

NCN: [2024] EWHC 1340 (Comm)
IN THE HIGH COURTS OF JUSTICE

Claim No: CL-2020-000748

BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (KBD)

The Honourable Mrs Justice Cockerill DBE
10 May 2024

B E T W E E N :

(1) FIESTA HOTELS AND RESORTS SL
(2) RESIDENCIAL MARINA SL
(3) RESIDENCIAL ES VIVE SA
(4) DOMINICAN ENTERTAINMENT (LUXEMBOURG) SARL

Claimants

and

(1) DEUTSCHE BANK AG
(2) DEUTSCHE BANK AG, LONDON BRANCH

Defendants

EDWARD LEVEY KC, LAURIE BROCK and IAN SIMESTER (Instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) appeared on behalf of the Claimants

ALEXANDER POLLEY KC and WILLIAM DAY (Instructed by **Herbert Smith Freehills LLP**) appeared on behalf of the Defendants

APPROVED JUDGMENT

Digital Transcription by Epiq Europe Ltd,
Lower Ground 46 Chancery Lane WC2A 1JE
Tel No: 020 7404 1400
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
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MRS JUSTICE COCKERILL

1. Thank you very much. The point has obviously been very skilfully argued on both sides.
2. I am not going to give you any lengthy judgment on this, but at the heart of this is the practical question about what Project Fox is doing and what the documents surrounding it are likely to yield, in terms of what can sensibly be put to witnesses at the trial, what can sensibly be relied on in opening or closing submissions. In essence the practical utility of the documents.
3. To a large extent it seems to me that what is being focused on in relation to this application is material which, in an ideal world, anybody running the fraud claim would like to see, because it may well give rise to embarrassing correspondence that the other side would not like them to see and because it may help them to short circuit the analysis of what was being thought of as abnormal.
4. But that does not really engage, as Mr Polley said, primarily with the issues which have to be decided in relation to the restructuring fraud aspect.
5. The other aspects to which, it seems to me, these documents may properly go is to effectively test the storyline. So, when one is looking at the account of what was done and why it was done and the state of mind of those who are in the frame as regards fraud, this correspondence may -- although it is slightly secondary -- provide material which might be useful for cross-examination.
6. So one does have an application which in large part does not really seek documents which are properly probative. But in part, it does seek documents which may have a trial purpose in terms of relevance and utility, if maybe not probativeness.
7. In those circumstances, this would obviously be a fairly marginal case in relation to disclosure whenever one made it and however lavish one was feeling about the concept of disclosure.

8. We are now at a point in the timeline of this case and in the circumstances of this case where the test in relation to paragraph 18 of PD57AD needs to be looked at with somewhat of a laser focus.
9. In those circumstances, I do have to think very carefully about what is necessary for trial and about reasonableness and proportionality. As I have said, the question of necessary for trial probably is not met, but it is marginal.
10. The question of reasonableness and proportionality has to be looked at through the lens of where we are. Not just the financial cost but, as Mr Polley rightly said, the other cost. I think those points are going to be points that the parties need to take on board for all the disclosure applications which are apparently out there between now and trial. There will be laser focus on that balance.
11. In these circumstances, I would have been minded to give something in relation to one of the custodians but what is being offered is, I think, for the moment sufficient.
12. The other thing which I am going to say I would like to be done is for an audit to be done on the timeline and to the extent gaps in terms of email traffic can be located, even after Mr Civade's locally saved documents file has been looked at and the ten documents that have been identified have been looked at. To the extent there are identifiable email gaps, some conversation should be had about whether there is a sensible way of, for example, filling in the email from the BCU, whether there is an easy way of getting to that. Because that will give contemporaneous horse's mouth account of what was said or what account was given. So that may be useful. So that is all I am prepared to order: what the defendants have offered, plus that extra.
13. I should say in relation to Mr Civade, it seems to me that in that he is the chief investigator in relation to Project Fox, and that he went to the trouble of maintaining a file, it is a shortcut. If there are documents which are likely to be relevant, there is a very good chance they are in there. If that then discloses that there are further documents that are missing, that really should be looked for, that may be a way to do it. But it will give a very good indication of whether there is any important gap and I suspect that there will not be.

Approved Judgment
The Honourable Mrs Justice Cockerill DBE

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Lower Ground, 18-22 Funnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: civil@epiqglobal.co.uk