Contract - directions in relation to discovery

[2020]JRC061

ROYAL COURT
(Samedi)

16 April 2020

Before : Advocate Matthew John Thompson, Master of the Royal Court

Between	**Oleg Sheyko**	**Plaintiff**
And	**Consolidated Minerals Limited**	**First Defendant**

Advocate C. F. D. Sorensen for the Plaintiff.

Advocate J. C. Turnbull for the Defendant.

CONTENTS

JUDGMENT

THE MASTER:

Introduction

1. This decision contains my detailed reasons for issuing various directions in relation to the provision of discovery including eDiscovery by the defendant.

Background

2. The proceedings were commenced by an order of justice signed on 27th July 2018. There are related proceedings for injunctive relief but these are not relevant to this decision. The proceedings in brief concern allegations by the plaintiff that he was entitled to treat himself as dismissed as a result of various repudiatory breaches of contract by the defendant. The plaintiff was, until acceptance of the conduct alleged to amount to repudiatory breaches, the chief executive officer of the defendant. The order of justice at paragraph 19 sets out a series of allegations relied on as repudiatory conduct by the defendant. Other than to say those allegations are extensive, it is not necessary to set out the details of those allegations for the purposes of this judgment. As a consequence of the alleged repudiatory conduct, the plaintiff claims extensive damages by reference to the terms of his employment contract described as a service agreement.

3. The plaintiff's allegations are all denied and contested for reasons set out in an answer and counterclaim dated 5th October 2018. A reply and answer to the counterclaim signed on 16th November 2018; and a rejoinder dated 7th December 2018 to the reply were also filed.

4. It is also relevant to set out certain correspondence and other procedural steps that have occurred.

5. On 5th September 2018 Baker and Partners for the plaintiff wrote to Advocate Seddon of Walkers for the defendant. The letter in effect put down a marker setting out what Baker and Partners considered might be relevant documents and seeking to ensure that the defendant took steps to preserve all relevant documents.

6. Walkers replied on behalf of the defendant on 15th October, 2018, which reply included the following statement:-

> *"My client is aware of its disclosure obligations, and shall provide disclosure in accordance with the court's procedure, at the proper time."*

7. On 23rd January 2019, in advance of a directions hearing, I emailed the advocates for both parties informing them that, by reference to the pleadings, it appeared that there may well be significant amounts of disclosure. I therefore reminded both parties of their obligations contained in Practice Direction RC17/08 and that I expected to be addressed on the question of eDiscovery at the directions hearing.

8. On 24th January 2019, the parties agreed a stay pursuant to rule 6/28 of the Royal Court Rules, 2004, as amended until Friday, 24th May 2019. That stay did not lead to a settlement and therefore before its expiry the plaintiff sought a directions hearing. Ultimately, the directions hearing took place on 5th June 2019. In advance of the directions hearing, Baker and Partners wrote to Walkers making various suggestions in relation to proposed directions including informing them of the identity of their third party eDiscovery provider and proposing a meeting.

9. Walkers replied on 24th April 2019 suggesting that discovery be limited, indicated that they intended to use an eDiscovery provider and suggesting a joint platform for the exchange of documents.

10. When the matter came before me on 4th June 2019, the issues I had to determine were relatively discrete. Firstly, I ruled on how much time the defendant should have to provide discovery. The defendant was allowed until 4th October 2019 to meet its obligations. I also reminded the defendant of the importance of making appropriate use of technology referred to in principle 4c of Practice Direction RC17/08 and discussed in Haddad v GB Trustees & Anor [2018] JRC 227. In particular, I emphasised the importance of using predictive coding to identify potentially relevant documents within the timeframes the parties had agreed would be relevant periods and using the search terms largely agreed between the parties. I also made it clear that I expected the defendant's affidavit of discovery to outline precisely where data had been extracted from and the searches that had been carried out against that data. Otherwise, I made some discrete rulings on particular search terms that were in dispute.

11. I have referred to the issues I considered in summary because the issues subsequently raised by the defendant were not raised at the hearing 4th June 2019.

