Neutral Citation Number: [2024] EWHC 2385 (Ch)

Claim No.IL-2020-000079

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

The Rolls Building
7 Rolls Buildings
London
EC4A 1NL

Date: Thursday, 12th September 2024

Before:

MR. JUSTICE RAJAH

- -

Between:

ILLIQUIDX LIMITED	**Claimant**
- and -	
(1) ALTANA WEALTH LIMITED	**Defendants**
(2) LEE ROBINSON	
(3) STEFFEN KASTNER	
(4) BREVENT ADVISORY LIMITED	

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- -

MARK VINALL and **CHARLES WALL** (instructed by **Reynolds Porter Chamberlain**) appeared on behalf of the **Claimant.**

TOM MOODY-STUART KC and **BEN LONGSTAFF** (instructed by **Fieldfisher LLP)** appeared on behalf of the **Defendants.**

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APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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MR. JUSTICE RAJAH :

1. This is the pre-trial review of Illiquidx's claim for breach of confidence, infringement of trade secrets, breach of contract and copyright infringement. Illiquidx says that it disclosed confidential information relating to a business opportunity to invest in Venezuelan distressed debt to the defendants during a brief joint venture. It says that after the end of the joint venture the defendants misused that information by setting up a fund to take advantage of the opportunity for the defendants' benefit. It is significant that the contractual non-disclosure agreement which was created during the joint venture does not treat as confidential information, information which is in the public domain.

2. The case is listed for a 10-day trial in a five-day window starting on the 7th of October 2024. Illiquidx has brought an application to amend its pleadings, which is opposed.

3. Illiquidx sets out the confidential information on which it relies in a confidential Annex 1 to its particulars of claim ("RRACA1"). The present shape of RRACA1 is that the first half describes a package of confidential information called "the Business Opportunity", while the second half sets out what is referred to as "the Detail". Until the service of witness statements, the defendants say they understood from Illiquidz pleadings, from correspondence and from responses to requests for further information, that the confidential information comprising the Business Opportunity was made up of, and only made up of, the Detail. Illiquidz says that this is the wrong interpretation of its pleadings, and that the matters pleaded in the first half of RRACA1 are also components of the Business Opportunity and confidential information.

4. In dealing with various case management applications earlier this year, Chief Master Shuman rejected Illiquidz' contention, but it maintains that this was not a fundamental part of the decisions that she had to make and is, therefore, not *res judicata*. I will assume that is correct for the moment, as I did not hear full argument on that point from the defendants.

5. The procedural history is this. The claim was issued on 27th July 2022. In December 2020 the claimant attempted a reformulation of its list of confidential information, seeking to position it, instead, in the terms used in a case called *CF Partners v Barclays Bank*, namely, (1) the Big Idea, and (2) a set of various component elements making up the Big Idea, called the Detail.

6. Deputy Master McQuail (as she then was) rejected the Big Idea as incoherent and unintelligible, and refused permission to appeal. Miles J, on appeal, agreed and upheld that decision. Miles J did, however, permit the pleading of the Detail, provided that the claimant gave proper particulars of each element relied on and excised phrases such as "without prejudice to generality" and other such phrases watering-down precision. Miles J did not rule out a further attempt by the claimant to reformulate the Big Idea, but he was clear that this was to be the composite effect of the Detail which he required to be properly particularised.

7. Following that hearing, in early 2022, the claimant presented new draft reamended particulars of claim, a new reamended confidential Annex 1 (i.e. RRACA1) and 5, which reframed its confidential information instead as the Business Opportunity, which is said to be composed of various elements listed as the Detail.

8. The drafting of RRACA1 leaves a lot to be desired. The "Business Opportunity" is defined in paragraph A1 as a package of confidential information. Paragraph A13 provides as follows:

> "As stated above, the Business Opportunity was a package of confidential information. It was made up of component pieces of confidential information contained in and/or evidenced by the documents and/or other communications that the claimant provided to the defendants in circumstances giving rise to an obligation of confidence. Those component pieces of confidential information ('the Detail') are set out below".

9. Then A14 carries on to say:

> "For the avoidance of doubt, the claimant avers that the Business Opportunity as a whole is confidential, regardless of whether any particular component piece is or is not confidential."

