



Neutral Citation Number: [2022] EWHC 1403 (Ch)

Case No: IL-2020-000097

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

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 7 June 2022

**Before:** Deputy Master McQuail

**Between:**

**(1) GHS Global Hospitality Limited**

**Claimant**

**- and -**

**(1) Edward Anthony Beale**

**Defendants**

**(2) Binu James**

**(3) Webstorm Information Technology Private  
Limited**

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**Miss Josephine Davies and Ms Maria Kennedy (instructed by Rechtschaffen Law) for the  
Claimant)**

**Mr Thomas St Quintin (instructed by Potter Clarkson) for the First Defendant)**

**Mr Theo Barclay (instructed by Stobbs) for the Second and Third Defendants)**

Hearing dates: 24 and 25 March 2022

## **Approved Judgment**

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I direct that this approved judgment, sent to the parties by email at 10am on 7 June 2022, shall be deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

**Deputy Master McQuail:**

1. This judgment concerns two applications in these proceedings:
  - (i) an application dated 9 September 2021 by the claimant to amend its particulars of claim (**PoC**) in the form of proposed amended particulars of claim annexed to the application (**APoC**) (save as otherwise appears references to paragraph numbers in this judgment are to the APoC);
  - (ii) an application dated 26 October 2021 by the first defendant to strike out the PoC under CPR 3.4(2)(b) and/or (c), alternatively that it be struck out under 3.4(2)(a) and/or that summary judgment be given.
  
2. There is a third application dated 7 January 2021 made by the first defendant seeking disclosure of an arbitration award that is said to determine the effect of a settlement agreement (**the Mediation Agreement**) between the claimant and various parties who may be jointly liable for acts alleged in the APoC. Directions will be given for the hearing of that application if it remains relevant after the present applications are determined.
  
3. At the hearing, counsel for the claimant confirmed that the APoC represents an improved and clarified version of the claims advanced by the PoC and confirmed that deletions in the APoC of primary causes of action meant they were abandoned. Accordingly, by the deletions of the claims of infringement of object and source code against each of the defendants and the claims of database right infringement, misuse of confidential information and conspiracy against the second and third defendants those causes of action are abandoned. The claimant's better formulation of its remaining causes of action is contained in the APoC.

4. Accordingly, the questions as between the claimant and the first defendant are:
  - (i) whether the APoC (and PoC) survive the first defendant's summary judgment/strike out applications;
  - (ii) if the APoC (and PoC) survive summary judgment but not strike out whether the claim against the first defendant should be struck out or the claimant be given a further opportunity to plead its case;
  
5. The second and third defendants are concerned only with the amendment application. It is their position that they do not object in principle to the amendment of the claimant's pleading but that the proposed APoC insufficiently particularises the only claim made against them (of copyright infringement) and so permission to amend in the form of the APOC should not be allowed.
  
6. The first defendant's application is supported by his witness statement of 25 October 2021. He says that the lack of particulars means that he is unable to understand the causes of action against him. He says also that until he ceased to be a director of the company from which the claimant claims to have obtained the rights alleged to be infringed he cannot have undertaken acts of infringement and nor does the claimant have any claim before it acquired those rights. He also denies that he has or ever had a copy of or access to or the ability to access the bespoke sales and customer relationship management system (**CRM**) (**the Syncomate Software**) which is at the root of the claimant's claims and does not now have and believes he never had access to the alleged infringing software (**AP Digital**).

7. The claimant has not put in any evidence in connection with either application. The PoC is verified by a signed statement of truth. Although the APoC is not so verified, it would need to be before being served.

## **Background**

8. These proceedings are one aspect of a wider dispute between three brothers. On one side is Tejinderpal Matharu (**Tony**), and on the other Harpal Matharu (**Harp**) and Rajeshpal Matharu (**Raj**). Tony is a director of the claimant and its sole shareholder. Harp and Raj are not parties to these proceedings, possibly because the Mediation Agreement releases them from claims made in the proposed APoC. The terms of the proposed APoC make allegations of wrongdoing against them, even though no relief is sought against them.

9. The Grange Group of hotels was founded and run by Harp, Raj and Tony.

10. Global Hospitality Services Limited (**GHS**) was incorporated in 2002. The first defendant's father, Edward George Beale (**EGB**) owned its only share which he held on trust for Harp, Raj and Tony. EGB was GHS's sole director for much of its existence.

11. Part of GHS's activity was to carry on business as a hotel sales and marketing company, providing services both to hotels in the Grange Group and to independent hotels outside the UK.

12. EGB died in March 2017. After EGB's death the first defendant was asked by Harp and Raj to take on a role in GHS, and two other businesses. He commenced work at GHS in July and was formally appointed the sole director in August 2017.

13. The first defendant says his brief was to find out what was happening with the business of GHS and to determine its viability, including by securing the use of GHS's information technology function. The claimant's case, in short, is that the first defendant, at the instigation of Harp and Raj, secured access to and made copies of software and data of GHS including the Syncomate Software and the Syncomate Data, in order to make it available to a new business under the control of Harp and Raj.

14. On 13 October 2017 GHS entered into administration.

15. In late October and early November 2017 a sealed bidding process took place for the purchase of GHS and its assets. The two interested parties were the claimant and Amistad Hotel Marketing Partnership Limited (**Amistad**) which was incorporated on 10 November 2017; its sole director and shareholder was the first defendant. The claimant made the successful bid of £2.1m, beating Amistad's bid.

16. The claimant claims that by a written agreement dated 13 November 2017 (**the SPA**) it took an assignment from GHS of GHS's intellectual property rights and its commercial information. The claimant did not take any assignment of any relevant existing claims that GHS had and counsel for the claimant confirmed that the only causes of action it relies on in these proceedings are ones that accrued on or after 13 November 2017, although acts of the defendants prior to that date may be relevant.

