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Case No: CL-2020-000347

CL-2021-000169

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 July 2022

Before:

MRS JUSTICE MOULDER

Between:

CHRISTOPHER BERNARD UPHAM & ORS

(CL-2020-000347)

AYODELE AKINLUYI & ORS

(CL-2021-000169)

- and -

HSBC UK BANK PLC

Claimants

Defendant

William Day (instructed by Edwin Coe LLP) for the Claimants in CL-2020-000347
Graham Chapman QC and James Mather (instructed by Stewarts Law LLP) for the Claimants
in CL-2021-000169

Andrew Green QC and Dominic Howells (instructed by Norton Rose Fulbright LLP) for the
Defendant

Hearing dates: 8 July 2022

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10.00am on 15 July 2022.

Mrs Justice Moulder :

1. This is the Court's ruling which was reserved from the second Case Management Conference on 8 July 2022 on whether the Disclosure Review Document (the "DRD") filed by each of the Stewarts Claimants and the Edwin Coe Claimants respectively, should be approved by the Court.
2. The proceedings in these claims referred to as the "Edwin Coe Action" and the "Stewarts Action" are being case managed and tried together. References to the "Edwin Coe Claimants" and the "Stewarts Claimants" are to the claimants in the Edwin Coe Action and the Stewarts Action respectively. The Defendant is the same for both actions and is referred to in this judgment as "HSBC".
3. It is not necessary to set out the details of the underlying claim. Suffice it to say that it relates to investments in a film scheme ("Eclipse") which was promoted by Future Films Limited ('Future'). The role of HSBC is in dispute: HSBC's case is that it was only an advisor.
4. There are two linked but separate issues for determination by the Court: the first relates to section 1 of the DRD now before the Court, namely whether certain issues in the pleadings should be in the List of Issues in the DRD against which disclosure will be made at this stage of the proceedings; the second is the scope of the searches to be carried out at this stage as set out in section 2 of the DRD.
5. The starting point is the order (the "CMC Order") which was made on 7 February 2022 at the first Case Management Conference (the "1st CMC").
6. The CMC Order provided that (for the time being) the Court and the parties would proceed on the basis that there would be a joint single trial of "Sample Claimants" in the Edwin Coe Action and the Stewarts Action. The CMC Order further provided for the selection of up to 28 Sample Claimants although it was envisaged that the number of Sample Claimants would be adjusted and if possible reduced for trial.
7. The CMC Order contemplated (paragraph 17) that the Sample Claimants would each file and serve individual Points of Claim in the form of schedules appended

to the Particulars of Claim in the relevant claim. Thereafter HSBC would file individual Points of Defence in the form of schedules appended to its Defence in the relevant proceedings and the Sample Claimants would file and serve individual Points of Reply. (The Particulars of Claim, Defence and the Reply in each action had already been filed: the Stewarts Claimants served their Claim Form and Particulars of Claim on 5 June 2020, the Edwin Coe Claimants served their Claim Form and Particulars of Claim on 28 September 2020, HSBC served its Defence in the Stewarts Action on 21 September 2020, and on 4 March 2021 HSBC served an Amended Defence in the Edwin Coe Action.)

8. In relation to disclosure, paragraph 19 of the CMC Order provided for “*a bespoke timetable and procedure for extended disclosure*” as provided for in the CMC Order and as further provided for at the second and third Case Management Conferences.

9. Paragraph 20 of the CMC Order stated:

“Until any further order at CMC3, individual claimants are not required to carry out any searches for documents for disclosure. For the avoidance of doubt, the steps referred to in paragraphs 21 to 23 below shall be limited to the issues on the generic pleadings in the two actions.”

10. Paragraph 21 – 23 of the CMC Order provided:

“21. The deadline at paragraphs 7.2.1 and 7.2.2 of the Disclosure Pilot (date by which claimants provide first draft of Section 1 the Disclosure Review Document) shall be varied to 14 March 2022.

22. The deadline at paragraph 7.5 of the Disclosure Pilot (Date by which Defendant responds to Claimants draft List of Issues for Disclosure and proposals on Models, as per Section 1 the Disclosure Review Document) shall be varied to 11 April 2022.

23. Thereafter the provisions of the Disclosure Pilot, including paragraph 7.6 and 7.6 A shall apply *mutatis mutandis*.”

