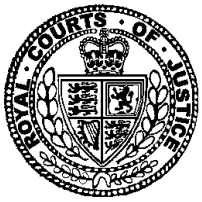

Neutral Citation Number: [2022] EWHC 2799 (Comm)

Case No: CL-2021-000276

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 28/09/2022

Before :

MR JUSTICE JACOBS

- -

Between :

Claimant

CONTRA HOLDINGS LTD

- and -

Defendant

MR M J C BAMFORD

- -
- -

MR A LEGG (instructed by STEPHENSON HARWOOD LLP) appeared on behalf of the Applicant
MR A POLLEY KC (instructed by SLAUGHTER & MAY LLP) appeared on behalf of the Respondent

Hearing date: Wednesday 28th September 2022

- -

Approved Judgment

MR JUSTICE JACOBS:

1. I am now concerned with an application by the claimant, on this "consequentials" hearing, for permission to amend to plead a case whose substance is that the Defendant engaged in a fraud. A "consequentials" hearing is intended to deal with issues (such as applications for permission to appeal and costs) arising in consequence of a judgment which the court has previously given. It is unusual, to say the least, for an application to amend to be made – whether at a "consequentials" or otherwise – after the court has given a judgment (here on a strike out/ summary judgment application) which has brought the case to an end.

2. The substance of the amended case, as Mr Legg confirmed in the course of argument, is a point, which I raised with leading counsel for the claimant (Mr Hochhauser KC) during the course of argument on the Defendant's application which resulted in judgment striking out the claim: see [2022] EWHC 1857 (Comm) para [73]. I asked counsel whether fraud was being alleged, and was told that it was not. However, the claimant now wishes to make that allegation, and the question arises as to whether it should be permitted to do so at this stage.

3. The background to the case is set out in my judgment, and I will summarise it briefly. The claimant was seeking relief in relation to developments which followed the conclusion of the "Touch Agreement". That agreement referred to Project Crakemarsh: that project envisaged the sale of the JCB Group. The claimant advanced various causes of action arising from the fact that this sale ultimately did not materialise.

4. During the course of Mr Hochhauser's argument for the claimant, he placed significant reliance on various statements, which had been made by the Defendant ("Mark") to his cousin ("Richard"). Those statements concerned a proposed and actual settlement of disputes between Mark and his brother ("Anthony"). Statements were allegedly made relating to the separation of interests of Mark and Anthony. The way forward proposed between the two brothers was the project known as Project Crakemarsh. This envisaged the sale of the main JCB Group, and this way forward is reflected in the terms of the Touch Agreement. As described in my judgment, reliance was placed by the claimant upon those statements as part of the factual matrix to the Touch Agreement. It was this reliance that gave rise to the question, which I asked in the course of the hearing, as to whether there was any allegation of fraud in relation to the statements made. In other words, was it being said that the statements were made, as to the intention to go forward with Crakemarsh, without any genuine intention that that was going to happen?

5. Mr Hochhauser, for his part, said that no such case was being made. Mr Rabinowitz KC, for Mark, acknowledged that in theory a case in fraud could be advanced, if the facts justified an allegation that Mark had fraudulently represented that there was an intention to proceed with Project Crakemarsh, when in fact that there was no such intention. However, that was not the case that was being put forward.

6. Subsequent to my judgment, however, the claimant has taken a different view. Richard has said, in his most recent witness statement, that he now does wish to put forward the fraud case discussed in the course of argument. The proposed amended pleading is not particularly clear, and could possibly be read as raising some issues other than fraud. However, it is clear that the heart of the amended case is that there was a dishonest representation by Mark to his cousin, Richard, to the effect that there was an intention to proceed with project Crakemarsh, when in fact there was never any such intention.

