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



No.LM-2022-000084

The Rolls Building

Wednesday, 7 June 2023

Neutral Citation Number: (2023) EWHC 2168 (Comm)

Before:

HIS HONOUR JUDGE KRAMER sitting as a judge of the High Court

B E T W E E N :

COCOA SDN BHD & Anor

Claimants

- and -

MAERSK LINE A/S

Defendant

MR A LEUNG (instructed by Birketts LLP, Ipswich) appeared on behalf of the Claimants.

MR T STEWARD (instructed by Campbell Johnston Clark Ltd) appeared on behalf of the Defendant.

J U D G M E N T

(v i a M i c r o s o f t T e a m s)

(A p p r o v e d b y H H J u d g e K r a m e r 2 3 . 0 8 . 2 3)

JUDGE KRAMER:

(Transcript prepared from poor audio and without access to documents)

- 1 This judgment deals with the Defendant's application for specific disclosure dated 15 February 2023. The Claimants are represented by Mr Leung and the Defendant, Mr Steward, both of counsel.
- 2 The defendant seeks the disclosure of an exchange of correspondence between the claimant and JLB Expertises, a company which provided a survey of a report on a cargo of cocoa beans which are the subject matter of this claim. I also have to deal with a costs application concerning a withdrawn application but have yet to hear argument on that issue.
- 3 The facts relevant to the application are taken from the pleadings and the fourth and seventh statement of Richard Hickey, the defendant's solicitor, and the second statement of Pamela Dunning, the solicitor for the claimants.
- 4 The claimants claim to be parties with an interest in a cargo of cocoa beans which were shipped on the Maersk Chennai under a Bill of Lading issued at Lagos, Nigeria on 26 September 2017. The defendant owners of the ship acknowledged receipt of the goods and agreed to carry 11 x 40ft containers, containing a total of 4,430 bags of Nigerian cocoa beans in jute bags from Lagos to Tanjung Pelepas, Malaysia. The First claimant was the owner of the Cargo, the 2nd the indorsee of the bill of lading and the 3 and 4, insurers of first claimant.
- 5 Most of the cargo was loaded onto the vessel on 8 September 2017. There were two reports from JLB Expertises, dated 30 August and 15 September purporting to evidence that the cargo was in sound condition. The vessel discharged the cargo into storage facilities at Tanjung Pelepas on 30 September and 1 October 2017.
- 6 The 1st Claimant submitted the original bill of lading to the defendant on 17 November 2017, but for reasons as to which there is a dispute, the cargo was not delivered to the holder of the bills agent, that being the 1st Claimant, until 26 and 27 November. On delivery, 2,291 bags were wet, stained and suffered from mould growth due to wetting. The claimants allege that a further 12 bags were short delivered. The cocoa lost from the damaged bags resulted in

a shortage of 11,813 MT. There was a small amount of the cargo that was loaded about a week later onto the Maersk Cameroun but that was delivered to the 1st Claimant intact and there is no complaint concerning that shipment.

- 7 The claimants' primary case is that the cargo was shipped in good condition and complete, but it was delivered damaged and incomplete. It is for the defendant to prove that it took reasonable care of the goods and to carry them safely and properly up to the point of delivery. The claimants rely upon the common law as to the obligations of contractual bailees in making these allegations, as well as the contract of carriage in Art.3 to the Hague Rule. Further, the claimants advance the positive case that the damage was caused wholly or in part by the cargo remaining in containers for an excessively prolonged period, over 45 days, prior to delivery.
- 8 The defendant's case is that the cargo was carried safely and properly to Tanjung Pelepas but that the claimants did not take steps to collect the cargo until 13 November, at which point their obligations in relation to its safety ceased. They put the claimant to proof that the mould was not present at the time of delivery to the defendant, the methods of packaging and dunnaging and, in respect of the shortfall, the method used to tally the bags. There are other defences not relevant to the issue before me.
- 9 In addition to the JLB reports phytosanitary certificates were requested by the sellers, these evidence the fumigation of the cargo, and certify that on inspection it was free from Fusarium Wilt, Bud Rot and Red Ring Nematode. These were issued by the Nigerian Agricultural Quarantine Service. It appears from an email dated 30 October 2017 from BP DIT, the sellers of the beans, that a first set of certificates was produced by the Quarantine Service recording 72 hours of fumigation. The email asserted that this was contrary to the shipping instructions, as 120 hours fumigation is required for entry into Malaysia. The email requested 120 hours of fumigation to be performed and a certificate stating that the certificate should read "Phostoxin at 565 or 3gm/M3 for 120 hours". A certificate was