17. The claimant claims that the first defendant made available wrongfully obtained material to Amistad which used the material in a bespoke CRM called AP Digital. Amistad entered liquidation in April 2019.

18. Rechtschaffen Law on behalf of the claimant sent a letter before action dated 30 May 2018 to Harp, Raj, the first defendant and others complaining about matters including those now the subject of the APoC. Rechtschaffen Law, on behalf of Tony and the claimant sent a further letter before action dated 10 January 2020 (mistyped 2019) to Harp, Raj and the defendants to these proceedings. That letter enclosed draft Particulars of Claim which named Harp and Raj and the defendants to this action as parties to a prospective claim alleging that they were parties to a common design and/or conspiracy to infringe various alleged rights in intellectual property and data.

19. The present proceedings were issued on 1 June 2020, joining only the three named defendants. By the APoC it is alleged that:

(i) the first defendant is liable for:

(a) infringement of copyright;

(b) breach of confidence;

(c) infringement of sui generis database rights; and

(d) unlawful means conspiracy; and

(ii) the second and third defendants are liable for infringement of copyright.

20. The APoC alleges that the value of the claim is the total sum of £2.1m which is equal to the sum paid by the claimant for its acquisition of GHS's assets.

21. The first defendant served a request for information seeking further detail of the claim made against him on 4 August 2020 (**RFI**). No response was received before the date for the first defendant's defence. That defence, denying the claimant's claims, was filed on 28 August 2020.

22. The response to the first defendant's request for further information was dated 29 September 2020 (**RRFI**). Relevant elements of a number of the responses are now incorporated within the APoC. Although the tenor of much of the RRFI was to deny inadequate particularisation of the claim "at this stage" and assert that requests for particulars were requests for evidence.

23. The second defendant is resident in India and the third defendant is an Indian company. There was some procedural wrangling about service of the claim out of the jurisdiction and service was only effected on 24 June 2021. Before the second and third defendants' defence was due the claimant indicated its intention to seek to amend the PoC and it was agreed that, until the disposal of any application to amend, no such defence should be served.

24. The APOC was sent to the defendants on 13 August 2021. They did not consent to the amendments.

### **Amendment**

25. Following service of a statement of case, unless all other parties consent in writing, the Court's permission is required to amend it: CPR 17.1(2)(b).

26. The parties agree that the Court's discretion in deciding whether to grant permission to amend is to be exercised in accordance with the overriding objective. In *Essex County Council v UBB Waste (Essex) Ltd* [2019] EWHC 819 (TCC), 184 Con LR 76 Pepperall J said at paragraph 11:

“...there is essentially one rule on any application to amend. Parties should be allowed to amend their statements of case to bring forward intelligible and apparently credible claims or defences where the balance of injustice to the applicant if the amendment is refused outweighs the injustice to the other party and to the litigants in general if the amendment is permitted”.

27. The Judge went on to point out that the tests of intelligibility and apparent credibility arise because the court ought not to allow amendments which are liable to be struck out or against which summary judgment would be ordered.

28. Mr Barclay also drew my attention to paragraph 53 of the judgment of Roger Ter Haar QC in the case of *Advance Systems Control Inc v Efacec Engenharia e Sistemas SA* [2021] EWHC 914 where he quoted a passage from the judgment of Asplin LJ in *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204 where she said at paragraph 41:

“ For the amendments to be allowed the [applicants] need to show that they have a real as opposed to fanciful prospect of success which is one that is more than merely arguable and carries some degree of conviction: *ED&F Man Liquid Products Ltd v Pael* [2003] EWCA Civ 472. A claim does not have such a prospect where (a) it is possible to say with confidence that the factual basis for the claim is fanciful because it is entirely without substance; (b) the claimant does not have material to support at least a prima facie case that the allegations are correct; and/or (c) the claim has pleaded insufficient facts in support of their case to entitle the Court to draw the necessary inferences: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1.”

### **Strike Out**

29. CPR 3.4(2) provides:

“The court may strike out a statement of case if it appears to the court –  
(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;



- (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;
- (c) that there has been a failure to comply with a rule, practice direction or court order.”

30. As to CPR 3.4(2)(c), the relevant rule with which the first defendant says that the APoC do not comply is CPR 16.4(1)(a) requiring the inclusion of a concise statement of the facts on which the claimant relies.

31. In the case of each sub-paragraph of CPR 3.4(2) the first defendant's complaint is essentially the same: the claimant has not given details of its case, with the result that the first defendant is not able to understand the case that he has to meet.

32. The notes at section 3.4.1 of the White Book and the judgments in *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ 685 and *Biguzzi v Rank Leisure plc* [1999] 1 WLR 1926 to which I was referred make clear that applications for strike out under CPR 3.4 should be made as early as possible, that exercise of the power is a draconian remedy which should only be exercised when it is just and proportionate and that other remedies may be more appropriate.

33. The power to strike out under CPR 3.4(2)(a) and the power to grant summary judgment were compared by Marcus Smith J in *Allsop v Banner Jones Ltd* [2021] EWCA Civ 7, where at [7] the Judge said:

“In contrast with the applications under CPR r 3.4(2)(b), the applications under CPR rr 3.4(2)(a) and 24.2 are concerned with the merits of the claim, specifically whether the claim meets the (low) threshold of what I shall call “reasonable arguability”. Although it can be said that there is no material difference between the test applied by these two provisions, there is an important distinction between CPR r 3.4(2)(a) and CPR r 24.2, in that an application under CPR r 24.2 can be supported by evidence, whereas an application under CPR r 3.4(2)(a) should not involve evidence regarding the claims advanced in the statement of case.”

34. The approach to summary judgment was summarised by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) and approved by the Court of Appeal in *AC Ward & Son v Catlin (Five) Ltd* [2009] EWCA Civ 1098 as follows:

- “i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 2 All ER 91;
- ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
- iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*;
- iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
- v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
- vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
- vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

## Copyright Infringement Allegations

### The Law

35. In the UK, the provisions that determine the existence and infringement of copyright are contained in the Copyright Designs and Patents Act 1988 (**the CDPA**).