7. That new case is said to arise because of what was said in a witness statement served by Mark some three weeks before the hearing of the strike out/ summary judgment application. Mark's witness statement does not directly address the question of whether there was any intention to proceed with Project Crakemarsh. That is, doubtless, because there was at that stage no allegation of fraud or misrepresentation, whether made in relation to intention or otherwise, which Mark was seeking to meet.

8. It is nevertheless said that on a true analysis of Mark's witness statement – which refers to various documents as constituting the entire settlement agreement between him and his brother Anthony – it was obvious that Mark was accepting that there had never been any intention to carry out Project Crakemarsh. It is on that basis that Mr Legg says that there is an allegation of fraud that can properly be pleaded, and that permission to amend should be granted. Mr Legg says that, until Mark's statement came in, there was nothing which provided sufficient material to indicate that there was no intention ever to proceed with Crakemarsh. However, when considering that statement, in particular after a period of reflection following the hearing in July, it was appreciated by Richard that there had indeed been fraudulent statements to him, and that a case in fraud could and should be advanced.

9. That is the background to the application. It falls to be considered in the context of a claim which was being intimated, in different ways, for some considerable time prior to the action actually being commenced in 2021. The Touch Agreement was concluded in 2011, and during the intervening years the claimant sent Mark various draft pleadings. No allegation of fraud was made either in those pleadings or in the Particulars of Claim that were eventually served. Once the proceedings were commenced, they were responded to by Mark's application to strike out or for summary judgment. That then led to an exchange of evidence and to a hearing, which took place on 7 July 2022.

10. The draft judgment was provided to parties approximately a week later, and formally handed down shortly after that, on 18 July 2022. An increasingly common, but regrettable, feature of Commercial Court litigation is the apparent difficulty in counsel making themselves available for a hearing of "consequential" matters, following the hand-down of a judgment. This was the reason why, in the present case, no "consequentials" hearing was fixed for July or early August, but instead was deferred until the end of September. Had the consequentials hearing taken place promptly, it is most unlikely that the present application to amend would have been made. Delayed consequential hearings create an increased amount of work for the parties and the judge, who has to deal with a case weeks or (as here) over 2 months after judgment has been given, when the case is no longer fresh in his or her mind. They also, as in the present case, allow time for parties to re-think and try to salvage a case which has been lost. Quite often this involves very lengthy draft grounds of appeal, sometimes involving points which were not advanced at the trial or hearing. Here, it involves a substantial application to amend, with the intended result of saving a case which would otherwise be struck out. Commercial Court judges will be far less tolerant in the future of consequential hearings being delayed because of the unavailability of counsel, and will fix consequential hearings to take place within a short time after judgment.

11. In the present case, around 2 months passed between the date of the judgment and the first intimation by the claimant, on 16 September 2022, of an intention to amend. A formal application to amend so was issued on 23 September. That was some 10 weeks after judgment, 12 weeks after the hearing and 15 weeks after receipt of the witness statement from Mark, which is said to be the origin of the case that is now sought to be advanced.

Real prospect of success?

12. The starting point, when one considers any proposed amendment, but in particular an amendment which is made at the present stage, is that it must carry a degree of conviction on the merits. The Court must be satisfied that the case, sought to be advanced by the amendment, has a real prospect of success. That is a point dealt with in paragraph 17.3.6 of *The White Book*:

> "A proposed amendment must be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence that establishes the factual basis for the application".

13. In my judgment, there is nothing about this amendment which has any degree of conviction.

14. First, the case that there was no intention to carry out Project Crakemarsh is belied by the very facts pleaded in the Particulars of Claim, as well as other aspects of the claim hitherto been advanced by the claimant. It is clear from the Particulars of Claim, and the evidence filed in the context of the strike out/ summary judgment application, that substantial work was indeed carried out in relation to Project Crakemarsh following the Touch Agreement. This included the appointment of financial advisers for the purposes of bringing about the proposed sale. Furthermore, the claimant himself alleges that he carried out work on Project Crakemarsh subsequent to the Touch Agreement, and it was part of his case in these proceedings that he was entitled to a significant amount of money for the work performed. The fact that work did proceed in this way belies any suggestion that there was never any intention to implement Crakemarsh.

