responds to this by saying, "*au contraire*", if I decide at least this aspect of the claim now, I have helpfully removed one part of the trial which the trial judge would otherwise have to determine. However, that misses the point, which is that it is not possible, sensibly, to remove this element of the trial and to do so fairly when it is, in my view, so very intertwined with the other issues. Put another way, had this been proposed as a matter to be dealt with initially as a preliminary issue, it would have been rejected at the outset, even more so when there is no preliminary trial at all, but rather a summary judgment application. Considerations of this kind, dealing with the position at summary judgment and a trial which is going to take place in any event, have been held to constitute a compelling reason for a trial (see the first part of the notes in the **White Book** at 24.2.4). For that reason, there is obviously, in my judgment, a compelling reason for a trial of the issue now before me. Indeed, that would remain the position even if I took the view, which I have not, that none of the defences alleged had any real prospect of succeeding at trial.
- 61 Accordingly, I dismiss this application and I will now hear counsel on consequential matters.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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