36. The relevant framework of the CDPA is as follows:

(i) section 1(1) provides that copyright is a property right that subsists in original literary or artistic works;

(ii) section 1(3) provides that to qualify for protection in the UK a work must do so as a consequence of the citizenship or residence of its author, or place of first publication, see sections 153 to 155;

(iii) section 3(1) provides that “literary work” means any work, other than a dramatic or musical work, which is “written, spoken or sung”, and accordingly includes -

(a) a table or compilation other than a database;

(b) a computer program;

(c) preparatory design material for a computer program and

(d) a database;

(iv) the requirement for an original work is satisfied if and only if two cumulative conditions laid down by the CJEU in *Cofemel v G-Star Raw* Case (C-683/17) [2020] ECDR 9 at [29]:

“First, that concept entails that there exist an original subject matter, in the sense of being the author’s own intellectual creation. Second, classification as a work is reserved to the elements that are the expression of such creation”;

(v) these conditions were further explained in [30] to [34] of *Cofemel*. In essence, the first – originality – requires the expression of free and creative choices and is not present where the subject matter is dictated by technical considerations, rules or other

constraints. The second – classification as a work – requires the subject matter to be identifiable with sufficient precision and objectivity, among the reasons for that requirement (see *Cofemel* [33]) are:

(a) because courts assessing infringement must be able to identify, clearly and precisely, the subject matter protected; and

(b) because alleged infringers must also be able to do so;

(vi) section 16 provides that infringement occurs if a substantial part of a work has been copied. In *SAS Institute v World Programming* [2013] EWCA Civ 1482 Lewison LJ, at paragraph 38, accepted the proposition deriving from *Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2010] F.S.R. 20 that “a substantial part” must “contain elements which are the expression of the intellectual creation of the author of the work”;

(vii) section 3A deals with databases. A collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means comprises a database and will be an original literary work protected by copyright if by reason of the selection or arrangement of its contents it constitutes its author’s own intellectual creation;

(viii) in *Football Dataco v Britten Pools* [2010] EWHC 841 (Ch), Floyd J set out a four stage test for assessing whether or not database copyright subsisted at paragraph 91:

"It seems to me that the task for the court is as follows:

- i) Identify the data which is collected and arranged in the database;
- ii) Analyse the work which goes into the creation of the database by collecting and arranging the data so identified, to isolate that work which is properly regarded as selection and arrangement;
- iii) Ask whether the work of selection and arrangement was the author's own intellectual creation and in particular whether it involved the author's judgment, taste or discretion;
- iv) Finally one should ask whether the work is quantitatively sufficient to attract copyright protection."

37. Mr Barclay drew my attention to Recorder Campbell QC's judgment in the case of *Oysterware Limited v Intenator Limited* [2020] EWHC 2125 where he said at paragraph 19:

“in a case of infringement copyright in computer software, it is important to identify the relevant work; the intellectual creation of the relevant author; and whether the alleged infringement copies the form of expression of that intellectual creation.”

## **Copyright Infringement Allegations**

### **The Pleading**

38. The allegations of copyright infringement against the first defendant are set out in paragraphs 10, 10A, 15, and 30 to 34.

39. The allegations of copyright infringement against the second and third defendants are set out in paragraphs 10, 10A, 13 and 30.

40. Paragraph 10 alleges that the Syncomate Software comprised at least the following copyright works:

(i) at 10(1) - “images used in the graphical user interface which are each an original artistic work, and are together a compilation amounting to an original literary work”.

That is an allegation of two types of copyright work: images and a compilation;

(ii) at 10(2) - “the structure and presentation of the elements of the graphical user interface”. That is an allegation of the existence of two copyright artistic works: the structure of the elements of the GUI and the presentation of the elements of the GUI;

and

(iii) at 10(3) - “the schema for the database” being an original literary work.

41. Paragraph 10A(1) lists the names of seven individuals said to be the authors of the claimed copyright works, but no author of any of the particular works is specifically identified.

42. Paragraph 10A(3) refers to the sale of intellectual property rights subsisting in the software to the Claimant on 13 November 2017. At the hearing the claimant's counsel confirmed that that reference to software was intended to be a reference to the Syncomate Software.

43. Paragraphs 15 and 31 of the APoC allege that the first defendant copied all or a substantial part of the alleged copyright works. The paragraph 15 allegation of copying, is said to be inferred from:

- (i) at 15(1) - the sending of an email referring not to the alleged copyright works but to Gmail accounts and email data; and
- (ii) at 15(2) and (3) - the sending of emails that make no reference to copying the alleged copyright works and did not involve the first defendant.

No consequence of these emails is pleaded. Paragraph 31 simply refers to the first defendant infringing copyright as set out in paragraph 15.

44. Paragraph 30 alleges that in producing AP Digital each of the alleged copyright works or a substantial part of them was copied by the second and third defendants and paragraph 32 alleges, without further particularisation, that the first defendant authorised that copying. The copying is said to be inferred from:

- (i) at 30(1) - alleged access;

(ii) at 30(2) - seven months being too short a period to prepare CRM software without copying; and

(iii) at 30(3) - the layout in both AP Digital and Syncomate using ribbons and drop-down menus.

45. Paragraph 33 contains an unparticularised assertion that copyright was infringed by the first defendant running or authorising the running of the Syncomate Software in or after November 2017 and thereby copying it.

46. Paragraph 34 contains an allegation of infringement by the first defendant possessing AP Digital knowing or believing it to include infringing copies of elements of alleged copyright works.

### **Defendants' Position**

47. The defendants complain that the proposed APoC does not include or incorporate:

(i) any images or copies of the artistic works used in the GUI and alleged to be protected by copyright;

(ii) any images or copy of the GUI;

(iii) any particulars of what is said to constitute the expression of the author's own intellectual creation in any of the works;

(iv) any means which allows any of the works to be identified clearly and precisely;

(v) any particulars of when the works were created or by whom; or

(vi) any statement of the number of works.