15. Secondly, I am unpersuaded that there is anything in Mark's statement that can reasonably be read as an admission that there was no intention on his part ever to carry out Project Crakemarsh. That was not a case that Mark was seeking to meet: he was not addressing that point. If Mark's statement really was in the nature of an epiphany, which made it clear why Crakemarsh had never in fact proceeded successfully to a conclusion (i.e. that there had never been an intention to carry it out), then that would have been appreciated at the time by Richard and/or the claimant's advisers, and a necessary application to amend made promptly and at the proper time.

16. Thirdly, I attach importance to the fact that experienced leading counsel made it quite clear that, despite the reliance placed on pre-Touch Agreement statements as part of the factual matrix, no allegation of fraud was being pursued. That question was raised directly by the Court. Had there been evidence to justify such an allegation, or if it was a case that carried any degree of conviction, a different response would have been given. The reason the point was raised was because heavy reliance was indeed being placed upon these pre-contractual statements, and counsel was referring in some detail to the conversations and documents at that time. I do not accept that Mr Hochhauser was simply saying that there was nothing on the current pleadings which currently alleged fraud – but implicitly without prejudice to the possibility that fraud might be alleged in the future. Rather, counsel was making it clear that it was no part of the claimant's case to allege fraud. An answer by leading counsel that fraud was not being advanced does bear on whether the case has any degree of conviction. Counsel at that time was clearly on top of the materials, and had obviously read all of them very carefully. Counsel not only indicated that fraud was not being pursued, but he did not ask for time to consider the matter with his client to see whether, in the light of my questions, the case should be put in a different way. It does seem to me that all of that is indeed a reflection of the lack of merits of the proposed amended claim.

17. Fourthly, if there had been any real substance in the case of fraud, that case could and should have been made long before 16 September 2022. If Mark's statement really was revelatory, then the case should have been advanced prior to the hearing of the strike out/ summary judgment application. It is commonplace for parties, faced with a strike out application, to amend their pleadings prior to the hearing. I see no reason – save for the lack of merit in the amended case – why this could not have been done in the three weeks between service of Mark's statement and the hearing. That was a time when the claimant's team would have been focusing on the case, and deciding how it could be run. I also accept the point made by Mr Polley KC for Mark that, even if three weeks prior to the hearing was considered to be too short, steps could have been taken after the hearing: before the Court gave its judgment, and certainly long before the application was made in the present case.

18. I have dealt with these various points in the context of the claim not having a sufficient degree of conviction. They do, however, have a bearing as well on other reasons for refusing the amendment, including discretionary considerations.

Strong or satisfactory reasons for applying after judgment?

19. The second broad reason for refusing the amendment is an application of the principles, which are set out in paragraph 17.3.9 of *The White Book*, which is as follows:

> "The Court does have power to permit an amendment, which is sought after judgment has been given, but before an order recording that judgment has been drawn up and sealed. However, before permitting such an amendment, the court must first decide whether there are exceptional circumstances or strong reasons for taking the unusual course of re-opening the earlier decision",

20. The White Book then cites Stewart v Engel [2000] 1 WLR 2268, where Roch LJ said:

> "It is clearly not satisfactory for the (claimant) to be allowed to wait to see the outcome of the defendants' application (for summary judgment) and then, if the judge decides in the defendants' favour, to apply for an amendment. There must be some satisfactory reason for failure to apply for the amendment at the proper time. The proper time is either before the defendants' application is heard or during the hearing of the application"

21. That passage is apposite to the present circumstances, because this was an application for summary judgment in the defendant's favour. It seems to me that I should adopt the approach of looking to see whether there are exceptional circumstances or strong or satisfactory reasons for taking the unusual course of, in effect, re-opening my earlier decision.

