

JERSEY / JUDGMENT

CMC -v- Forster and Ors

[2018] JRC 078 (26 April 2018)

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judgment

Deputy bailiff:

Introduction

1. This is an appeal brought by RBC Trust Company (International) Limited ("the Second Defendant") and The Regent Trust Company Limited ("the Third Defendant") against an order of the Master of the 25 th September, 2017, ("the Order") the reasons for which are set out in the Master's judgment of the 8 th November, 2017, under reference CMC Holdings Ltd-v-Forster and Others

[2017] JRC 188 ("the judgment"). 2. The respondents to this appeal are CMC Holdings Limited ("the First Plaintiff") and CMC Motors Group Limited ("the Second Plaintiff") (jointly referred to as "the Plaintiffs"). 3. The order deals with discovery in proceedings between the plaintiffs and the defendants and others. The operative parts of the order are in the following terms:- "1. The Plaintiffs be given leave to undertake a limited search for discoverable documents limited to a sampling as described in the second affidavit of Sally Patricia Mukabana sworn in September 2017 of not less than 10% of the documents contained in the storerooms of the Plaintiffs as described in the first affidavit of Sally Patricia Mukabana dated the 26th May 2017; 2. The Plaintiffs shall give discovery of any relevant documents arising from the limited search by the 17th November 2017; 3. Notwithstanding paragraphs 1 and 2 of this order, liberty to the Defendants to apply to require the Plaintiffs to carry out a more extensive search following receipt of discovery produced pursuant to this order; or alternatively to make an application for specific discovery, in either case if advised to do so. 4. The costs of this application are reserved to any further application for discovery or if there is no such application to the trial judge." 4. The order was made pursuant to a summons issued by the plaintiffs seeking limited discovery in the form as ordered by the Master. The Notice of Appeal is dated the 5 th October, 2017, and seeks the setting aside of the order and that the court further order that the plaintiffs provide general discovery "in relation specifically to (but not limited to) hard copy documents located in their storage warehouses in Kenya" . 5. The grounds of appeal

set out in the Notice of Appeal in essence are that the Master improperly exercised his discretion in making the order for a limited search of documents on the basis of "dip sampling" methodology and in so doing failed to take into account either at all or sufficiently deficiencies in the methodology for dip sampling and the resultant consequences for the integrity of discovery; the likelihood of relevant discoverable documents being contained in the body of documents excluded from the dip sampling methodology; the potential detriment to be suffered by the defendants in granting the plaintiffs leave to carry out a limited search for discoverable documents; and the degree to which fair disposal of the proceedings would potentially be compromised. 6. In addition the Notice of Appeal asserts that the Master gave undue weight to the defendants' ability retrospectively to interrogate the plaintiffs' discovery by specific discovery requests or otherwise. 7. Further it is said that the Master took into account inadmissible evidence submitted orally by the plaintiffs advocate as to the steps taken and difficulties purportedly faced by the plaintiffs in locating and reviewing documents stored in their warehouses in Kenya or alternatively gave undue weight to it. 8. It is further alleged that, to the extent the order was based on proportionality, and with the costs of the discovery exercised to the plaintiffs in mind, the Master erred by giving that fact a disproportionate and undue weight given the wider context of the value, nature and complexity of the claim and in respect of what discovery should be properly given or needed for the fair resolution of the dispute. 9. Lastly, it is stated that the Master erred in giving insufficient weight to the effect of his order which would allow the plaintiffs to prosecute a claim in which they allege, amongst other things, that they had no knowledge and hold no documentary evidence of a purportedly secret scheme that they alleged that the First Defendant (and others) operated to the plaintiffs' detriment but without requiring the plaintiffs to properly consider all the documentary material in their possession, custody or control. The nature of the case 10. Whilst it is not necessary to go into the full details of the plaintiffs' claim and the nature of the answer filed, it is necessary to gain some understanding in order to put the orders for discovery made by the Master in context. 11. In general terms, the nature of the case can be explained by quoting the summary of claims set out in the plaintiffs' Order of Justice. It is in the following terms:- "1. The Plaintiffs are long-established Kenyan companies. They import vehicles from overseas vehicle manufacturers and supply them to the East African market. The Second Plaintiff is a wholly owned subsidiary of the First Plaintiff. 2. The Plaintiffs seek relief in respect of the Defendants' participation in a secret scheme ("the Scheme") which operated from 1977 to 2011. Under the Scheme, funds properly due to the Plaintiffs were diverted at the instruction of certain directors of the Plaintiffs, in breach of fiduciary duty and in breach of trust. The directors responsible included the First Defendant. 3. Those directors were dishonestly assisted by the Second and Third Defendants who were at all material times fiduciary and corporate services providers in Jersey. In the alternative, the Second and Third Defendants are vicariously liable for the dishonest assistance rendered by their employees and agents in the directors' breaches of duty. 4. The Scheme was funded by secret commissions paid by vehicle manufacturers that supplied vehicles to the Second Plaintiff. They were paid directly to bank accounts in