48. The defendants further complain that in respect of the alleged compilation the APoC contains:

- (i) nothing to indicate that the compilation can be “written, spoken or sung”, in order to be a literary work;
- (ii) no indication of the content of the GUI in which the artistic works are compiled;
- (iii) no particulars of what is alleged to constitute the expression of the author’s own intellectual creation in the compilation; and
- (iv) nothing that allows the compilation to be identified clearly and precisely.

49. The defendants further complain that in respect of the structure and presentation of the GUI the APoC contains:

- (i) no image or indication of the appearance of either;
- (ii) nothing to indicate what is alleged to constitute the expression of the author’s own intellectual creation in either;
- (iii) no means of distinguishing between what is said to be the structure and what the presentation of the GUI; and
- (iv) nothing that allows either to be identified clearly and precisely.

50. The first defendant makes a further complaint that while it is alleged that the “schema for the database” is an original literary work the APoC:

- (i) is unclear whether a claim to copyright database or a claim to copyright in a literary work containing a design for the “schema” of a database is made and does not identify the work;
- (ii) contains no particulars of what is alleged to be the expression of the author’s own intellectual creation giving rise to originality;



(iii) if the work alleged is a database, contains no material that enables the first defendant or the court to consider the four steps set out in the *Brittens Pools* case; and

(iv) if the work alleged is a literary work containing a design for a schema, contains nothing to enable the first defendant or the court to understand how any of the elements necessary to establish copyright infringement are said to arise, or to assess whether or not they have.

51. All three defendants complain that no particulars or images of any aspect of AP Digital that infringes copyright in any alleged copyright work are given. There are no side-by-side images to show a comparison of the alleged copyright and the alleged infringing work.

52. The first defendant complains that the authors of the alleged copyright works have not been particularised adequately.

53. The first defendant and the second and third defendants each complain that the particulars from which it is pleaded an infringement may be inferred by any of them are an insufficient basis for any such inference to be drawn.

### **Claimant's Position**

54. The claimant says it is disproportionate for it to be required to particularise every single copyright work which makes up the Syncomate Software and Syncomate Database. It is enough that categories of copyright work - images, compilations of images, structure and presentation of the GUI, and the database schema - have been identified in paragraph 10 of

the APoC. Disclosure will be given at the appropriate stage and with proper confidentiality arrangements.

55. The claimant says it does not know the details of how the copyright works which form part of the Syncomate Software and Syncomate Database have been used. It says its claim has been particularised as fully as it can be based on information presently available.

56. The claimant further says that the copying allegations are sufficiently pleaded by the assertion in paragraph 30 of the proposed APoC that the second and third defendants had access to the copyright works in the Syncomate Software and Database and used them to develop a CRM tool.

57. It is said by the claimant also that the allegations of copyright infringement by the first defendant in paragraphs 31 to 34 of the proposed APoC speak for themselves.

58. The claimant answers the first defendant's complaints about authorship by pointing to the identification of the creators of the copyright works in paragraphs 7 and 10A(1) of the APoC paragraphs 8 and 19(a) of the RFI. The claimant argues that it would be disproportionate at this stage for it to spend time identifying precisely which line of code or graphic was authored by which individual.

## **Confidential information**

### **The Law**

59. The elements of a claim for breach of confidence are well established. See for example Megarry J's statement at paragraph 47 of *Coco v A.N. Clark (Engineers) Ltd* [1968] FSR 415:

“First, the information itself ... must ‘have the necessary quality of confidence about it’. Secondly, that information must have been communicated in circumstances importing an obligation of confidence. Thirdly, there must have been an unauthorised use of the information to the detriment of the party communicating it.”

60. The well-known general principles of pleading claims for breach of confidence were set out by Laddie J, in *Ocular Sciences v Aspect Vision Care* [1997] RPC 289 at 359-360. The Judge there pointed out that the rules as to the proper particularity of pleading apply to breach of confidence claims as they apply to all other proceedings, that the potential for breach of confidence actions to be used to oppress or harass competitors is well recognised and that the courts are careful to ensure claimants give full and proper particulars of all confidential information on which they intend to rely. The Judge referred to the *John Zink* case in which the Court of Appeal [1973] RPC 717 ordered particulars before defence and the High Court [1975] RPC 385 subsequently struck the claim out. The Judge went on:

“if a plaintiff wishes to seek relief against a defendant for misuse of confidential information it is his duty to ensure that the defendant knows what information is in issue. This is not only for the reasons set out by Edmund Davies L.J. in *John Zink* but for at least two other reasons. First, the plaintiff usually seeks an injunction to restrain the defendant from using its confidential information. Unless the confidential information is properly identified, an injunction in such terms is of uncertain scope and may be difficult to enforce: See for example *P.A. Thomas & Co. v Mould* [1968] 2 Q.B. 913 and *Suhner & Co. AG v. Transradio Ltd.* [1967] R.P.C. 329. Secondly, the defendant must know what he has to meet. He may wish to show that the items of information relied on by the plaintiff are matters of public knowledge. His ability to defend himself will be compromised if the plaintiff can rely on matters of which no proper warning was given. It is for all these reasons that failure to give proper particulars may be a particularly damaging abuse of process.

These principles do not apply only to the question of the content of the pleadings. Just as it may be an abuse of process to fail properly to identify the information on which the plaintiff relies, it can be an abuse to give proper particulars but of information which is not, in fact, confidential. A claim based even in part on wide and unsupportable claims of confidentiality can be used as an instrument of oppression or harassment against a defendant. It can be used to destroy an ex-employee's ability to

obtain employment or a competitor's ability to compete. The wider the claims, the longer and more expensive the litigation.”