22. That seems to me to be consistent with the approach to late amendments, which is fully set out in the judgment of Naomi Ellenbogen QC (as she then was) in *Bioconstruct GmbH v Winspear* [2020] EWHC 2390 (QB), and the various authorities to which she refers in that judgment. Those authorities include the well-known judgment of Carr J (as she then was) in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm). I bear those principles in mind in relation to this application.

23. It does not seem to me that there is any satisfactory reason in the present case, let alone a strong or satisfactory reason or exceptional circumstance, for the claimant's failure to apply

for amendment at the proper time, even assuming that the proper time started to run upon receipt of the statement from Mark on 15 June 2022. There was still sufficient time for that statement to be properly considered – it was not a long statement – and sufficient time, if there was to be an alternative case advanced, for an application to amend to be made and to have been considered by the Court. I say nothing about whether or not that application would have been granted, not least because it may well be that the evidence on the merits of the case might have been rather different to the materials that I have at the present time.

24. However, no application was made, and I do not consider that there is any satisfactory reason as to why that was not done. The basic reason put forward is that Richard did not appreciate the significance of what Mark had said in his statement, and in particular that he could not accept that he had been misled in the way that (as Richard now contends) is revealed by the statement.

25. I am not impressed by that explanation. This was a very significant litigation between members of a family. Serious allegations were being made, even leaving aside the allegations of fraud, and a very substantial claim was being advanced. The claimant was well represented, and must have been thinking about this claim for years. Richard was facing a strike out application, which would have meant the end of his case. As I have said, it is well known that when such applications (including reverse summary judgment applications) are made, lawyers look very carefully indeed to see how the case can be saved, and it is very common for amendments to be made, even shortly before a strike out application or even at the hearing itself, in order to head it off.

26. There was in my view a sufficient opportunity before the hearing to put forward an alternative case. There was an opportunity, when I raised the point at the hearing, for instructions to be taken. There was also an opportunity after the hearing, when lawyers and their client can reflect on how a hearing has gone, for a party to say: "Well, actually, I need to amend in the light of what the Judge said".

27. However, none of that happened in the present case and I do not think that there are any exceptional circumstances or strong reasons or even satisfactory reasons for the failure to apply at the proper time.

Discretionary factors

28. I will deal briefly with wider discretionary considerations, bearing in mind the principles in *Bioconstruct v Winspear* and *Quah Su-Ling v Goldman Sachs* International. To a large extent, the important factors, which result in my discretion being exercised against permitting the amendment, are those which I have already addressed. I summarise my main reasons as follows.

29. First, I attach significance to the fact there was a clear disavowal of a claim in fraud. That disavowal goes to whether the amendment has an appropriate degree of conviction, whether there is a satisfactory reason for the late application, and also to the court's general discretion.

30. Secondly, that disavowal came after a considerable background to the commencement of the present this litigation, including that it had been known for many years that Project Crakemarsh had not proceeded to a satisfactory conclusion. If it is the case, which I do not accept, that Mark's statement served some three weeks before the hearing really did give rise to an epiphany in terms of explaining what had happened, then that was all the more reason why the case should have been raised promptly.

31. Thirdly, and looking at the matter overall, I have to strike a balance between injustice to the applicant if an application to amend is refused, and injustice to the opposing party and other litigants in general if the amendment is permitted. I consider the balance here is in favour of disallowing a very late amendment. Mark had a legitimate expectation of finality if his application for strike out or reverse summary judgment was successful. He had a legitimate expectation that the claimant would put forward whatever case it had on Project Crakemarsh in order to defeat the strike out/ summary judgment application. That application was pending for some time. Having succeeded on the application, when full argument was addressed, it would be prejudicial to Mark, and indeed to other court users, for this matter now to be re-opened with a new case, which could have been advanced prior to or at the hearing.

32. Therefore, for those broad reasons, I refuse permission to amend.

End of Judgment

Transcript from a recording by Ubiqus
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