12. The relevant provisions of the act of court dated 4th June 2019 are paragraphs 1a to g as follows:-

> *"1. this action shall be set down on the hearing list and:-*
>
> *a) on or before 4th October, 2019 the Plaintiff and the Defendant shall make discovery to each other by provision of a List of Documents verified by affidavit;*
>
> *b) discovery shall be conducted electronically. The relevant search terms and data custodians are listed in Schedules 1 and 2 to this Order;*

c) the date range in which the document search shall be conducted shall be 1st February, 2017 to 27th July, 2018;

d) the Plaintiff shall have the search terms listed in Schedule 2 translated into Russian by an independent professional translator so that a supplementary search can be conducted;

e) the parties shall jointly appoint an independent professional translator to translate the search terms listed in Schedule 2 into Chinese so that a supplementary search can be conducted. The parties shall have the opportunity to consider the translations proposed by the said translator and, in the event that the parties are unable to reach agreement in respect of the appropriate translations, there shall be liberty to apply;

f) any discoverable material in Russian will be provided in the original language and with an independent professional translation;

g) any discoverable material in Chinese will be provided in the original language and with an independent professional translation;…"

13. I also gave directions for exchange of witness statements and required the parties to return for further directions once witness statements had been exchanged.

14. On 13th August 2019, I granted a further stay of the proceedings at the request of the parties until 4th September 2019. As a consequence, if the matter did not resolve, the deadline for the provision of discovery was extended by consent until 28th October 2019.

15. Again, it is right to record that the issues later raised before me were not referred to me at the time I granted a further stay.

16. On 24th October 2019, the defendant issued a summons for a further extension of time in order to provide discovery. That application was heard on 6th November 2019. In support of the application, the defendant filed the first affidavit of Advocate Niall McDonald dated 1st November 2019.

17. Paragraphs 1 to 3 of the act of court dated 6th November 2019 stated as follows:-

"1. the deadline for the Defendant to provide discovery is extended to close of business Tuesday, 28th January, 2020 for all documents held outside China, such order to be a final order;

2. the deadline for the Plaintiff to provide discovery in respect of all documents held in China is also extended to close of business Tuesday, 28th January, 2020, such order also to be a final order, subject to the remaining paragraphs of this Act of Court;

3. the Defendant shall use its best endeavours to obtain approval from the relevant authorities in China to make discovery and provide inspection of any documents held within China;…"

18. I also directed that a further hearing should take place on 15th January 2020 for half a day if any further extensions of time were required for the provision of documents located in The People's Republic of China ("PRC").

19. It is also appropriate to refer to paragraphs 8 and 9 of the same act of court which stated:-

"8. the Defendant may provide discovery in tranches for any documents provided any tranche is of a reasonable size, is in chronological order, and is appropriately numbered, and the final version of the list of documents of the Defendant shall identify any alteration to any reference number for any document provided in tranches;

9. inspection of documents shall take place simultaneously with the provision of lists of documents, with documents being provided in a suitable electronic format to enable this to occur;"

20. The defendant was also ordered to pay the costs of the application on the standard basis and generally to bear its own costs, save that 50% of the costs of the preparation of the affidavit of Advocate MacDonald were costs in the cause. This order was to reflect that this affidavit would in part have to have been produced anyway in order for the defendant to discharge its discovery obligations.

21. In summary, my reasons for making this costs order were:-

(i) generally a party seeking more time should ordinarily bear the costs of the application;

(ii) the plaintiff's advocates did not act unreasonably in seeking more information when the initial request for an extension was not agreed;

(iii) the defendant did not proceedings with its discovery obligations at the pace required;

(iv) the defendant also unnecessarily delayed in instructing translators;

(v) the defendant further chose not to proceed with its discovery obligations when mediation was proposed in July 2019 although there was no stay in place at that time; and

(vi) the defendant's approach to discovery adopted in November 2019 should have been taken much earlier in particular in view of the exchange of correspondence referred to above in 2018.

22. These reasons were set out in a short judgment for the parties only.

23. In relation to the present application for a further extension of time, the defendant relied on Advocate MacDonald's second affidavit sworn on 6th January, 2020, exhibiting a legal opinion from Ning Ren opinion is dated 2nd January 2020. Ning Ren law firm is located in the PRC. The plaintiff filed an affidavit in response to the application sworn by Phillip James Brown dated 6th January, 2020 exhibiting an opinion from Mr Taili Wang a partner in East & Concord Partners also a law firm in the PRC.

24. This exchange of opinions led to further supplementary opinions from Ning Ren and Taili Wang dated 6th and 10th January 2020 which were also exhibited to supplemental affidavits from Advocate MacDonald and Mr Brown.

25. As as at the hearing on 15th January 2020, one tranche of documents located outside the PRC had been provided since the hearing on 6th November as contemplated by the first affidavit of Advocate MacDonald; otherwise there had been no further discovery.

Submissions

26. Advocate Turnbull firstly argued that paragraph 8 of the act of court of 6th November 2019 was permissive and did not require discovery of documents outside the PRC to be provided in tranches.