10. Paragraph (3), which follows after A14, goes on to say:

> "The claimant's case is that each document and legal advice is itself confidential. Without prejudice to the foregoing, the claimant identifies within the documents and legal advice the specific passages and/or parts of the documents/legal advice on which it relies as confidential and confirms that it does not rely on any passage not so satisfied."

11. On the face of those paragraphs, it is clear, as a matter of construction, that the Business Opportunity is stating the effect of the component parts which are in the section headed "the Detail".

12. What, then, is the purpose of the first half of RRACA1, the discursive paragraphs A2 to A12? The purpose of that is somewhat less than clear but they seem to be particulars of the special insight which the claimant says it gave the defendants. What it is not doing, on an ordinary reading of the is setting out a component of the Business Opportunity or identifying confidential information.

13. Mr. Vinall relied on paragraph A4, and paragraph A4 says this:

> "The particulars of the Business Opportunity which made up the claimant's investment strategy and which in combination gave rise to the Business Opportunity are set out below".

14. What A4 means, so far as the relationship between Business Opportunity and investment strategy, is hard to understand, and Mr. Vinall was unable to shed any light.

15. A4 is then followed by A5 to A12, which are not part of the Detail. It is, therefore, ambiguous whether A4 is referring, when it refers to "particulars set out below", to paragraphs A5 to A12 or to the Detail section, which follows later and is also "below" A4. If it referred to paragraphs A5 to A12, then what is said in A13 is simply wrong whereas if it referred to the Details section then A13 is correct. The obvious construction is that A13 is correct and the “package of confidential information comprising the Business Opportunity are in the Details.

16. This is an issue which was explored and put to bed some years ago. After the service of the claimant's new case, there was an exchange of correspondence over the period 16th to 18th March 2022, whereby the claimant's previous solicitors, Waterfront, protested that A13 and A14 were clear, and confirmed that the claimant did not rely on any component of the Business Opportunity that was not set out in the Detail.

17. Moreover, a Part 18 request was served on 18th May 2022, which required the claimant to identify, amongst other things, how the Business Opportunity differed from certain documents in the public domain. In its response, the claimant reiterated (twice) that the component pieces of confidential information in the Business Opportunity are pleaded in the Detail.

18. I was not impressed with Mr. Vinall's strained attempts to suggest that other parts of the pleadings, taken out of context, detracted from this clear iteration of the claimant's

case.

19. It seems to me to be clear that a conscious decision was made by the claimant, after the judgment of Miles J, to cast its case as described above with the component parts of the Business Opportunity being identified in the Details section, and each component part being identified as confidential information. I reject the suggestion that this is not what was intended by the claimant and its legal team at that stage of the proceedings, which is contrary to the correspondence and the response to the request for further information.

20. Mr. Vinall confirmed that there has since then been a change of the legal team. While I have not been given the precise dates of that change, no one suggests that that is a recent change. On a change of the team, it is incumbent on the new team to review the pleadings and consider whether amendment is required. It will have been clear from a review of the defendants' pleadings that the defendants were operating on the basis that the Details contained all the component parts of the Business Opportunity on which the claimant relied. There has until now been no attempt to amend on this issue.

21. Against that background, the claimant applies to amend, to expressly rely upon certain matters in the first half of RRACA1 as (a) component parts of the Business Opportunity and (b) confidential information.

22. Turning to the law, I was referred to Kawasaki KK v James Kemball, [2021] EWCA Civ 33.

> "16. It was common ground that on an application to serve a claim on a defendant out of the jurisdiction, a claimant needs to establish a serious issue to be tried, which means a case which has a real as opposed to fanciful prospect of success, the same test as applies to

> applications for summary judgment: Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1804 per Lord Collins JSC.
>
> "17. The court will apply the same test when considering an application to amend a statement of case, and will also refuse permission to amend to raise a case which does not have a real prospect of success.
>
> "18. In both these contexts:
>
> "(1) It is not enough that the claim is merely arguable; it must carry some degree of conviction: ED & F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472 at paragraph 8; Global Asset Capital Inc v Aabar Block SARL [2017] 4 WLR 164 at paragraph 27(1).
>
> "(2) The pleading must be coherent and properly particularised: Elite Property Holdings Ltd v Barclays Bank Plc [2019] EWCA Civ 204 at paragraph 42.
>
> "(3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: Elite Property at paragraph 41."