Jersey operated by entities unconnected with either of the Plaintiffs and without the knowledge or authorisation of the Plaintiffs. Funds paid into the Scheme were transferred between those entities, invested, and over time substantially distributed to a small group of people, including the First Defendant and other of the Plaintiffs' directors who were privy to the Scheme. 5. The secret commissions paid into the Scheme and their proceeds were the result of breaches of fiduciary duty and breaches of trust by directors of the Plaintiffs, including the First Defendant. The Plaintiffs seek orders that the First Defendant account to the Plaintiffs for all sums that were paid into the Scheme as a consequence of his breaches of fiduciary duty and breaches of trust. The Plaintiffs also seek an order that he account to the Plaintiffs for his profit from the Scheme still in hand." 6. The Plaintiffs also seek orders for the Second and Third Defendants to account to the Plaintiffs for all sums paid into the Scheme on the ground of their dishonest assistance in these breaches of fiduciary duty and / or breaches of trust, wherein the alternative on the basis that they are vicariously liable for the dishonest assistance provided by their agents and employees." 12. Accordingly insofar as it related to the second and third defendants, the claim against them is predicated upon there being a scheme, the funding of which was provided by secret commissions paid by suppliers of motor vehicles to the plaintiffs at the request of directors of the plaintiffs. The secret commissions were paid into offshore companies and structures operated, so it is alleged, by the second and third defendants. It is alleged that the payments were made by the directors of the plaintiffs in breach of their fiduciary duty and that the second and third defendants dishonestly assisted the directors in the scheme. The monies held in the scheme from the secret commissions were ultimately provided for the personal use of a group of directors of the plaintiffs. 13. The method of procuring money into the scheme has been characterised before us as an "over-invoicing" exercise. Although in argument before us the plaintiffs said that "over-invoicing" is a characterisation of an element of the scheme by the defendants, it appears to us that taking the pleadings as a whole it is accepted by the plaintiffs as the methodology by which the secret commissions were procured. 14. The only director sued by the plaintiffs is Martin Henry Forster (the First Defendant) although a number of other directors have been joined as third parties at the instance of the second and third defendants. In the first defendant's answer, he says under the heading "Summary" at paragraph 6, the following:- "6. From 1977 until 2011, the Plaintiffs made and operated arrangements whereby:

- a. Overseas suppliers of motor vehicles invoiced CMC Motors for amounts greater than the true price, the difference usually being 1% to 2%;
- b. CMC Motors paid the inflated invoice price and the overseas supplier paid the extra amount to bank accounts in Jersey in the names of entities established at the request of the Plaintiffs; and
- c. At the direction or request of the Plaintiffs, Scheme funds and the investment accumulations to those funds were used to top up the salaries of CMC officers and employees by payments of hard currency made outside Kenya. These payments, which were typically semi-annual,

were made in lieu of the Plaintiffs paying similar amounts by way of salary, salary increments, pension contributions, performance bonuses and terminal payments inside Kenya in Kenyan shillings." 15. The first defendant goes on to allege that far from being a scheme that was unknown to the plaintiffs and therefore improperly to their prejudice, in fact the plaintiffs set up the scheme in order to achieve the legitimate purpose of payments to directors and employees. 16. In the plaintiffs' reply to the first defendant's answer, the plaintiffs deny that any actions of the directors involved in the scheme amounted to authorisation by the plaintiffs and, at paragraph 5, say this:- "Furthermore at no time did the Plaintiffs own the shares in any of the phase one companies or either of the phase 2 companies. Accordingly, the over invoicing arrangements clearly served to move capital, without consideration, from the Plaintiffs to those who did own the shares ..." 17. It appears, therefore, that the plaintiffs accept that the scheme, in terms of the method by which secret commissions were procured, might reasonably be characterised as over-invoicing. 18. The second and third defendants deny any wrongdoing and specifically do not admit the existence of the scheme either as set out in the preamble to the Order of Justice or as pleaded in somewhat greater detail in the body of it. 19. Moreover, at paragraph 67 of the answer filed by the second and third defendants it is pleaded that they reasonably believed that the plaintiffs were aware of and authorised a number of actions including payment and receipt of monies and the various entities and bank accounts which are allegedly part of the scheme. 20. It is the second and third defendants' case that not only did the plaintiffs know of the so-called scheme but in effect they approved it as it was for the benefit of the plaintiffs and a way of securing the services of foreign employees. 21. Accordingly, so the second and third defendants would argue, any documentation relating to or that might point to the state of knowledge of officers of the plaintiffs would be of relevance to the issues in the case and accordingly should be comprised within the discovery process. 22. As we note later in this judgment, the difficulty with the discovery process lies in the number of documents that will need to be reviewed, their location, the apparently haphazard or even chaotic way of storing those documents and, therefore, the size and scope of the exercise that will need to be undertaken to review all of them. Appeal from the Master 23. The position of this Court when considering an appeal from the Master when the Master is acting as a Greffier Substitute, as here, is as set out in *Murphy v Collins*