61. These passages make plain that full and proper particularisation of a confidential information claim is essential. The claimant must make apparent to the defendant what information is in issue, even if that places a heavy burden on the claimant. Failure to do so means that a defendant cannot know what case he has to meet and is unable to prepare to show that certain elements relied on are matters of public knowledge. It can be equally abusive to bring a breach of confidence action that particularises information that is not in fact confidential.

62. In the case of *Spectrum v Pyrah* [2012] EWPC 46 *Ocular Science* was relied upon in support of a successful strike out application and the first defendant urges me to follow suit.

63. The claimant seeks to distinguish *Ocular Sciences* and *Spectrum* making the following points:

(i) In *Celgard v Shenzhen Senior Technology Material Co Ltd* [2020] EWCA Civ 1293, [2021] FSR 1, [47] Arnold LJ pointed out:

“What amounts to sufficient particularisation must depend on the circumstances of the individual case ...”

In that case all but one trade secret was described as to its nature rather than particularised and the Court of Appeal held that the pleading raised a serious issue to be tried;

(ii) Collections of information (where clearly defined) are an example of where it may not be necessary to identify with specificity every item of information alleged to be confidential (see *Toulson & Phipps on Confidentiality* at §4-012(b));

(iii) The concern articulated in *Ocular Sciences* does not arise in this case as Laddie J was concerned with the use of breach of confidence actions to oppress and harass competitors and ex-employees, particularly where accompanied by claims for an interim injunction whose scope would need to be sufficiently certain to enforce since here no interim injunction is sought and the defendants are not competitors and Amistad no longer exists;

(iv) there is no suggestion by the first defendant that the information was public knowledge in any relevant sense (the collation being important) and it is described by the first defendant in his witness statement as a “core asset”;

(v) the claimant relies on Sir Anthony Mann in *Mulsanne Insurance Company Limited v Marshmallow Financial Services Limited* [2022] EWHC 276 (Ch), where he said at paragraph 70(i) that:

“... it is equally important to specify, so far as possible, the misuse alleged. I say “so far as possible” because it is of the nature of a confidential information misuse claim that the claimant will very often not know details of how information has been used until disclosure, and sometimes not until cross-examination, because the use may have been hidden from view and all the claimant has to go on, for a time, is some evidence from which inferences are drawn but which does not show the full picture.”

(vi) the APoC is only the second attempt to plead the claim, not the fifth as in *Spectrum*.

## **Confidential Information**

### **The Pleading**

64. The paragraphs that are relevant to the breach of confidence claim are 11, 13, 14A, and 26 to 29.

65. Identification of the relevant confidential information is contained in paragraphs 11 and 13. Paragraph 11 includes a definition of “the Syncomate Data”. It is said to be contained in the Syncomate Database and include “at least data in the categories particularised in Schedule A” to the APoC. Paragraph 13 alleges that “the Syncomate Data ... constituted confidential information”.

66. Schedule A comprises a list of 18 broad categories and does not particularise any of them. For example:

(i) category 1 is “All contact details relating to the Partner Hotels (including prospective Partner Hotels) and the Clients and key stakeholders (including names, email addresses, telephone numbers, addresses).” Paragraph 6(1) of the APoC defines “Partner Hotels” as “non-UK hotels in independent ownership or in hotel chains” and defines “Clients” as “corporate clients and agents across the world”. Paragraph 5(1) describes “key stakeholders” as “individuals within companies who are known to take relevant decisions or be influential in the taking of those decisions”;

(ii) category 4 is “All emails sent and received by GHS to and from the Partner Hotels and the Clients”;

(iii) category 7 is “International Air Transport Association (“IATA”) distribution data for major travel agencies”;

(iv) category 8 is “GHS’s leisure databases, Corporate Client database and MICE database in key feeder markets including New York City” which counsel for the claimant clarified would be better expressed as “GHS's leisure databases in key feeder markets, including New York City, corporate client database, in key feeder markets including New York City, and MICE database, in key feeder markets, including New York City” while acknowledging that those definitions are not otherwise defined;

(v) categories 14 and 15 are “Email templates used by GHS for email marketing campaigns” and “Historical Email marketing campaigns sent to Partner Hotels and Clients”.

67. Paragraph 26 pleads that the Syncomate Data was not publicly available, had evident commercial value and was designated as confidential in the SPA.

68. Paragraph 28 contains the allegation of breach. It asserts that, from November 2017, the first defendant disclosed and made available the Syncomate Data in the form of spreadsheets and screenshots or instructed others to do those things.

### **First Defendant’s Position**

69. The first defendant says that both types of abuse identified by Laddie J in *Ocular Sciences* are present. The APoC fails to give full and proper particulars, and it makes wide claims to confidence in information that is not self-evidently confidential.

70. In relation to the categories mentioned above:

(i) in category 1 there is nothing to identify who the key stakeholders are. The statement that they “known to take relevant decisions” without stating to whom they known or what the decisions are does not assist. The category extends to the address of any non-UK hotel, and includes the name of any person within any corporation or agent who is known (to unknown persons) to take decisions.

(ii) by category 4 the claimant claims as its own confidential information the content of every email sent to it by any non-UK hotel or by any client corporation in the

world. This very wide category inevitably includes information that could never be the claimant's confidential information;

(iii) category 7 on its face refers to information belonging to IATA or to travel agencies and without particularisation, neither the first defendant nor the court can know what the claimant believes it to encompass, how it could belong to the claimant or why it is confidential;

(iv) category 8 refers to a number of databases without precisely defining which and without explaining how databases could be particulars of data within the Syncomate Database;

(v) categories 14 and 15 are not particularised and fail to explain how emails or the templates that structure those emails or email marketing campaigns sent to third parties can be confidential.

71. In summary the first defendant's position is that no particulars, or no full and proper particulars, are given of any aspect of the alleged confidential information. Accordingly, he says that there is no way for the first defendant or the court to know what is and is not alleged to be included in the confidential information and there is no means for the first defendant to defend himself by demonstrating at trial that at least some parts of the information is in fact public knowledge.