23. In summary, that is a passage which makes clear that an amendment must, first of all, be an amendment which is more than merely arguable but carries some degree of conviction so far as the merits are concerned; secondly, it must be coherent and properly particularised; and thirdly, it must be supported by evidence which establishes a factual basis which meets the merits test.

24. I was also referred to a number of authorities on late amendments, the most significant of which is the decision of Quah v Goldman Sachs International [2015] EWHC 759:

> “10. …
>
> (a) In exercising the discretion under CPR 17.3 , the overriding objective is of central importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted.

(b) A strict view must be taken to non-compliance with the CPR and directions of the Court. The Court must take into account the fair and efficient distribution of resources, not just between the parties but amongst litigants as a group. It follows that parties can no longer expect indulgence if they fail to comply with their procedural obligations: those obligations serve the purpose of ensuring that litigation is conducted proportionately as between the parties and that the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately is satisfied.

(c) The timing of the application should be considered and weighed in the balance. An amendment can be regarded as "very late" if permission to amend threatens the trial date, even if the application is made some months before the trial is due to start. Parties have a legitimate expectation that trial dates will be met and not adjourned without good reason. Where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. A heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The timing of the amendment, its history and an explanation for its lateness, is a matter for the amending party and is an important factor in the necessary balancing exercise: there must be a good reason for the delay.

d) The prejudice to the resisting parties if the amendments are allowed will incorporate, at one end of the spectrum, the simple fact of being 'mucked around' to the disruption of and additional pressure on their lawyers in the run-up to trial and the duplication of cost and effort at the other. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission. If allowing the amendments would necessitate the adjournment of the trial, this may be an overwhelming reason to refuse the amendments.

e) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but that is just one factor to be considered. Moreover, if that prejudice has come about by the amending party's own conduct, then it is a much less important element of the balancing exercise."

25. I also find it helpful to refer to paragraph 38(d) :

"Lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done".

I do not regard it as significant whether one places the tag "late" or "very late" to an amendment. In the end, what is happening is a balancing exercise of the justice or injustice to the parties of allowing an amendment at whatever stage that amendment is made.

26. Clearly, if, as happened in the case of *Ahmed v Ahmed* [2016] EWCA Civ 686, to which I was referred, there is an amendment which is in some senses a formality because the parties have operated on the basis that the proposed amendment is already part of the case which has to be met and is an amendment which takes nobody by surprise, then it may well be that, however late the amendment is made, the balance of justice swings in favour of amendment. But in most cases, the later the amendment, the more likely it is that there will be injustice to the party on the receiving end of the amendment. This is because of the way our procedural rules operate. Pleadings come at the very outset of the case. They frame the case. Everything which happens thereafter is done on the basis of those pleadings. Steps are taken, decisions are made, costs are incurred, all on the basis of that framework. When that framework is changed, whenever that change happens, there is a risk of injustice to the people who have previously relied on that framework. The later that amendment comes, the more likely it is that injustice will be occasioned. That is why the later the amendment, the heavier the burden on the party making the application for an amendment to satisfy the court that it is just to do so.

27. Turning then to this case, so far as the Kawasaki test is concerned, I have a number of concerns about it. I will focus simply on particularisation.

28. It does not seem to me that the proposed amendments, in the way in which they are proposed to be amended, are in any way satisfactory. The proposed amendments,

bringing in parts of A5 to A12 (nuggets, as Mr. Vinall refers to them) is lifting from a part of the pleading which was not intended to identify the component parts of the Business Opportunity and was not intended to identify what was confidential, and to take them and put them into another part of the pleading whereby they will become component parts of the Business Opportunity and will thereafter be treated as if they contain confidential information. However, the nuggets which are being moved do not identify what, in these nuggets, is confidential. The proposed amendment does not say clearly what information in those nuggets is relied upon as a component part of the Business Opportunity. These nuggets refer to telephone calls and meetings, but precisely what is said to be the confidential component of the Business Opportunity is not separated from the narrative of who did what and who said what.