11. The dispute which has arisen between the parties is as to the meaning of paragraph 20 of the CMC Order. This paragraph of the CMC Order was agreed prior to the CMC and accordingly, although it was dealt with in the skeletons for the 1st CMC, at the hearing there was little discussion of the relevant paragraph, the Court being informed that “*peace had broken out*” and that the position concerning disclosure was agreed.
12. Although in oral submissions at this hearing, HSBC placed considerable reliance on the wording of the CMC Order, I note from the transcript of the 1st CMC that in the course of the submissions, the Court asked whether in referring (at paragraph 20 of the draft order) to “*issues on the generic pleadings*” there was “*a separate list of issues*” for the purposes of disclosure or whether it was a reference to the common issues in the list of issues. Mr Green Q.C. for HSBC responded that it was not common issues in the sense of common to both actions and “*any issue within those pleadings as set out in the list of issues is up for grabs in the DRD*” but that he thought there would be a further disclosure list of issues when it came to preparing the DRDs. That the matter was not in fact settled is confirmed in my view by the extract from the submissions of Mr Chapman Q.C. on that occasion when he told the Court that:

“the precise scope of any disclosure exercise which the claimants are undertaking at this stage, prior to the selection of samples, is something for discussion and agreement between the parties when completing the various disclosure review documents required by the pilot.”

13. HSBC submitted at this hearing that:
 - i) disclosure (at this stage) was to be carried out by reference to the issues in the generic pleadings;
 - ii) the effect of paragraph 20 is that only individual Claimants were excused from the requirement to carry out searches for documents but that searches would be carried out by the agents of the Claimants who held relevant documents.

14. It was submitted orally for HSBC that in the alternative, searches would be carried out by the solicitors for the Claimants and in relation to other agents by whom searches would be made, these should be agreed between the parties and then reflected in Section 2 of the DRD prior to it being approved by the Court.
15. In support of its submissions, HSBC relied on an email exchange between counsel prior to the 1st CMC and the wording of paragraph 20. HSBC submitted that it is clear from the email exchange that the parties agreed that disclosure was to be carried out not by reference to “generic issues” in the pleadings but all issues in the “generic pleadings”.
16. In my view it is clear from the transcript of the hearing of the 1st CMC referred to above, that although the parties at the stage of the 1st CMC believed they had reached an agreement, they had not in fact identified the precise scope of the disclosure and the matter cannot be resolved merely by reference to the terms of the CMC Order read in the context of the email relied on by HSBC.
17. It was submitted for HSBC that it was agreed that individual Claimants would not need to carry out their own searches at this stage but that the agents of those Claimants would search for relevant documents. It was submitted that disclosure at the first stage against the issues in the generic pleadings must extend to documents held by agents of individual Claimants.
18. For the Stewarts Claimants it was submitted that:
 - i) It was illogical to suggest that the agents of the individual Claimants should carry out searches at this first stage since it would cut across the principle of Sample Claimants and the fact that once Sample Claimants are identified, the claims by the other Claimants are stayed.
 - ii) The Claimants have received a pool of generic documents (in the case of Stewarts Claimants by ARC LLP on behalf of the Eclipse LLPs) and what they had in mind to disclose at stage I was limited to documents in this pool of documents held by their solicitors. Searches by individual Claimants would be at stage II once the Sample Claimants had been identified and against the list of issues for that Sample Claimant.

19. For the Edwin Coe Claimants it was submitted that:
- i) It would search the pool of documents which were held by its solicitors (provided from Future) and which were used to draft the current pleadings;
 - ii) Disclosure should not extend to agents for Claimants who are not Sample Claimants as this would be equivalent to ordering third party disclosure.
20. It is helpful in my view to have regard to the background to this issue as set out in HSBC's skeleton for the 1st CMC from which I note the following:
- i) It was originally envisaged by the parties that the Sample Claimants would plead their case and then disclosure would follow in the normal way. Had this occurred, it is clear that disclosure would only have taken place in relation to documents in the control of the Sample Claimants (including their agents).
 - ii) However "*to make progress*" it was proposed that there was no reason to delay "*generic disclosure*" and whilst it was initially proposed by the Stewarts Claimants that HSBC should make disclosure prior to the pleading of the individual cases by the Sample Claimants, a compromise was reached whereby the Claimants would also make some disclosure.
21. In its skeleton for the 1st CMC HSBC stated:
- "Both Edwin Coe and Stewarts will necessarily have in their possession documents which are relevant to generic issues, including presumably much of the documentary evidence each firm reviewed for the purpose of instructing counsel to plead their detailed generic statements of case and on the strength of which those firms were content to sign the statements of truth attached to their pleadings. By way of example, the Edwin Coe Claimants have a cache of documents obtained from Future between 2016 and 2018 including the key transaction documents

and other material responsive to keyword searches...” [emphasis added]