issued by the Quarantine Service dated 2 November 2017 recording 120 hours of fumigation on 19 August 2017.

- 10 I pause there to observe that the time at which the new certificate was requested post-dated the shipping of the goods and their delivery into Malaysia; so at the time the certificate was issued confirming 120 hours of fumigation, the goods had already left Lagos and therefore were not available for fumigation.
- 11 The JLB certificate of stuffing and loading, which records that moisture content was checked on 21 to 24 August 2017, also states that the beans were delivered to Wascot Warehouse Ibadan (so this is in Nigeria) on 21 August 2017, and that the fumigation of containers was from 22 August to 25 August 2017. It says there was a shipped on board date of 8 September 2017, which it states is the date that the vessel sailed.
- 12 The delivery date of 21 August 2017 is at odds with other supposedly contemporaneous documents. This discrepancy has been picked up in both parties' experts reports. There is witness evidence, exhibiting documents, which suggests that the cargo was in the warehouse on 2 August 2017. Mr Steward says that this evidence is not necessarily accepted. He argues that all the document says is that the date upon which the goods entered the warehouse is in doubt, and that none can be relied upon as accurate.
- 13 To set the application into procedural context, proceedings were issued on 28 September 2018. They comprised a claim for damages to the goods and consequential loss totalling €185,356.00. Paragraph 9 of the particulars of claim alleges that the goods were loaded in sound condition as evidenced by, a phytosanitary certificate issued on 3 November 2017 which showed 120 hours of fumigation, cocoa analysis reports numbers 4 to 6 issued by JLB Expertises on 20 August 2007 recording "typical cocoa smell, no contamination or off

odour detected,” and a further report issued by JLB on 15 September 2017 recording its findings on stuffing and loading and asserting that goods and containers were dry, the bags in good condition and the moisture controls used and the average moisture levels.

- 14 The defence is dated 27 August 2019. When dealing with the condition of the cargo, it is not disputed that it was found to suffer from mould damage in Malaysia, ie, after it had carried the goods, but it puts the claimant to proof that any mould damage was not present prior to loading and not the result of previous mould damage identified in a JLB analysis.
- 15 Case management directions and budgeting took place on 1 April 2022 when disclosure was ordered to be by 17 June 2022. Issue 7 in the disclosure discussion document reads:“In what order and condition was the cargo loaded on to the vessel on 8 September 2017 at Apapa Nigeria?”. Witness statements were to be exchanged by 5 August 2022. The defendant has required the claimant to prove the certificates on which they rely. A statement has been served from someone at JLB, which I have not seen, but this only goes to the certificate being the work of JLB. It does not explain its contents. Expert reports were to be exchanged on 4 November, with the joint expert memorandum by 25 November 2022 and supplemental reports by 16 December 2022. The trial is listed for the four days to begin on 12 June, the first day to be a reading day.
- 16 The experts have, as I say, both noted the discrepancy between the JLB Expertises certificate suggesting the goods arrived at the warehouse on 21 August 2017 and other documents which suggest they may have been there in advance of that date.
- 17 On 19 January 2023 Miss Dunning emailed Mr Hickey in these terms:

“Dear Sirs

1 The reports of the experts instructed by both the claimants and the defendants have noted that there is a potential discrepancy in an entry that appears, the “Stuffing and Loading Inspection Report” issued by JLB Expertises dated 15 September 201, when read in conjunction with other documents disclosed by the claimants [para.64 of Technical Report of Dr Roger Bancroft 16 December 2022; Paragraph 2.15 of report of Christopher Elliott dated 15 December 2022.]