72. The first defendant further complains that the pleading fails to provide any credible allegation of breach of confidence by the first defendant. So far as paragraph 28 alleges disclosure of confidential information:

(i) neither the spreadsheets nor the screenshots referred to in the APoC have been provided;



- (ii) no particulars support the allegation that the first defendant used any of the Syncomate Data on or after 13 November 2017;
- (iii) no particulars are given that support the allegation that the first defendant instructed others to use of any of the Syncomate Data on or after 13 November 2017;
- (iv) to the extent that there are allegations of communications relating to extracts from a database in paragraphs 13C(3), 15(2) and 15(3) those communications pre-date November 2017 and did not involve the first defendant; and
- (v) to the extent that pre-November 2017 communications involving the first defendant are identified in the APoC no particulars are given of communications that are other than consistent with the first defendant's role as a director of GHS.

### **Claimant's Position**

73. The claimant's response is that more than sufficient particulars have been given to enable the first defendant to understand and meet the case made against him. The claimant says that the first defendant's wrong approach at this stage of the proceedings is demonstrated by the RFI which requests "the degree of particularity that will be relied upon at trial".

74. The claimant says that the confidential data to which the APoC refers is quite clearly the data in the Syncomate Database and its general nature was a large collection of data about Partner Hotels and key stakeholders.

75. It is submitted that what is alleged to make the information confidential is obvious from the nature of the collation of information itself and is lent support by the first defendant's witness statement in which he refers to the importance of controlling GHS's "information

technology assets”. It is said that the key points are sufficiently pleaded at paragraphs 26(1)-(3).

76. As to misuse, the allegation is that the first defendant gave the confidential information to a competitor company of which he was a director and which then went on to use the data. The details provided are the best which can be given at present.

## **Sui Generis Database Right**

### **The Law**

77. Sui generis database rights arise from Directive 96/9 (**the Database Directive**). That Directive was transposed into UK law by the Copyright and Rights in Databases Regulations 1997/3032. The structure is as follows:

- (i) A “Database Right” arises (reg. 13(1)) where there has been a “substantial investment in obtaining, verifying or presenting the contents of the database”;
- (ii) regulation 6 inserted section 3A of the CDPA 1988 giving the definition of “database” as “a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means”;
- (iii) investment includes (reg. 12(1)) “any investment, whether of financial, human or technical resources” and “substantial” means “substantial in terms of quantity or quality or a combination of both”;
- (iv) the maker of a database is defined (reg. 14) as the person who “takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in that obtaining, verification or presentation” and such person is the first owner of the Database Right (reg. 15);

(v) a database right expires 15 years after the end of the calendar year in which it was created (reg. 17).

78. In *British Horseracing Board v William Hill Case C-203/02* [2005] RPC 13, the CJEU explained that the substantial investment refers to the resources used to seek out existing independent materials and collect them in the database and not to the resources used to create the pre-existing materials. The purpose of the protection being to promote the establishment of storage and processing systems for existing information.

### **Sui Generis Database Right**

#### **The Pleading**

79. The existence of database right in the Syncomate Database under the Database Regulations and also under the CPDA is alleged in paragraph 11 of the APoC. The content of the database that is said to benefit from the right is identified by reference to the categories in Schedule A.

80. The allegation of infringement of the database right is an assertion in paragraph 35 that the first defendant (as pleaded in paragraph 15) extracted a substantial part of the content of the Syncomate Database without consent to obtain and use the Confidential Information. Paragraph 15's allegation is that the first defendant copied the copyright works listed in paragraph 10 and extracted the Syncomate Data.

#### **First Defendant's Position**

81. The first defendant complains:

(i) it is wrong to assert any such right under the CPDA;

(ii) no particulars of any relevant investment in the obtaining, verifying or presenting any of the categories of data set out in Schedule A is identified. By way of examples:

(a) there is no pleaded basis to conclude relevant substantial investment was made in the obtaining, presenting or verifying the contact details data in categories 1 or 2 of Schedule A;

(b) there is no pleaded basis to conclude that there was relevant substantial investment in obtaining presenting or verifying the reports of various activities referred to in categories 3 or 16, merely accumulating the reports would not be sufficient;

(c) there is nothing pleaded to support a substantial investment in obtaining, verifying or presenting the emails and materials referred to in categories 4, 9, 11, 14, 15, 17 and 18, merely accumulating these items would not be sufficient;

(d) the results of analysis are unlikely to be databases. There is nothing pleaded to support any relevant investment in obtaining, verifying, or presenting the contents of any of categories 5, 10, or 13; and

(e) other categories are said to be so vaguely described that it is impossible to know what they might refer to – examples are categories 5, 6, and 8 - and there is no pleading that any relevant substantial investment was made in respect of them.

82. The first defendant goes on to complain that the allegation of infringement of database right in paragraph 35 includes a confused reference to use of confidential information and that the extent of the allegation of infringement is by reference to paragraph 15's assertion that the first defendant extracted Syncomate Data, without anything further to support an

allegation of infringement after 13 November 2017. The allegation of infringement is thus a bare assertion.

### **Claimant's Position**

83. The claimant says the definition of the Syncomate Database is similar to the definition which was held to be “a clear and sufficient identification of the database” in *Medical Innovations v Eakins* [2014] EWHC 4626 (Pat), Recorder Meade QC (sitting as a Deputy High Court Judge).

84. As for the substantial investment that gives rise to the database right, it is said that this is described at paragraphs 5(1) and 5(4), 6(2) to 11 and that is said to be more than adequate at this stage.

85. The infringement of the database right is described at paragraphs 15 and 35 to 36 of the APoC. It is asserted that this is necessarily without great detail because the infringing activities were conducted out of sight of the claimant.

### **Unlawful Conspiracy**

86. The claimant claims by paragraph 25(3) that the first defendant was concerned in a wrongful conspiracy to undertake unlawful acts of copyright infringement, breach of confidence, and infringement of database right as set out above.