[2000] JLR 276 . This position was cited with approval in *Holmes v Lingard*

[2017] JRC 012 in which the Court said:- "On an appeal from the Master (where he is acting as a Greffier Substitute operating a delegated jurisdiction from the Royal Court) the Court should exercise its own discretion and give such weight as it thought fit to the discretion exercised by the Master." 24. Further, the Court in that judgment recognised that:- "Of course not only is the Master a senior Jersey lawyer but he has a very significant practical experience of litigation both as a practitioner and as a procedural judge of this Court." 25. Certain judgments were cited to us by the plaintiffs to the effect that the appellate court will be very slow to interfere with a case management decision. These judgments, however, referred to appeals from the Royal Court to the Court of Appeal and were not

references to appeals from the Master. In our view such statements are of qualified, if any, assistance given that we are acting, not as appellate jurisdiction but a 'de novo' jurisdiction although we are certainly entitled and do place significant weight on the experience of the Master in dealing with such matters. Discovery 26. It is accepted that an order for discovery of documents may be limited, pursuant to Royal Court Rule 6/7(2) to such documents or classes of documents only, or to such only of the matters in question in the proceedings, or to the results of searches carried out by a party as may be specified in the order. 27. It also appears to us that Practice Directions RC17/07 and Practice Directions RC17/08 relating to discovery are relevant. These were cited by the Master in the judgment. 28. RC17/07 states as follows:- "10. In giving discovery, a party is required to make a reasonable search for documents. What is meant by reasonable is determined having regard to:- (a) the overriding objective; (b) the number of documents involved; (c) the nature and complexity of the proceedings; (d) the ease of retrieval of any particular document; (e) the significance of any document which may be located during the search; (f) the likely expense of carrying out any search." 29. The practice direction is specifically applicable to a decision relating to limitation of discovery. Paragraph 14 of Practice Direction RC17/08 states, with regard to searching for electronic documents, as follows:- "The extent of the reasonable search required for electronic documents shall be determined having regard to the general factors listed in Practice Direction RC17/07 at paragraph 10 relating to discovery together with the following:- (a) the accessibility of the electronic document; (b) the location of electronic document; (c) the likelihood of locating relevant electronic document; (d) the cost of recovering any electronic document; (e) the cost of providing inspection; (f) the likelihood that the electronic documents could be materially altered in the course of recovery, disclosure or inspection; (g) the availability of documents or contents of documents from other sources; and (h) the significance of any document which is likely to be located during the search." 30. The reasons for the Master's decision were set out at paragraph 35 of the judgment which in our view we should repeat in full. It states as follows:- "In this case I was satisfied it was appropriate to limit discovery having regard to the statements contained in Practice Direction RC17/07 and RC17/08 for the following reasons: (i) By reference to the affidavits filed and the oral submissions of Advocate Sheedy, I was satisfied that the plaintiffs are taking their discovery obligation seriously. However, it would have been helpful if the approach described to me orally had been explained to the second and third defendants earlier and in advance of the application, rather than it having to be extracted by me through questions at the hearing. I also expect the plaintiffs when they file their affidavit of discovery to file a detailed affidavit setting out the approach taken. (ii) Secondly, I agree with the plaintiffs that what is at the heart of this case is whether or not the alleged scheme was approved by the plaintiffs, or whether it was a secret scheme. While the scheme is said to have operated over many years, the key issue is who knew about it and authorised it. Given the affidavit of Mr Lay, to which I have referred above, and how those now responsible for directing the plaintiffs say they came to be aware of the alleged scheme, I am not surprised that limited documentation is being found in relation to who knew about the scheme. While the

plaintiffs have reviewed board meetings, personal records of the individuals involved, financial statements and certain hard drives, the fact that these reviews have only produced limited documentation does not surprise me given how and where documents about the alleged scheme were discovered by Mr Lay and the nature of the plaintiffs' allegations that this was a secret scheme. This means I am satisfied that it would be disproportionate for the plaintiffs to have to look through every piece of paper it holds in order to prove, as Advocate Sheedy described, a negative; namely that the plaintiffs did not know about the alleged scheme, but rather knowledge of it was restricted to a few individuals. (iii) At this stage, I am also satisfied that the approach being taken is proportionate. The records at the premises where the plaintiffs' group carries out its operations have been reviewed. What is therefore being looked for in the storerooms is material that might be found in the historical records of the plaintiffs. I am satisfied that the plaintiffs' approach is cautious and is not based on a purely random sampling of files. (iv) In relation to this approach I consider I am entitled to take into account the realities of the storage processes of the plaintiffs and just how difficult it is to carry out searches in light of the conditions in which documents are stored. When this is linked to the likelihood of relevant documents being identified, given the very few relevant documents that have been identified so far (see the affidavit of Ms Ferbrache referred to above), I regard the plaintiffs' approach as one that is reasonable and proportionate. (v) In reaching this view, I have not forgotten or ignored the fact that serious allegations are made against the defendants. However, in the case of the first defendant, while his stance is understandable because he is being pursued, this stance means it is difficult for him to complain about the approach being taken if he elects not to indicate where relevant documents might be stored in support of the position he has adopted. In relation to the second and third defendants, they have extensive records of their role in relation to the operation of the alleged scheme. Their defence is far from being solely reliant on the plaintiffs producing documents. (vi) Furthermore, the plaintiffs have searched the obvious sources where you would expect knowledge to be contained; i.e. the minutes of the relevant companies, the personnel files of the individuals said to be involved, the servers / hard drives. While of course the sampling approach may mean that some documents are missed, the sampling approach is limited to general records to see whether there might be relevant material which ended up in one or more storerooms used to keep other irrelevant material and where any archive methodology was either rudimentary or non-existent. (vii) The plaintiffs through their advisors in my view are taking an appropriate approach to ascertain if there is some potentially relevant material in the storerooms as it would have been wrong to exclude these storerooms altogether from any search. Equally, in my view it would be wrong in the sense of being disproportionate and unjust to require every piece of paper held by the plaintiffs to be reviewed. Such an obligation would be to apply a counsel of perfection. In my judgement, in this day and age to require such a search goes too far. The parties and the Royal Court, if this matter proceeds to trial, will have significant material to evaluate the rival contentions put forward by the parties. Putting it another way, the sampling approach taken by the plaintiffs in my judgement will not prevent a fair