2 The noted discrepancy entry, below, is on page 2 of the Stuffing and Loading Inspection Report in the box labelled “Operations” and is not in accordance with the other entries in that box:

*‘Delivery of lots at Waycot Warehouse, Ibadan on 21/08/17-
Number of lots, 1 to 2 and 5 to 24’.*

3 Claimants have disclosed two Certificates of Quality, Fumigation, Good Packaging Materials & Weight dated 25 September 2017, respectively in relation to the Maersk Chennai and Maersk Cameroun Cargoes, issued by the competent regulatory authority in Nigeria, the Federal Produce Inspection Service. Both Certificates certify that the date of fumigation of the Cargoes was 19 August 2017 and that fumigation had been conducted with phostoxin at 56%.

4. Claimants have also adduced a Witness Statement of Romuald Djossou, dated 10 October 2022. The Witness Statement exhibits at **RD1/1-2** a copy of instructions dated 1 August 2017 received from D.I.T., said to be for analysis of a lot of 300T Nigerian cocoa as quickly as possible because the merchandise is ready. The instructions go on to state that D.I.T’s representative was to be present at the warehouses of WACOT, the seller, during the survey. The instructions were forwarded internally by JLB Expertises on 2 August 2017 requiring the survey or to “*prepare samples and send them urgently to Lome*”.

5. **RD1/6-8** also exhibits analysis reports of initial pre-loading batch analyses conducted for D.I.T dated 7 August 2017. These certify that the sampling of lot number 1 to 24 took place at the warehouse in Ibadan, so inevitably the lots must have been in the warehouse by that date.

6. From the above evidence it is apparent that the 300MT of cocoa beans in lots 1 to 24 were already at the Ibadan warehouse of WACOT by, most probably, 1 August 2017 and that the Stuffing and Loading Inspection Report therefore contained a clerical error relating to when the lots were “delivered” to the warehouse. It should be obvious to those reading all the documents together that the lots were already at the warehouse on 21 August 2017 and that the use of the word “delivery” was a simple error that occurred when the report was being prepared, as it possible to read all the other entries logically, consistently and sensibly when all the evidence is considered.

7. The documents exhibited at RD1 are consistent with the fumigation of the lots taking place on 19 August 2017, as certified, at the WACOT warehouse and lasting for a duration of 72 hours, prior to stuffing in containers.”

18 I will come to para.8 in a moment, which is the key paragraph. What I apparent so far is that, whatever reason, the claimants’ solicitors were seeking to argue with the defendant’s solicitors in correspondence that the date in the relevant document of 21 August must be an incorrect date, albeit that the document in which that date is contained is one of those upon which they rely, in the Particulars of Claim, as evidence of the condition of the goods. Further, the certificate concerning fumigation, which is also one relied upon in their Particulars of Claim, indicating 120 hours of fumigation must be incorrect, because they say 72 hours is what they are claiming.

19 The email goes on at para.8 – and this is the key paragraph which has caused this issue which is before me

“8 Nonetheless, in order to clarify the relevant entry, and without waiver of any privilege and any communications, our clients contacted JLB Expertises to enquire specifically about the discrepancy in the Stuffing and Loading Inspection Report regarding *“Delivery of lots at Wacot Warehouse, Ibadan, on 21/08/17.”* Again, without waiver of any privilege, JLB Expertises confirm that the description of the entry is inaccurate and should read, *“lots ready for stuffing at Wacot Warehouse 21 August 2017”.*”

20 In relation to that email, Mr Hickey said, in an email dated 23 January 2023, with which I have been provided although it is not clear whether there was some email in between:

“Our client’s rights are entirely reserved in relation to your below email. As to para.8, it is completely unacceptable for your clients to be attempting to rely on this correspondence with a third party in order to support their speculative analysis of the facts whilst trying to assert privilege. First, the material is not privileged. Your clients are not gathering evidence for use in proceedings but seeking to raise a query with a third party about the contents of a disclosed document. Further or alternatively, the case law is clear, the court will not accept an attempt to deploy or rely on parts of a document or chain of correspondence in support of a party’s case whilst they are refusing to disclose it in full. This is unfair and liable to lead to cherry picking of

favourable excerpts. Given that the parties' experts are due to meet very soon, please disclose by 5 pm London time today both the full unedited email from JLB and the emails to them that prompted the response. In relation to the former, privilege has obviously been waived. In relation to the latter our clients are entitled to a sight in accordance with the collateral waiver principle. Failing disclosure in the above timescales, our clients' rights are fully reserved including to pursue an application".

We know that disclosure was not given.

21 This was followed by the 15 February 2023 application which is before me. That asks:

"That the claimants disclose by way of specific disclosure the documents identified in para.11 of the Fourth Witness statement of Richard Malcolm Hickey, dated 15 August 2023 pursuant to CPR 31.12, (specific disclosure on inspection) and/or CPR 3.1(2)(m), (the court's general powers of court management); and/or the inherent jurisdiction of the court in the terms of the draft order attached to the application notice".

22 What para.11 of Mr Hickey's statement asks for is:

"The claimant's communications with JLB Enterprises as referred to in para.8 of Ms Dunning's email of 19 January 2023".

23 Notwithstanding that the application was made in February for a trial which is to take place on 12 July, the application did not get on for hearing until 26 May 2023 just three weeks before the trial. The fact that it got on event them may have been by dint of the fact that there was availability in Newcastle for me to deal with the case on that day.

24 The claimants object to disclosure on the grounds that there is no jurisdiction to grant disclosure as sought under CPR 31.12 and that rule 3.1(m) has no application to disclosure in the BPC, which is governed by Civil Procedure Rule PD57AD. Furthermore, an application under the last provision must fail due to non-compliance with its terms and on its merits in any event, that is that the exchanges between the claimants and JLB were and remain privileged and that there had been no waiver.

25 In order to determine its application aside from the issue of privilege alone, it is first necessary to establish what test I must apply. Mr Steward accepts that he could not rely on

Part 31 because para.1.8 of Practice Direction 57AD specifically disapplies Part 31 from proceedings in the Business and Property Courts, apart from some express savings in relation to disclosure in pre-action and against non-parties.

26 Practice Direction 57AD 18 provides:

“18.1 The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.

18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4).

18.3 An application for an order under paragraph 18.1 must be supported by a witness statement explaining the circumstances in which the original order for Extended Disclosure was made and why it is considered that order should be varied.

18.4 The court’s powers under this paragraph include, but are not limited to, making an order for disclosure in the form of Models A to E and requiring a party to make a witness statement explaining any matter relating to disclosure”.

27 Mr Steward said that para.18 cannot apply because he is not seeking to vary an order for extended disclosure but seeking specific disclosure in relation to an issue identified for the purposes of extended disclosure. As this is not catered for in Practice Direction 57 the court must have resort to its general case management powers under rule 3.1(2)(m).

28 Mr Leung argues that the court is obliged to apply Part 57. not general case management powers in determining this application. He referred me to *Patisserie Holdings Plc v Grant Thornton UK LLP* [2021] EWHC 3022 (Comm); and *Vannin Capital PCC v RBOS Shareholders Action Group Limited* [2019] EWHC 1617 (Ch) in support. He says that this proposition and *Brake v Lowes* [2020] EWHC 538 (Ch) to establish that strict compliance with para.18 is required before a court can grant relief. Mr Leung says there is no *lacuna* in

Part 18 which needs to be covered by general powers of case management. The addition of an order for specific disclosure is a variation of the preceding extended disclosure order.