87. The allegation of conspiracy is contained in paragraph 25(1). The allegation is that the first defendant, Harp and Raj conspired and combined together to use the GHS

Syncomate Software and the Syncomate Data for the benefit of Harp and Raj, by sharing it with Amistad.

88. The first defendant denies that was the case. His evidence is that when working as a director of GHS his intention was to secure its business.

89. There are no particulars in the APoC from which it is said that the alleged conspiracy might be inferred, merely assertions.

## **Conclusions**

### **Conclusion on Copyright**

90. The first letter of claim was sent in May 2018. Neither that letter nor any subsequent letter, pleading or RRFI has identified any image, copy or representation of any of the alleged copyright works or any element of them. In the absence of any visual representation it is unclear how either the first defendant or the court can clearly and precisely identify the alleged copyright works in question, or enable any assessment of originality and unclear how, in the absence of comparative images of the alleged copyright works and the alleged infringing works, the extent of any infringement could be determined.

92. In order to plead that the production of AP Digital involved the copying of all or part of the images used in the GUI, the structure and the presentation of the GUI and the “schema for the database” of the Syncomate Software, the claimant must have seen and analysed AP Digital in some detail and compared it with the relevant elements of the Syncomate Software. No particularisation of any such comparison exercise is given in the APoC.

93. There is no other material in the APoC upon which any assessment that a substantial part of the Syncomate Software including elements of the author's intellectual creation has been copied can be made.

94. If particulars of the parts of the alleged copyright works alleged to have been copied and used in the creation of AP Digital cannot now be clearly and precisely identified the claimant cannot have a proper basis to bring a copyright infringement claim against any of the defendants.

95. To the extent that the APoC alleges copyright in the Syncomate Database the *Brittens Pools* case test must be considered. The relevant data would seem to be said to be all the Confidential Information listed in Annex A. There is nothing in the APoC to enable an analysis of the work that is said to comprise the creation of the database by the collecting and arranging of that data. Nor is there material to enable a determination whether that work was the author's intellectual creation. It is also not possible to assess whether that work is sufficient in amount to attract copyright protection.

96. It is also the case that the facts from which an inference of infringement of copyright by the defendants are insufficient to enable such an inference to be drawn. The facts pleaded against the first defendant are bare assertions. As to the second and third defendants: access alone cannot be sufficient, there is no detail behind the assertion that AP Digital could not be produced within seven months absent infringement of copyright belonging to the claimant and the only pleaded points of similarity of the Syncomate Software and AP Digital are the inclusion of ribbons and drop down menus which, without

more, are a hopeless basis upon which to invite the necessary inference to be drawn (and even this averment is not supported by any images).

97. The particularisation of the claimant's copyright claim in the APoC is insufficient for the defendants or for the court to understand what the works are in which it is alleged there is copyright entitled to protection or whether infringements have occurred and insufficient to enable the disclosure and witness statement stages of litigation to be conducted in a proportionate manner, if at all.

98. It is not good enough for the claimant to say that it would be disproportionate to carry out an analysis of the elements of the Syncomate Data and its authorship and give particulars at some later time. That particularisation must be given now, subject to appropriate confidentiality arrangements.

### **Conclusions on Breach of Confidence**

99. The categories of confidential information listed in Schedule A to the APoC are in at least the respects identified by the first defendant extremely wide and not self-evidently categories of information which could be said to be confidential to GHS. There is therefore no means for the first defendant or the court to know what the alleged confidential information is or for the first defendant to defend himself by demonstrating public knowledge of at least some parts of that information. While the particularity required at trial may not be necessary at this stage, the particularity of the APoC is not sufficient and nor is a general assertion that the confidential data is simply the data in the Syncomate Database being of the general nature of a large collation of data about Partner Hotels and key stakeholders.



100. I reject the claimant's points made in an attempt to distinguish this case from *Ocular Sciences*:

(i) in *Celgard* the Court of Appeal was concerned with whether a serious issue to be tried arose on the pleadings. It was satisfied that it did in at least one respect and did not therefore need to be directly concerned with the adequacy of the particularisation of other parts of the claim;

(ii) where clearly defined collections of information are relied upon it may not be necessary to identify every item alleged to be confidential. However the application of that principle to this case would depend upon each of the 18 categories in Schedule A being clearly defined, which they are not;

(iii) I do not accept that the reasons as to the necessity of particularity of pleading in *Ocular Sciences* are confined to cases where proceedings are used to oppress defendants and where injunctive relief is sought. The reasons were expressly stated to be additional to the reasons set out by Edmund Davies LJ in *John Zink*, namely, that the allegations impute conduct of a gravely improper character;

(iv) the first defendant's reference in his evidence to Syncomate and the Syncomate Database as a "perceived" core asset of GHS was a reference to the claimant's perception of that asset and does not disentitle him from being provided with proper particulars of what is said to be confidential so that he may defend himself against the claim;

(v) while Sir Anthony Mann's statement in *Mulsanne v Marshmallow* recognises that a claimant's plea of the misuse of confidential information need only be "so far as possible" it recognises that a claimant will be expected to have some evidence from which inferences of misuse may be drawn, compare *Elite Property Holdings*.

101. The claimant must have the Syncomate Database and all its data or have had both after 13 November 2017 and in the period leading up to the date of its first letter of claim in May 2018. In order to identify the existence of a claim it must have undertaken some analysis of the data identifying that in which it has a claim to confidentiality and some analysis of the breaches it claims occurred or some analysis of the material from which such breaches might be inferred. In order for the first defendant and the court to understand the claim a sufficient part of that analysis must be pleaded. Again, it is not good enough for the claimant to say it has given sufficient particulars at this stage.

102. To the extent that data retains its character of confidentiality there should be no difficulty in agreeing a way of particularising the claim in a manner which preserves such confidentiality.