trial taking place or the issues at the heart of this case from being determined. (viii) In particular, applying the factors set out in paragraph 10 of Practice Direction RC17/07:- (a) There are a huge number of documents involved, most of which I consider are likely to be irrelevant; (b) These are proceedings where effectively dishonesty is alleged. Any findings of dishonesty may well be made on the basis of what is not contained in documents or based on inferences the Royal Court is invited to draw at trial; (c) The ability to retrieve relevant documents from the storerooms is on any view not easy. Indeed, I would go further would describe it as particularly challenging; (d) A review of all documents would be an extremely expensive process which might not produce any material of significance for the reasons already given; and (e) The cost of the exercise already carried out and to be carried out shows that significant monies have or will be spent by the plaintiffs in support of the approach they have taken." 31. At paragraph 36 of the judgment the Master says:- "My conclusion does not mean, however, that the door is closed to further requests for discovery made by the second and third defendants once they have received the fruits of the plaintiffs' enquiries together with a detailed explanation of the searches carried out. It may be that either applications for specific discovery are justified, or that further enquiries in certain parts of the storage facilities which may have thrown up some relevant material might be necessary or justifiable. I expressly did not close the door to the defendants to make such an application because, while I was satisfied about the approach being taken by the plaintiffs to date, there was always a risk of an area being overlooked due to a sample approach always having a random element about it." The evidence before the Master 32. The Master had before him a number of affidavits dealing with the issues relating to discovery, as follows:-

- (i) First affidavit of Sally Mukabana (i) The first affidavit of Sally Patricia Mukabana was dated the 26 th May, 2017. She is the company secretary of the first plaintiff and is a practising Kenyan lawyer. (ii) While she claimed no personal knowledge of the facts described within the Order of Justice, she had significant information relating to the holding of documentation in general by the plaintiffs and the difficulties in searching that documentation. (iii) She understood that the main point in dispute between the plaintiffs and the defendants to be whether what is described as "the scheme" was known about or authorised by the plaintiffs. (iv) She identified the approach to potentially discoverable documents as searching for documents that supported the defendants' case (and undermined the Plaintiffs' case) that the scheme was known about and authorised by the plaintiffs. (v) She explained that the plaintiffs' archive of hard copy documents consists of eight document storerooms which each contain a mixture of documents belonging to the first plaintiff and the second plaintiff. She indicated the documents that support the defendants' case may be found among the historic documents from both plaintiffs and that those documents are "dispersed throughout CMC's archives" . She also points to the fact that there are a number of additional, smaller stores of potentially relevant documents located around the premises housing the operations of the first plaintiff. (vi) She points to the fact that she has already taken certain steps in connection with discovery by gathering up the

minute books for the highest levels of decision making within the plaintiff companies and the archived personnel files of senior management including those who received money from the scheme. (vii) She pointed out that, following enquiry, the plaintiffs had no "discernible or consistent document retention policy across all divisions and the hard copy archive rooms are filled with a variety of documentation.... spanning several decades". The document storerooms are not indexed and accordingly it is not easy to identify potentially relevant documentation in each storeroom. Her understanding is that when one document room was full, a spare storage room would be identified and documents would be stored there. She also explained at paragraph 21 of her affidavit, the following:- "There is currently a team of English counsel on site working all day indexing the files in the storerooms and assessing their contents for relevance to the Defendants contention that the scheme was known about and authorised by the Plaintiffs. I understand that each member of the team has experience of document review exercises including experience as part of a large UK serious fraud office investigations. The team has completed their indexing review and review of 850 files of material in room 1. Rooms 7 and 8 have also been reviewed for relevance. Rooms 2 to 6 are still in the process of being reviewed. There is a lot of material." (viii) Some of the rooms are so large that they have needed to be subdivided into zones to make them easier to index. For example, room 1 consists of two zones. Zone 1 contains seven rows of metal shelving and each of the shelving units has two sets of files on it. There are more than 6,520 A4 lever arch files of documents in zone 1 alone. She pointed out that the files in question contain " the service records for vehicles CMC have sold or leased to customers in its domestic market. The files are labelled with the registration number of the vehicles to which they pertain" and then says "unless told otherwise, I do not consider the material in zone 1 to be relevant to whether the Plaintiffs knew about or authorised the scheme". (ix) By way of further example she went on to speak about room 2 and, at paragraph 29 of her affidavit, says this:- "Room 2 is a large room which consists of six zones. Room 2 contains what I understand to be historical financial records of CMC Motors, consisting of payroll records, cash ledgers, bank statements, invoicing and shipping documentation for the importation of a range of vehicles, makes and parts.... There are thousands of importation files. A brief examination of them shows they contain the shipping invoices for vehicles (showing the price charged to CMC for the goods), declarations of the Kenyan revenue authority for the purposes of customs duties, the bills of lading and invoices for logistics and warehousing." (x) She explained that the largest of the zones in room 2 consists of approximately 4,000 A4 lever arch files. She estimated that, when that is collated with the other material in room 2 the volume would be approximately double. She exhibited photographs of those rooms. (xi) Her affidavit went on to deal with the other rooms and explains why she views the likely contents of those rooms as either relevant or irrelevant to the claims made by the Plaintiffs. With regard to room 6, at paragraph 35 of her affidavit, she said:- "Room 6 consists of various archived documentation mostly of a financial nature. I cannot state definitively what is in room 6. Judging by the dust, some of the documentation appears to have been there for some time, other material appears to be newer. Among the newer looking material are a number of cardboard boxes filled with documentation from