22. It appears that it was contemplated (at least by HSBC) that the solicitors would search their files but that individual Claimants would not. The HSBC skeleton stated:

“Edwin Coe and HSBC are in agreement on this point and the wording at §19-23 of the draft Order reflects their position: the parties should give generic disclosure at the same time. Edwin Coe and Stewarts will search their files for the purpose of giving generic disclosure. Individual Claimants need not search their own files. Whether the Claimants’ custodians for generic disclosure should include, for example, Fieldfisher, the IFAs or any others is a matter to be resolved in the normal way custodians are agreed under the disclosure pilot.” [emphasis added].

23. In relation to the objection then raised by the Stewarts Claimants in correspondence, it was submitted for HSBC in its skeleton for the 1st CMC that:

“The Sample Claimant process doesn’t affect the disclosure which it would in principle be appropriate for both sets of Claimants to give in respect of generic issues. As a matter of practicality, however, it would not be desirable for all 573 Claimants to conduct searches for documents relevant to issues on the generic pleadings. It may be that many Claimants have few or no documents going to generic issues in their possession, the principal repositories for such documents being Edwin Coe and Stewarts who have investigated, assembled and marketed these group claims and will have relied on documents in doing so...

...After Sample Claimant pleading, a further search will be required, but this time within the files of the Sample Claimants for documents relating to Eclipse and/or their own investment

decisions. The only additional searches required to be performed by Stewarts on their own files at this stage will be for documents relating to the selected Stewarts Sample Claimants, which will likely be modest in number...” [emphasis added].

24. It is clear therefore that HSBC expressed the issue in relation to searches by individual Claimants as one of “*practicality*” and that as a matter of “*principle*” the solicitors should search their files for “*generic issues*”.

25. Mr Chapman at the 1st CMC submitted as follows:

“My Lady, the concern that the Stewarts Claimants had here was this. Much of the utility of having sample claimants in terms of costs savings will or may be lost if the claimants are required to undertake an extended disclosure exercise prior to the selection of sample claims. That was the principal concern. Relatedly, if the claimants as a group were not going to be required, as appears to be the case, individually themselves to undertake a disclosure exercise at this stage and prior to sample claimant selection, there was a concern as to how the claimants might comply with their obligations under the disclosure pilot.

It now seems clear, as is reflected in the revised wording in the draft order which you have been shown, that an individual claimant disclosure exercise, if I can put it that way, i.e. an obligation on individual claimants to search for documents or undertake a disclosure exercise at this stage prior to the selection of sample claimants, is not what is envisaged.

That being so we were content with the revised wording.

...

But the parties have agreed for the time being that the precise scope of that exercise is something to be explored through the

pilot process, and it is only if it cannot be agreed that we will trouble your Ladyship with that issue again.” [emphasis added]

26. At this hearing Stewarts maintained their objection that the utility of having Sample Claimants will be lost if the Claimants have to undertake Extended Disclosure prior to the selection of sample claims. In the skeleton for this hearing Mr Chapman submitted that:

“The starting point is that, given the adoption of a Sample Claimant process, the appropriate procedure for disclosure relating to the Claimants will be specific to the sample claims, once those claims have been selected and pleaded out. At that stage it will be appropriate to prepare one or more DRDs tailored to the individual claims and issues relevant to those claims (and that is in turn reflected in the provision made by the CMC1 Order with regard to the subject-matter of CMC3). Any claimant-wide disclosure at this stage would not only give rise to a risk of duplication but would fundamentally undermine the rationale for adopting a Sample Claimant process. Not least, all claims other than those of the Sample Claimants are stayed under the process provided for by the CMC1 Order.” [emphasis added]

27. In my view it is clear that it was agreed that individual Claimants would not carry out searches at this stage. Further the 1st CMC Order provided that once the Sample Claimants had been selected, the claims of all other Claimants would be stayed:

“All claims other than those of the Sample Claimants shall be stayed upon selection of the sample claims until further order save that the stay will be lifted upon the handing down of judgment on the claims of the Sample Claimants in order for consequential directions and orders to be made, including, in particular, in relation to the costs of the non-Sample Claimants and the liabilities (if any) of the non-Sample Claimants in relation to costs.”