29. As I have said, these amendments do not expressly state what it is that is confidential in the information which is to be added. If the information is not confidential -- and it seems quite possible that it will not be confidential -- that would be a new turn to the way this case has been presented so far. As the current framework of the pleadings stands, the claimant's primary case is that every single component of the Business Opportunity as set out in the details is confidential information, although it has a fallback position that if one or more part of those components proves not to be confidential, that does not prevent the Business Opportunity as a whole itself being confidential.

30. Mr. Moody-Stuart says the attempt to make this amendment look innocuous by importing the nuggets rather than pleading out clearly the points which need to be made will actually make the pleadings less clear and the amendment more prejudicial. I agree.

31. I am not going to decide whether or not these particulars are supported by the evidence, but from what I have seen there is clearly an issue as to whether they are. I was taken to Mr. Amore's evidence, and that, on the face of what I saw, does not support the plea which it is said to support. Mr. Vinall seemed to think that there might be some other evidence which identified the relevant bonds and the relevant ISINs. Time did not permit us to explore that any further. So, I will leave that out of account. But I am not satisfied that the Kawasaki test on particularisation is satisfied.

32. Leaving that to one side, so far as the balance of justice is concerned, this application is too little too late. The claimant has had plenty of time to get its pleadings in shape. It was given an opportunity to reformulate its claim in 2022. I have been given no good explanation why the claimant is changing its position now. The suggestion that it has always thought this was part of its case is, in my judgment, not correct. The suggestion that this is what the current team thought is evidenced simply by a paragraph in a list of issues which, at best, ambiguously lists paragraphs A5 to A12 as relevant parts of the pleading to the issue of the transmission of confidential information. Why the present team thought that this was part of its case is not explained, and I find it difficult to understand how they could think so, if this case was being conducted properly, in the light of the pleadings, the correspondence, the RFI and the response of the defendants in its pleadings,.

33. The defendants say the claimants have, on any view, known since the Spring that this was a problem, but it is only in August that this application is raised. I think there is force in that submission, notwithstanding Mr. Vinall's submission that the judgment of Chief Master Shuman did not arrive until the end of August. Once the issue had been raised in Spring, it seems to me that if, indeed, the claimants thought there had

been a misunderstanding between them and the defendants as to what their case was, that was the time to make the application.

34. I accept the defendants' submissions that it has relied on the assurances it has been given as to the extent of the claimant's case and has prepared on the basis of it. If this amendment were allowed, I also accept that the defendants would be placed in an invidious position in knowing the case they have to meet. It would require further efforts to pin down what was being relied upon and the significance of what was being relied upon. It would possibly involve further requests for information. It would possibly require further amended pleadings. It would likely require further research to determine what, if any, defences the defendant might have. It might require further disclosure. It might require further searches, further evidence and a re-evaluation at the eleventh hour of the case as a whole.

35. The claimant says that the defendants' witnesses talk about each of the paragraphs it wants to introduce, but the defendants say it only does so at a high level and not at a granular level. Those witness statements have been prepared on one understanding of what is and is not relevant and it is not fair to treat them as all the evidence which the witnesses would have given if their minds had been turned to a different significance of those paragraphs.

36. After four years, and what I am told is millions of pounds in costs, this is much more than the "messing about" which was referred to in the judgment in Quah v Goldman Sachs International, which alone might have been sufficient to refuse an application at this stage. This is very significant prejudice, which I am told is likely to require an adjournment. In my judgment, the balance of justice swings very firmly in favour of refusing these amendments.

37. I was asked to make an exception in relation to particular 9(3)(i) of RRACA1, which would allow proposed amended paragraphs A9(2)(a) and (b) to be introduced. I am not going to allow that amendment. (3)(i) will stand or fall on its own as to what it pleads. It refers to further communications. At the moment, I do not presently see how the reference to oral conversations contains anything like the particulars of the confidential information which were required by the judgment of Miles J. If the claimant wants to argue that point further, it can do so during the course of the trial.

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