the group finance director's office and the group management accountant's office. If the scheme was authorised and known about at the (the former finance director Mr Shah appears to have received money from the scheme) [sic] I would expect this material to be relevant. I exhibit an index of some of the boxes in room 6 prepared by my colleague Mary Kamau.... Mary tells me she boxed and indexed these documents as she was the PA to the then CMC Group finance director from 1996 until 2012...". (ii) Second affidavit of Sally Mukabana (i) Miss Mukabana filed a second affidavit which was sworn in September 2017. In it, amongst other things, she set out the methodology in identification of potentially relevant documents. She echoed her first affidavit that no formal process for storing documentation or the allocation of space for storage existed in the plaintiff companies for many years and that storage of documents was "on an ad hoc basis". There is no ready means of identifying which part of the plaintiffs' archive was most likely to contain potentially relevant material. She also repeats that a team of English counsel have been working on the discovery exercise. Their work had ceased during August of 2017 as a result of the general election in Kenya. (ii) She brought up to date information relating to how many rooms have been searched and how many lever arch files have been reviewed within each of the rooms. It is clear that a substantial exercise has been undertaken. (iii) She also described the approach that the plaintiffs had taken to searching for documents. This was summarised at paragraph 15 of the judgment in the following way:- (a) The plaintiffs searched for 'responsive' documents within lever arch files. What was meant by 'responsive' was that if any file contained a potentially relevant document the entirety of that file was set aside for scanning even if other material in the same file was unlikely to be relevant. (b) The entirety of the files in rooms 1, 7 and 8 had been reviewed apart from files described as containing servicing records in room 1. The Plaintiffs had removed eight boxes of files from room 1 and thirteen boxes from room 7 and 8 for scanning. (c) Rooms 2 and 3 were said to contain considerably more material. As far as possible the origin of each of the individual files was determined and then files were reviewed on a sampling basis. The approach taken was to review 10% of the files on each shelf as well as reviewing a selection of any loose paper files at random. (iv) Miss Mukabana described what was meant by 'random' in paragraph 9 of her affidavit in the following terms:- "9. However, I understand that files were not randomly selected in the strict mathematical sense of the word "random";

- (a) Where a file looked as though it might be relevant, the team would review the file, otherwise the files were selected at random.
- (b) Whenever a relevant file was located, an additional file in its physical proximity was reviewed in order to give some confidence that the shelf was not full of relevant files.
- (c) Loose papers on the shelves were boxed for scanning, unless they could be grouped together as related material or were clearly not relevant. Again, this slowed the review process as there was little order to any of the loose papers, other than the ledgers and lever arch files on the shelf." (v) At paragraph 13 of her affidavit she said this:- "With respect for determining relevance, the team has been instructed to identify documents within very broad

parameters of relevance, which would subsequently be reviewed and filtered. This was to avoid the risk that documents might be discarded as irrelevant in error. A full review of the contents of the documents and their relevance against the issues, and whether they are protected by legal privilege is to be undertaken as a separate exercise. The relevance parameters applied were:

- (a) By date - between the 01 January 1976 and 31 December 2013; and
- (b) By key word - if a document contained a key word it was to be presumed relevant and disclosable; if within the above date range but not containing a key word it was to be presumed relevant and disclosable. A list of key words adopted is at [exhibit reference given]. This list was arrived at before Baker & Partners received Mourant Ozannes suggested list of key words on the 24 August 2017." (vi) She went into some length as to the dip-sampling method that had been applied and, at paragraph 23 of her affidavit said:- "While there can be no guarantee that all potentially relevant material has been captured, the team has endeavoured to review any material that appeared prima facie relevant; it is unlikely that such material would have been missed by the team. The dip sampling methodology effectively catered for potentially relevant material by requiring additional material in a box or shelf to be reviewed if relevant material was identified." (iii) Affidavit of Katherine Ferbrache (i) The plaintiffs also tendered the affidavit of Katherine Margaret Ferbrache of Baker & Partners (the Plaintiffs' lawyers) sworn on the 21 st September, 2017. (ii) Miss Ferbrache's affidavit was prepared to provide the Court with some indication as to the number of documents identified as potentially relevant as part of a dip sampling exercise. She explained that on the current analysis, notwithstanding that some of the documents were marked by discovery counsel as prima facie "responsive" , there appeared to be no documents in the warehouses that refer to the scheme. (iii) She explained that the plaintiffs have engaged a London based e-discovery and document management service provider to undertake discovery. That provider has searched materials from rooms 6, 7 and 8 identified by discovery counsel as potentially relevant. A list of key words has been identified. (iv) She explained that of the 45,604 searched documents only 101 documents were returned as containing any keyword. The results of the investigation has shown that the key word searches only generated false positives - that is, documents that contained a key word but which did not refer to the scheme. She also explains that where there were documents such as letters from, for example, "Richard Pirouet" the file containing those documents had been scanned and its contents were in the process of being assessed for relevance as part of the dip-sampling process. (iv) Further information (i) The judgment also reflects that counsel for the plaintiffs explained the involvement of Baker & Partners in the discovery process and that counsel had indeed visited Kenya on five occasions for about a week on each trip. He explained the significant costs involved and that, as explained above, as the Plaintiffs were using both technology and key word searches to identify relevant documents, a cautious approach had been taken. He pointed out that the plaintiffs had not been able to find any reference to the alleged scheme in the audited accounts and there was no reference to bank accounts of companies in Panama or Liberia. What the plaintiffs had looked at did not show