29 In *Patisserie Holdings*, Moulder J was dealing with a case involving the predecessor to Practice Direction 57AD. At paras. 37-39 she ruled that the court's inherent jurisdiction to manage cases under CPR 3.1(2)(m) should not be used to cut across the Practice Direction as the latter was designed to:

“... provide a structure and a set of rules which limit disclosure to what is reasonable and proportionate”.

She added that wider relief should only be granted if the court was satisfied that it does not run contrary to the regime imposed by the Practice Direction.

30 Mr Steward sought to distinguish *Patisserie Holdings* on the basis that that case was concerned with initial disclosure where one would expect the rule specific to that stage of proceedings would be restrictive, whereas this case concerns disclosure at a later stage.

31 It seems to me that these are distinctions without a difference. At each stage of disclosure there will be different considerations as to what is reasonable and proportionate. The Practice Direction sets out a set of rules which starts with the issue of proceedings and endures to trial. One only needs to look at the limited circumstances for the making of an order under para.18 to see that it carries through the disclosure regime in the BPC. It would be absurd if it could be bypassed by resort to a general power of case management. To allow that would permit the party seeking disclosure to get by the back door that which under the rules they could not get by the front. It would put the specific rule in danger of becoming otiose and for that reason I prefer the approach advanced by Mr Leung.

- 32 The case of *Vannin* was referred to. In that case the claimant sought to argue that para.18 had to be read subject to the restrictive way in which a court approached an application to vary or review its order under CPR 3.17 as set out in *Tibbles v SIG Plc* [2012] 1 WLR 2591. That argument was rejected by Joanne Smith QC (as she then was) sitting as a Deputy High Court Judge as there was nothing in a disclosure pilot which introduced that approach to the variation of an order (see para.10 of her judgment). This view emphasises that the provisions for disclosure in the BPC are free-standing and are unaffected by the general powers to be found in Part.3.
- 33 Dealing with the application under para.18, I should look at this application prior to considering the issue of privilege, although of course if the documents are privileged and privilege has not been waived, that would be an additional reason for refusing permission to vary under para.18.
- 34 Under the paragraph, the defendants must satisfy me that the variation of the original order for the extended disclosure is necessary (and I emphasise that word) for the just disposal of the proceedings and is reasonable and proportionate as defined in para.6.4. In addition, the application must be supported by a statement explaining the circumstances in which the original order was made and why it is considered it should be varied.
- 35 I do not need to dwell on proportionality as the court is only concerned with the limited amount of correspondence which came into being relatively recently. It has not been suggested that producing those documents would require substantial searches or substantial effort. Therefore it does not seem that an absence of proportionality would be a reason for refusing the application.

- 36 The main disputes in relation to the para.18 application is as to whether the defendant has complied with the formalities required by the paragraph, and, if not, whether that in itself is a reason to refuse relief, whether the further disclosure sought is relevant to an issue in the case, and, if it is, whether it is necessary for a just disposal of the case and reasonable.
- 37 The claimant's case on formalities is based on the requirements of para.18(3). It is said that Mr Hickey's two statements do not explain why the disclosure is required for the just disposal of the proceedings; nor does it explain the circumstances in which the original order for extended disclosure was made and why it is considered that the order should be varied.
- 38 Mr Leung says, on the authority of *Brake v Lowes*, that compliance with para.18.3 is the threshold condition to an application under the Practice Direction. In *Brake*, HHJ Paul Matthews (sitting as a Judge of the High Court) ruled, at para.13, that compliance was a threshold condition, as the Practice Direction contemplated that the court would be put into the position of knowing "why the court had done what it did in the first place", before making a variation order.
- 39 Mr Steward argues that although Mr Hickey's statement does not, in terms, set out the basis of the original order and why it should be departed from, that can be detected from the issues in the DRD and the fact it is common ground that the documents now sought post-date the disclosure order, and were generated by an exchange between the claimants and JLB of which the defendant did not become aware until the January 2023 email.
- 40 I accept that I should not apply a mechanistic approach under which I should refuse relief for a technical failure provided the court can ascertain the reason for the original order and why it may be just to vary. I accept that issue 7 of the DRD and the disclosure order in