28. An order for disclosure at this stage against all Claimants and/or their agents would be inconsistent with the rationale of having Sample Claimants (namely to make the proceedings manageable and control costs whilst still striving to ensure that there is good coverage of the issues) and thus the principle. It would also be inconsistent with the stay which is now in force in relation to all claims other than the Sample Claimants.
29. In my view it would be equally inconsistent with the principle of Sample Claimants who had not yet been identified, that the order should provide for the files of claimants in each action to be searched merely because those files (in the respective actions) are held by a single firm of solicitors.
30. Once the principle of Sample Claimants is recognised, it should only be a matter of timing when disclosure is carried out in respect of files held by the solicitors.
31. However the crux of the matter it seems to me is that by seeking “generic disclosure” at this stage, HSBC seeks to obtain disclosure against Claimants who will not be a party to the proceedings at trial. This was clearly not what would have been the position if disclosure had followed its normal course (after the case of the Sample Claimants have been pleaded) and in my view it is not justified merely because some earlier disclosure is now contemplated in order to progress matters.
32. It was submitted for HSBC that it would be unfair that potentially relevant documents held by non-sample Claimants will not be disclosed and that for example on limitation, documents from other non-Sample Claimants should be capable of being put to the Sample Claimants as evidence of what other Claimants had done in similar circumstances.
33. In my view it is inherent in the fact that the proceedings are proceeding by way of Sample Claimants that not all documents in the possession of all Claimants will be before the Court even if such documents could or might be relevant to the cases brought by the Sample Claimants. To adopt a contrary view would be to sanction a form of disclosure that went far beyond the usual approach to disclosure by a party and in effect to order third party disclosure without HSBC having satisfied the Court that the documents sought would meet the test under

CPR31.17 for third party disclosure (including that it was “necessary” in order to fairly dispose of the claim).

34. Accordingly in my view disclosure at this stage should be limited to the respective pool of documents which is held by the respective solicitors. It should not extend to individual Claimants or their agents (other than specifically the pool of documents referred to above).
35. The next question is whether the search of that pool by each set of solicitors should extend to Issues 9 (Inducement), 11, 12 (knowledge for limitation purposes including constructive knowledge) and 14 (personal recommendations) which HSBC submit arise on the current pleadings.
36. It was submitted for Edwin Coe that these are Claimant specific and for Stewarts that it would lead to duplication.
37. It was submitted for HSBC that the issues of reliance and limitation are not claimant specific but are generic issues on the pleadings.
38. Whilst noting that the Issues for Disclosure for the purposes of PD51U are not the same as the pleaded issues, that in my view does not assist the Court to resolve the question here. Paragraph 7.3 of PD51U defines “Issues for Disclosure” as follows:

“Issues for Disclosure” means for the purposes of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings.

It was not submitted that there would not be documents which are responsive to these issues.

39. However when looking at the pleadings it is clear that the following issues are (at least in part) claimant specific:

40. As to reliance this is pleaded by the Edwin Coe Claimants at paragraphs 57 onwards of the Particulars of Claim. Paragraph 59 starts with the following:

“The precise circumstances in which the Eclipse Partnerships were marketed varies from individual Claimant to individual Claimant and will be a matter for schedules of information, disclosure and evidence in due course. For present purposes, the Claimants plead the following matters...”.

41. The Defence at paragraphs 111-113 includes the following:

“111. Paragraph 57 is unparticularised but is admitted as a general description of the marketing activities carried out by Future in relation to Eclipse...”

113. As to paragraph 59:

“(a) The first sentence is noted. HSBC pleads to the subparagraphs following paragraph 59 as general summaries only and without prejudice to its response to any schedules of information in respect of individual Claimants which are produced in due course...”.

42. At paragraph 77 onwards the Edwin Coe Claimants plead inducement.

43. The Defence response at paragraph 130 includes the following:

“(d) As for the fourth sentence, reliance is a Claimant-specific issue and at present the Particulars of Claim do not set out any sufficient case on reliance”

44. On limitation this is pleaded at paragraphs 71-76 of the Particulars of Claim and in particular at paragraph 76:

“It is averred that the Claimants discovered, and could only have discovered with reasonable diligence, HSBC’s (and/or Mr Bowman’s) knowledge or recklessness of the falsity of the Representations at the time they were made (as pleaded in

section E below), and the extent of HSBC's involvement in the same (or liability otherwise), after the Action Group / Newport acquired Future's Documents".