### **Conclusions on database right**

103. The definition of the database in which sui generis database right is claimed as the “Syncomate Database” is a workable definition for the purposes of the pleadings in this case. However, it does not assist in understanding the nature of the organisation of the collection of the data claimed to be contained in that database.

104. It is not apparent from the APoC what the investment was in obtaining, verifying or presenting the categories of data set out in Schedule A. The paragraphs upon which the claimant relies describe no more than the accumulation of data in the course of GHS’s business, the commissioning and development of the Syncomate Software and a bare assertion in paragraph 11 of a relevant substantial investment, without particulars of the time, money or effort involved, the references back to paragraphs. The references back to

paragraphs 5(1), 5(4) and 6(2) are simply references to the nature of the business of hotel sales and marketing companies including GHS.

105. There is therefore no properly particularised basis on which the first defendant or the court could understand how the claimed database right arises.

106. The allegation of infringement in paragraph 35 appears to be confused with a reference to use of confidential information, and is no more than an assertion, apparently relying on matters in paragraph 15 which all pre-date the claimant's acquisition of the right, and would not of themselves appear to amount to infringement.

### **Conclusions on the Applications**

107. The lack of particularisation of the breach of copyright, infringement of confidential information and breach of database right claims are such that the defendants cannot fairly respond without (at least) needing to make Part 18 requests. On the basis of the APoC as it presently stands the disclosure process could not be appropriately limited and the scope of expert evidence could not be suitably focussed.

108. It is for the claimant to plead its case in a way which can be understood and responded to by the defendants. The defendants are entitled to know precisely what the case is against them in order for the proceedings to be conducted in a just manner. It is not in accordance with the overriding objective to allow amendments which will inevitably lead to Part 18 Requests and likely applications for orders under Part 18.

109. My conclusion is that it would not be right to accede to the application to amend in the form of the APoC as that would be likely to obstruct the just disposal of the proceedings within the meaning of CPR 3.4(2)(b).

110. I do not accept that the APoC are an abuse in the sense of comprising misconduct amounting to an affront to the Court such as to be susceptible to strike out under the abuse limb of CPR 3.4(2)(b). Nor do I accept that there has been a failure to comply with a rule, practice direction or order, in particular CPR 16.4(1)(a), such as to make the APoC susceptible to strike out under CPR 3.4(2)(c).

111. Counsel for the claimant's submissions were to the effect that, although burdensome to now give proper particulars of the alleged copyright works and their authorship, it could be done. It obviously ought also to be possible for a claimant claiming confidence in information to properly identify the information in question. If, as appears from the RRFI, there is evidence which can in due course be led about the database right it ought to be possible for the claimant now to give proper particulars in that respect. In relation to the infringement allegations the claimant must particularise a proper basis from which it asks the court to make the necessary inferences.

112. While the APoC is poorly particularised in the respects I have determined I do not conclude that it discloses no reasonable grounds for bringing the claims contained within it such as to fall foul of CPR 3.4(2)(a). The causes of action are clearly identified, but inadequately particularised.

113. Assuming properly detailed particulars can be put forward the claimant would have a case with realistic prospects of succeeding at trial and I do not therefore consider it appropriate to award summary judgment at this stage.

114. Since the unlawful conspiracy claim falls away if the pleading of unlawful acts falls away I do not consider it further separately.

115. I will refuse permission to amend the claim and strike out the PoC as against the first defendant.

116. There remains the question whether I should strike out the claim against the first defendant altogether, rather than requiring it to be re-pleaded.

117. The first defendant submits that if the APoC (and PoC) are struck out I would be fully justified in striking out the claim for the following reasons:

- (i) the APoC is the claimant's fifth attempt to plead its case;
- (ii) despite knowing the first defendant opposes the APoC for many months, the claimant has not put forward any alternative or filed evidence;
- (iii) the purpose of these proceedings is to oppress the first defendant or make attacks on Harp and/or Raj which is demonstrated by:
  - (a) its unsupportably wide allegations of breach of confidential and vague allegations of copyright and database right infringement;
  - (b) the allegation that the value of this claim is £2.1million; and

(c) the persistence of the allegation that Harp and Raj were parties to a conspiracy despite it appearing that the claimant has settled its dispute with them.

118. The claimant's response is that:

- (i) the APoC are only the second formal attempt to plead the claimant's claim;
- (ii) despite its dissatisfaction with the original PoC and the RRFI, the first defendant let over a year elapse before making his strike out application and only did so after the application for permission to amend had been issued and a defendant genuinely believing himself to be the subject of an oppressive claim might have been expected to have acted more swiftly;
- (iii) there is insufficient evidence to conclude that the proceedings are oppressive or a collateral attack on Harp and Raj and there is evidential support for the value of the claim.

119. I accept the first defendant's complaints have some force but I have decided not to go so far as to strike out the claim in its entirety. Although it is suggested that the litigation is being pursued to oppress the defendants or for an ulterior purpose, I do not conclude that that is the case from the conduct of the proceedings themselves and do not have other evidence to conclude that is the position at this stage, I bear particularly in mind that the first defendant did not make his strike out application earlier. I bear in mind also that this is the first occasion upon which the court has been asked to consider the adequacy of the claimant's claim, compare the history in *Spectrum*.

119. I will not therefore strike out the claim. The claimant should review its claims and the manner in which they may be properly particularised and produce a new APoC for consideration in the first instance by all three defendants within a reasonable period. If no such new APoC making claims against all three defendants is produced the claim against the first defendant will be struck out and the present PoC will stand against the second and third defendants although it would require to be amended to delete the claims struck out against the first defendant.

120. A final form of this judgment will be handed down remotely at 10am on 7 June 2022. I hope the parties are able to agree and submit a form of order to reflect my judgment. Any matters which are not capable of agreement between the parties will need to be dealt with at a further hearing to be listed on a separate occasion shortly thereafter or by way of written submissions.