respect of that issue sufficiently explains the reason for the order which followed – that is, both sides recognise the imperative of documentary evidence which sheds light on the condition of the cargo when it was loaded on to the vessel on 8 September. It is also evident that as the exchange of correspondence did not occur until after disclosure, and this explanation for what is said to be a clerical error in the report did not come into being until much later. It was not contemplated by the original order and would not fall to be disclosed under the original order unless the correspondence contained adverse documents, as to which there is a continuing duty of disclosure. These two factors would be sufficient to cross the threshold to enable the court to consider whether disclosure is required for the just disposal of the proceedings.

41 Mr Steward, on whom the burden lies, points me to a number of discrepancies in the documents relied upon in the claimants' pleadings as evidence of the condition of the goods and his expert evidence which advises that the moisture readings on and attached to the certificates and reports are improbable. He argues that the history of the presence of the cargo in the warehouse prior to shipping is therefore important in identifying why the goods were eventually damaged. Added to this is Mr Hickey's evidence to the effect that the defendant wanted to know who was behind the explanation in para.8 of the email and why JLB thought that this explained the discrepancy in the certificate so that the defendant could assess what weight would need to be given to JLB's recollection in 2023. Mr Steward did not press this point, but it seems to me it was an explanation from Mr Hickey as to why he was saying there should be disclosure.

42 Mr Leung argues that the requested documents are irrelevant to issue 7 in the DRD. First, what is in the email is not evidence in the case, so the defendant does not need to assess its weight. Second, there is no issue as to whether the cargo was delivered on 21 August 2017

or when it was stuffed. None of this is relevant to the condition of the cargo when loaded. The defendant does not explain in evidence, or in its skeleton, how the question of whether the goods were ready for stuffing on 21 August has any bearing on what happened to it between 1 and 23 August if it transpires it was in the warehouse by that stage.

43 He also asked me to look at the expert evidence in the joint statement in which Mr Elliott, the defendant's expert, having, at para.3.2, noted "significant discrepancies" in the documentation published in Nigeria, does not suggest that this has some relevance as to how the goods were treated when first received at the warehouse or suggest that this should lead to an examination of the history of such treatment. His point is that documents do not evidence that the cargo was in good condition when delivered to the vessel because of their unreliability. On the contrary, insofar as they can be relied upon, the JLB stuffing report indicates a portion of the cargo which would have been favourable to mould growth, which would have been causative of an increase in temperature and a factor in the formation of condensation in the containers into which the goods were stuffed for shipping. It is his opinion that the damage was caused by wetting by condensation, also called 'container sweat', which formed on the internal sides of the containers. Treatment of the goods prior to stuffing is not identified as a cause of damage. Accordingly, the expert evidence does not support the case that it is relevant to make an investigation of what was happening between 1-21 August.

Conclusion

44 Mr Leung's point that para.8 of the January email is not evidence in the case will be looked at when considering the claim for privilege. Aside from that, I agree with his characterisation of the question as to why JLB told the claimant, if they did, that they must

have been mistaken and that there was an error in the report in which the stuffing date was shown as the date of delivery to the warehouse, as not being relevant to issue 7 in the DRD in the light of the expert evidence to which I was referred, and the fact that neither the date of receipt into the warehouse or the date of goods were available for stuffing are dates which the claimant is seeking to prove as necessary to establish that the goods were in good condition when loaded on the vessels. Nor is the defendant in its pleading, or expert evidence, relying on these dates as evidence that it was not.

45 The relevance of the alleged error in the JLB report, as is the case with the other discrepancies, is that they arguably appear to be an unreliable source of information as to the condition of the cargo. As the claimants rely on these documents as evidence of their state, there is no need for further explanation as to why JLB sought to explain away one of the errors, for the force of the certificates is already, on the defendant's case, undermined. I am thus not persuaded that the variation of the disclosure order is necessary for the just disposal of the proceedings or reasonable. That view is reinforced by my conclusion as to whether the exchange is privileged.