45. The Defence at paragraph 129 is as follows:

"Paragraph 76 is denied. The date at which the Claimants did discover or could with reasonable diligence have discovered the alleged facts giving rise to the claim is a Claimant-specific matter. At present, the Particulars of Claim do not set out any sufficient case on this matter."

46. As to recommendations these are set out in Schedule 4 to the Particulars of Claim (paragraphs 7-9 and 18). In the Defence HSBC pleaded (at paragraph 144(c)) that the Claimants had not pleaded any particulars of alleged breaches. In the Reply the Claimants pleaded at paragraph 172 that:

"...The Claimants reserve their position in respect of the remainder of paragraph 144(c) pending schedules of information, extended disclosure and evidence."

47. Norton Rose Fulbright LLP, acting for HSBC, in its letter of 25 January 2022 stated that:

"We maintain that the Edwin Coe and Stewarts Claimants should give generic disclosure at the same time that HSBC gives generic disclosure... For clarity, we understand the term "generic disclosure" to refer to disclosure in respect of issues that are not specific or unique to any given Claimant". [emphasis added]

48. HSBC submitted (paragraphs 11-14 of its skeleton for the CMC) that there are generic pleadings and for example, that the Stewarts Claimants have pleaded that HSBC concealed its wrongdoing. HSBC accepted that individual claimants "*may have different things to say...about their own reliance and knowledge for limitation purposes*" but submitted that disclosure should be given at this stage insofar as these issues arise on the generic pleadings.

49. In my view it is clear that the issues of inducement, reliance and limitation are (at least in part) claimant specific.
50. I therefore see no real advantage in searching the pool of documents now for these issues since the respective pool of documents (as HSBC I infer acknowledge) is likely to differ as to reliance and knowledge and will therefore need to be searched once the Sample Claimants have pleaded their cases.
51. There are some additional objections raised by HSBC to the DRD in relation to the Edwin Coe Claimants (paragraphs 34 -39 of the HSBC skeleton) namely the failure to identify the custodians, date ranges and search proposals.
52. It was submitted for the Edwin Coe Claimants that (as now set out in the letter of 7 July 2022 to HSBC) Future provided to Newport (approximately) 412,000 documents and following a first review, 283,000 will be reviewed against the Disclosure List of Issues. It was thus submitted that in completing section 2 of the DRD references to ESI as the data sources was to these documents provided by Future to Newport, that the underlying Custodians were unknown, and the date range was February 2004 to July 2019. Counsel for the Edwin Coe Claimants proposed that the DRD should be refiled with the additional information but submitted that it should be approved on the basis of the proposed searches.
53. In relation to the Stewarts Claimants' documents HSBC also objects (paragraphs 40-44 of its skeleton) that no hard copy documents are to be disclosed, it does not know what documents are held by any other custodians (beyond those originating from ARC LLP) and the search parameters.
54. Stewarts propose that the pool of documents will be searched manually for relevance to the generic issues and submitted that in those circumstances they have not suggested any date ranges, custodians, or search terms as such parameters are unnecessary.
55. In the light of my earlier rulings above and the fact that a manual search will be carried out I see no reason to require the Stewarts Claimants to serve a revised Section 2.

56. It seems to me that when stage II of the disclosure exercise takes place with the Sample Claimants giving disclosure then the custodians will be identified in the usual way but for the disclosure at this stage there is no need to identify the custodians as the search is not against the underlying custodians of the documents but the respective pool of documents which has been identified.
57. I trust that the parties will now be able to agree an order and the DRDs (amended as proposed by the Edwin Coe Claimants to clarify the matters identified) can be approved accordingly. If there are any outstanding matters these can be dealt with on paper.

Addendum

When this draft judgment was sent out to counsel in the usual way, it was noted for the Edwin Coe Claimants that the Sample Claimants have already been selected and thus the stay provided for in the 1st CMC Order has come into force in relation to the remaining Claimants (although there is an ongoing process with a view to reduce the number of Sample Claimants). This reflects the submission for the Stewarts Claimants recorded at paragraph 26 of the Judgment and the terms of the 1st CMC Order set out at paragraph 27. Accordingly I have amended paragraph 28 to reflect this. It does not affect the conclusion reached in paragraphs 28 and 29 but reinforces it.