the existence of such a scheme. 33. It can be readily seen that, in the application before him, the Master was presented with the fact that there was a substantial number of documents contained in hard copy records of the plaintiff companies, there was no system or policy for archiving material, the material stretched back over many decades, and that material was distributed around many rooms in a warehouse. 34. The Master also had before him evidence that the plaintiffs had already undertaken a substantial identification and search exercise for the purposes of revealing discoverable documents. They had reviewed documentation that, *prima facie*, might be relevant to whether a scheme existed and whether or not the plaintiffs knew of it. Furthermore, they had identified a dip sampling method to deal with those files, of which there were very many indeed, which did not on the surface appear to contain relevant material. These would have been sampled on a random 10% basis in order to identify whether they contain any relevant documents. The case for the Second and Third Defendants 35. The second and third defendants argue that the Master's orders should be set aside because he failed to take into account at all or sufficiently deficiencies in the methodology proposed by the plaintiffs and the consequences of those deficiencies on discovery. They assert that he also failed to give sufficient account to the likelihood of relevant discoverable documents being contained in the warehouse and the potential detriment that would be suffered by the second and third defendants (and indeed the other parties) in permitting such a limited search. It is also asserted that the Master gave undue weight to the defendants' ability retrospectively to interrogate the plaintiffs' discovery given the difficulty in identifying where documents might be found, and that in reaching any decision in the interests of proportionality the Master erred by giving that particular factor disproportionate weight when considered against the claim as a whole, its magnitude and its effect on the defendants. 36. In written submissions the second and third defendants characterise the plaintiffs' discovery process as being the equivalent of a situation where they "simply threw the warehouse documents up in the air, picked 10% of them off the floor, and reviewed those documents as their discovery". They argue that a restriction in the form of the Master's order narrows the trial court's "field of vision" and places a heavy burden of inference to connect the steps alleged where there is no evidence. 37. The second and third defendants accept that the Master's finding of "whether or not the alleged Scheme was approved by the Plaintiffs or whether it was a secret Scheme" is a key element of the claim. They assert that it would be wrong, however, to characterise it as "the key issue". There are, so the second and third defendants assert, other questions that are equally fundamental to the plaintiffs' claim. Amongst those, they point out that the Master's finding pre-supposes that a scheme in the form alleged by the plaintiffs existed at all, and also make the observation that they have put the plaintiffs to proof of the existence of that scheme so characterised by them. Furthermore, a claim of dishonest assistance against the second and third defendants is contingent upon there being a breach of duty established against the core directors and if the plaintiffs cannot establish the scheme existed as they have pleaded it, or if they rely on inference to establish its existence, then those it will be highly relevant factors in the final determination as to whether or not a breach of duty occurred. They argue that there must be a large number of documents relating to each of the transactions which

are alleged to have included a bonus or surplus. If the scheme existed as pleaded by the plaintiffs, so the second and third defendants argue, it would be extraordinary if there was no trace at all of it within the basic documentation given the plaintiffs' claim that they overpaid for at least hundreds of vehicles over a number of decades. The second and third defendants wish to test such an assertion. 38. They further argue that the plaintiffs must be required to evidence each constituent element of the alleged scheme. The Master's assertion in the judgment that "he was not surprised that limited documentation has been found in relation to the Plaintiffs about the Scheme" and "it would be disproportionate for the Plaintiffs to have to look through every piece of paper in order to prove ... a negative" is an error because, so the second and third defendants state, it would not be possible for the plaintiffs to have known about the scheme if it never existed, and that a lack of documents referring to it could only be persuasive of the core directors' complicity in concealing the scheme from the plaintiffs if the plaintiffs can first demonstrate that the alleged scheme existed at all, and operated for the purposes claimed. Given the nature of the manner in which the documents are stored, the second and third defendants assert that any ability subsequently to apply for wider or specific discovery is, in effect, useless. 39. The second and third defendants further argue that an approach which leads only to looking for documents that refer to or discuss the Scheme as a scheme is far too narrow in this case and would remove from discovery many documents of potential, possibly crucial, relevance. 40. The second and third defendants made the point that they are subject to allegations of dishonesty and they should be entitled to test each element of the claim which includes establishing the nature of the scheme, and its extent and details. 41. They further make the point that it may well be that the dishonesty of the parties is judged by the Court on the basis of inference or by what is not in the documentation. The Court needs to be satisfied that all of the documents are looked at so that it is not basing any inference on the absence of significant evidence. 42. We do not in the above paragraphs set out in full the arguments put forward by the second and third defendants against the order. In their skeleton argument the second and third defendants have identified various statements by the Master which they characterise as findings and argue that those findings are not justified and undermine the basis of the order. The case for the Plaintiffs 43. The plaintiffs' argument is that there is nothing in the appeal that indicates that the Master's order was either plainly wrong or that he had strayed beyond the powers afforded to him by the Royal Court Rules and indeed the practice directions. 44. The plaintiffs point out that the claim against the second and third defendants relates only to the dishonest assistance alleged against them with regard to phase 1 of the scheme. The plaintiffs repeat the assertion that the principal issue between the plaintiffs and the defendants is whether there was any basis to suggest that the plaintiffs knew about or authorised the scheme. 45. The plaintiffs point out that they have already made full discovery of documents searched for and found within the offices of the plaintiffs' former senior management who were known to have been associated with the scheme. It is with regard to the documents remaining in the warehouse that the limited disclosure ordered by the Master pertains, and not documents in general. The plaintiffs point to the fact that there is no allegation that the Master went, in his statement at paragraph 35 of the