46 The claim to privilege is based on the established principle that communications between a party and its solicitors and their communications with third parties to gather evidence for the purposes of existing legal proceedings are privileged. In that respect, having read Mr Hickey's email suggesting that this was not a gathering of evidence but something else, namely, seeking to explain away the existing evidence, is again a distinction without difference. An attempt by the solicitors to investigate as to why it is that the certificate was bearing a date which did not appear to be correct is an attempt to gain evidence.

47 No-one has sought to argue that privilege does not attach to communications with third parties to gather evidence for the purposes of existing legal proceedings. The defendants, however, argue that the January email waived privilege when it referred to what the claimants had been told by JLB. Mr Steward referred me to the *Brennan & Ors v Sunderland City Council* [2009] ICR 435 at paras.16 to 17, where Elias J stated, citing Mustill J in *Nea Karteria Maritime Co Ltd v Atlantic Great Lakes Steamship Corporation No.2* [1981] Com LR 138 at 139 where he said this:

“Where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood. This is frequently referred to as the ‘cherry picking’ principle. A party cannot seek to gain an advantage in litigation by placing part of a document before the court and withholding the remainder”.

48 Mr Steward says this is a classic case of cherry picking. He seemed however to accept that if the explanation had been set out in a served statement used at trial drafts of that statement and correspondence between the third party and solicitors or claimant concerning the preparation of the statement would be privileged.

49 He distinguished that situation on the basis that here the claimant was seeking to rely on a reported exchange in an email, whereas had it been contained in a witness statement he would have had the opportunity to cross-examine the maker as to the source of their understanding. He said that the claimant should not be permitted to slip this document into evidence in a backdoor way without the same being subject to the scrutiny of disclosure. Otherwise neither the court or the defendant has had a fair presentation of the claimant’s evidence.

50 Mr Leung does not dispute the effect of *Nea Karteria*. Indeed, he relies upon it. He says “deploying” means deploying evidence in court in the strict sense, and he referred me to the decision of *The Zephyr* [1984] 1 Lloyd’s Rep 58 where Hobhouse J (as he then was) said, referring to what was said by Mustill J in *Nea Karteria*, said at p.99 of the report,

“Now looking at the reasoning of Mr Justice Mustill, it seems to be clear that he is approaching the matter using the words ‘deploying in evidence’ in the strict sense, in other words he is looking to see what is in evidence and what is not in evidence and in applying principle he repeatedly refers to what is given in evidence”.

And the claimant’s case here is that what is in the email is not in evidence in this case; still less has it been deployed. The question of waiver would only arise if it were deployed.

51 There has been an exchange of correspondence as to why the claimants put the email into the trial bundle. They say that the bundle of solicitors’ correspondence is part of the trial bundle as a matter of course, but that is not the case. If there is likely to be an issue as to what was said between the solicitors, usually when costs come to be argued, it is helpful to have a paginated bundle of the relevant correspondence. It should not, however, be regarded as standard practice to include all the inter-solicitor correspondence in the trial bundle; Appendix 7 to the Commercial Court Guide, which applies by extension to the Commercial Circuit Court, requires that bundles should only contain documents which are necessary for the hearing.

52 Mr Leung has told me that the email is not to be relied on and thus it has no place in the trial bundle. On a separate note, however, if the defendant objects to a document being included in the bundle, the correct approach for the claimant to adopt is not to include it but to

produce a separate bundle and then ask for the court's ruling as to whether the additional documents are to be admitted.

53 My conclusion is this – the email of January 2023 has yet to be deployed in evidence. The privilege in relation to the communications which lay behind it has not been waived. I am told that it will not be deployed, so, the question of waiver may not arise at any stage. I hold, therefore, that, certainly at this stage, privilege has not been waived. I cannot order the documents to be disclosed. I therefore refuse the application.

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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