judgment, beyond the factors listed in the relevant Practice Direction. The appeal is rather on the weight given by the Master to each of the factors and the plaintiffs assert that the overriding objective, which deals with the management of cases in a proportionate and cost efficient manner, leads to the view that the Master's decision should not routinely be re-argued de novo . 46. The plaintiffs' point to a change in stance on the part of the second and third defendants, and indeed this is apparent in the judgment of the Master where, at paragraphs 27 and 28 he says this:- "In his oral submissions Advocate Speck accepted that discovery had to be reasonable and proportionate as a matter of principle. He accepted the difficulty as being that until the oral submissions of Advocate Sheedy, his clients had not been in a position to understand what steps were being taken by the plaintiffs in relation to discovery, who was involved in undertaking those steps, and how far Baker and Partners were discharging their discovery obligations. The information had only been forthcoming in response to questions from the Court, rather than a proper explanation being received in advance for the application.

28. Having heard the explanation orally, Advocate Speck did not argue against the orders being granted but rather left matters in the hands of the Court, albeit reserving the right to make an application for further searches to be carried out once the result of the present searches was known and his clients had received a detailed affidavit setting out the methodology adopted covering the matters described orally by Advocate Sheedy during the hearing." 47. In the light of this apparent change of position, the Plaintiffs cited the English case of *Allan v Bloomsbury Publishing Limited*

[2011] EWCA Civ 943 when Lloyd LJ said:- "In our adversarial system of litigation, in a case where each party was professionally represented, there was plenty of opportunity to formulate and put to the court all points considered to be relevant on a particular point, it seems to be questionable for a judge to be criticised for having failed to take into account a factor which, if relevant, was known or available to all parties and which no party invited him to consider as part of the process of exercising his discretion." 48. On this latter point we observe that this was a judgment of the English Court of Appeal and therefore not the equivalent of an appeal to the Royal Court by the Master. There is nonetheless some force in the argument that it is difficult to argue against the exercise by the Master of a discretion on appeal when the arguments that underpin the criticism of his decision were not advanced before him in the first place. We think that it is regrettable that these arguments, which have now emerged on appeal, were not argued before the Master. We have no way of knowing what his view on them might have been. That being said, however, we keep in mind that we are exercising a de novo jurisdiction whilst giving due weight to the exercise of discretion by the Master. It seems to us, in the light of points made in *Holmes v Lingard* (cited above), and indeed in the light of the overriding objective, that the weight that the Royal Court will feel able to give to an exercise of discretion by the Master is likely in many cases to be substantial. 49. The plaintiffs go on to support the Master's decision largely for the reasons advanced by the Master in the judgment. They point to a number of arguments which underpin the Master's decision that the dip sampling method is satisfactory and say

that the plaintiffs have not so far found any documents in the warehouse that speak to the main issue in the proceedings. Indeed at paragraph 60 of their skeleton argument, the plaintiffs say:- "The Plaintiffs' approach to their search for discoverable documents is based upon the central issue in the proceedings, which the Master identified (paragraph 35(ii) of judgment) as to whether or not the Scheme as defined was known about and/or authorised by the Plaintiffs." 50. Again, as with our characterisation of the arguments for the second and third defendants, we have given a very general treatment of the arguments of the plaintiffs. 51. For the sake of completeness, we record that we received a letter dated 6 th December, 2017, from Messrs Dickinson Gleeson writing on behalf of the representative of the estate of Mr Prahlad Jani, the fifth named Third Party, who whilst not a party to the appeal before us, urged that the Order of the Master be overturned in favour of a more general obligation in connection with discovery. That letter was copied to the legal advisors for the second and third defendants and for the plaintiffs.

Conclusion

52. It is clear that in making the Order the Master neither exceeded his jurisdiction nor had regard to other than the correct principles. 53. In the light of the information that was both before the Master and is before us, that the challenges that arise within the discovery exercise take this case out of the norm. To us it may well call for both an iterative and imaginative approach to the discovery exercise such as that it ensures, so far as is possible, any relevant material is identified and disclosed without requiring any party to undertake an unnecessarily expensive exercise, which would be unlikely to reveal any further documentation of a discoverable nature. 54. However, it seems to us that in the main this appeal turns upon one point, namely whether or not the Master, in saying that "what is at the heart of this case is whether or not the alleged Scheme was approved by the Plaintiffs, or whether it was a secret Scheme. Whilst the Scheme is said to have operated over many years, the key issue is who knew about it and authorised it", was correct. If that were the determinative issue in the case then we can see justification for the Master limiting discovery in the way that he has done. 55. Whilst the scheme as pleaded by the plaintiffs is not admitted by the second and third defendants, it appears to be common ground that some form of scheme existed given the assertion to that effect by the first defendant in his answer. Is the existence of some form of scheme, whether in the form as pleaded by the plaintiffs or accepted by the first defendant sufficient to limit discovery insofar as it might disclose, absent limitation, documentation relating to the details of that scheme? We can see, looking at the picture overall, that the Master could legitimately form the view that he did. However, we are less confident in holding that that must be the case. 56. There is no doubt that the statement referred to above identifies one of the central issues to the case. That does not mean, however, that other issues are not equally important. Furthermore, to express the central issue in those terms, appears to presuppose that a scheme in the form as pleaded by the plaintiffs existed. That is, on the face of the pleadings, not of course a position that is accepted by the second and third defendants. 57. In our view, with some

reluctance, we think that the case against the second and third defendants must, in the light of the non-admittance contained in the pleadings, be proved in all of its elements to the appropriate standard by the plaintiffs. 58. Accordingly, we do not see any alternative but that the plaintiffs must prove the existence of the scheme in the form they have pleaded, and given that it appears to us that part of that scheme encompasses the payment of secret commissions generated by an over-invoicing arrangement (which for the reasons set out above appears to us to have been accepted in effect by the plaintiffs) then it must be that the plaintiffs must establish every element of that operation. Once they have established the existence of the scheme and the payment of monies to the entities in Jersey, they will then also have to establish that such was a breach of duties by the directors to prove that the second and third defendants had knowledge of the fact that the scheme was created in breach of duties owed by the directors to the plaintiffs and, in the light of that knowledge, dishonestly assisted the plaintiffs in the manner alleged. The existence of a scheme cannot in our view be assumed, and the second and third defendants are entitled to test whatever evidence may be available to support the fact that such a Scheme existed. 59. As we understand the pleadings and arguments, the allegation is to the effect that the over invoicing and/or payment of secret commissions was as a result of arrangements made directly with the suppliers of vehicles to the plaintiffs. There must, so it seems to us (and as argued by the second and third defendants), be a number of documents that reflect those transactions. It may be that were those documents to become available through the process of discovery that would give greater understanding of the nature of any scheme that might have existed, who would have been aware of it, and indeed enable the Court to reach conclusions by way of inference that it might have otherwise been reluctant to do. It is not, in our view, simply a matter of requiring the plaintiffs to prove a negative. It is not a matter of proof in that sense at all. It is a matter of looking for evidence as to what happened, and that to our mind must be evidence that follows a proper evaluation. 60. We do not in any sense suggest that it is not appropriate in many cases to limit the scope of discovery, perhaps as to dates or particular files. Much will depend upon the nature of the case. The nature of this case, however, is that a key element that needs to be established and understood so far as possible is what happened with regard to the payment of secret commissions and over-invoicing. That may suggest who was, or should be supposed to have been, aware of it. 61. Accordingly, whilst we fully understand and sympathise with the Master's desire to limit what was otherwise a very substantial exercise in discovery, we do not feel able to uphold his order. 62. We are not intending to suggest that some appropriate limitation as to discovery process is not possible in this case. In fact, we feel it should be and is desirable. It may be, for example, that review of documentation can be limited in some way, perhaps to those where payments are known and set out in schedule 2 to the Order of Justice. It may be that this is not possible. Perhaps service records could be excluded or sampled. We are not in a position to say because we were not addressed about any alternative. We were asked to uphold the order of the Master or to overturn it in favour of a full discovery exercise. 63. Without a greater understanding, we are unable to offer any suggestions as to what may be possible, and we are left, we think, with no alternative but to overturn the order of the

Master and to find that the normal discovery exercise should take place. We wish to be clear that all we are doing at this point is expressing the view that a 10% dip sampling process will not, in our view, suffice to meet the justice of this case as it is currently pleaded. However, were those parameters to alter, in other words were the pleadings to change or some other method limiting the discovery process to be identified, then we do not mean anything in this judgment to suggest that it would be inappropriate to explore and order discovery in accordance with those limitations. 64. We do not fault the plaintiffs for seeking to limit discovery. We do not, however, agree that a 10% dip sampling approach meets the justice of the case. In that sense, and for that reason, we overturn the order of the Master. That being said, we also note the fact that the limitation was not originally opposed before the Master by the second and third defendants. This appeal in effect represents a change of position and we think that the costs before the Master in connection with this matter and of this appeal should be costs in the cause. 65. Lastly, and for the avoidance of any doubt, we wish to specify that in our view the issue of discovery is as it was prior to the making of the order by the Master and there is accordingly liberty to make any further application in connection with discovery (including its limitation) as may be appropriate. We see no reason why any such application should not be made to the Master. Authorities CMC Holdings Ltd-v-Forster and Others

[2017] JRC 188 . Murphy v Collins

[2000] JLR 276 . Holmes v Lingard

[2017] JRC 012 . Practice Directions RC17/07. Practice Directions RC17/08. Allan v Bloomsbury Publishing Limited

[2011] EWCA Civ 943 . Page Last Updated: 21 May 2018 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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