27. He further explained in relation to documents outside the PRC that there were over 100,000 documents which were going to be discovered by the end of January 2020. The defendant would therefore have complied to a significant degree with its discovery obligations.

28. The reason these documents had not been provided in tranches was because an issue of privilege had arisen which had to be evaluated.

29. In relation to documents within the PRC, arrangements to retain the defendant's e-service provider in the PRC had not been completed until the end of November 2019. At the previous hearing, these arrangements were simply in the process of being completed. It took longer than anticipated for these arrangements to be concluded.

30. Once the e-discovery provider was in place, it had extracted relevant documents by reference to the search criteria agreed the previous June. Over 10,000 potentially relevant documents had also been reviewed within the PRC with the result that the defendant was in a position to upload onto the eDiscovery platform 1,595 documents for review by Walkers and to list any of those that were relevant. The defendant had also identified 8,777 potentially relevant documents which were potentially disclosable but which were not going to be listed or disclosed because they were contrary to certain state secrecy laws of the PRC referred to in the Ning Ren opinion. Walkers were not able to state what those documents were because they had not seen them because of the effect of the relevant laws of the PRC.

31. The effect of the relevant legislation was summarised at paragraph 30 of the defendant's skeleton as follows:-

> *"30. In summary, therefore, the Defendant's position on the state secrets issue is that:*
>
> *(a) At present, CML (and any other entity involved in the discovery process) cannot safely transfer the Chinese Documents out of China without a serious risk of censure, including criminal penalties;*

(b) Such censure can be avoided and documents disclosed by following the local law processes set out in Ning Ren's explanatory correspondence;

(c) The Defendant has engaged, at considerable expense, various parties (including Consilio Shanghai and Ning Ren in China) to ensure that those processes can be completed and the Chinese Documents disclosed to the fullest extent permitted by Chinese law; and

(d) CML expects to be in a position to give discovery of the Chinese Documents which are not prohibited from leaving China in due course. It has no intention of depriving the parties of those documents which fall to be disclosed."

32. In relation to translations, the second affidavit of Advocate MacDonald described how steps had been taken to find a cheaper quotation which had resulted in a significant reduction from figures previously quoted. Translations of disclosable documents could now be provided by early April 2020.

33. Advocate Turnbull also argued that all parties would benefit from a reasonable and proportionate extension of time for the reasons summarised at paragraph 39 of his skeleton argument as follows:-

"39. In short form, those are that the extension of time sought will :

(a) Assist the Plaintiff with the litigation of his claim by providing him with documents which he can utilise in seeking to prove the allegations he makes;

(b) Provide the Court with a full evidential picture from which it can draw safe factual findings at trial;

(c) Enables CML to fully and fairly defend these proceedings."

34. The question of discovery of documents within the PRC was further complicated by the need to protect personal data of third parties within the PRC.

35. Advocate Sorensen for the plaintiff made the following observations in response:-

(i) The defendant, if not going to disclose documents, had to be clear about what was not being disclosed and why;

(ii) By reference to the opinion his client had obtained, his client could not understand why discovery was not being made. All the opinion of Ning Ren did was to quote the relevant legislation without saying why that legislation applied to the facts of the present case.

(iii) The plaintiff also reserved the right to challenge in the future any process by which documents in the PRC had been reviewed and any subsequent objection to inspection by the defendant.

36. Advocate Sorensen also criticised the defendant for not explaining at the previous directions hearing in November 2019 why the defendant's eDiscovery provider had not been retained to operate in the PRC. He pointed out that the first affidavit of Advocate MacDonald at paragraph 11 had stated:-

> *"Following the Master's order CML engaged Consilio, an experienced leading eDiscovery provider with a global footprint, to assist with the furtherance of the discovery process."*

37. He contrasted this statement with paragraph 8 of Advocate MacDonald's second affidavit which stated that:-

> *"…the Defendant was in the process of engaging e-discovery provider Consilio to carry out the collection of data from custodians based within the Peoples Republic of China."*

38. He argued that such an inference could not be drawn from paragraph 11 of Advocate MacDonald's first affidavit.

39. Furthermore, Advocate Sorensen contended that the defendant must have known at the last hearing that Consilio had not been retained to act in the PRC and that there were issues that had to be considered. This was because on 4th November 2019 Consilio had received from Ning Ren a revised draft of Consilio's standard terms of engagement to enable Consilio to operate in the PRC.

40. Advocate Sorensen also criticised the defendant's failure to provide discovery in tranches. He referred me to paragraph 78 of Advocate Macdonald's first affidavit which stated:-

> *"CML proposes thereafter to provide further tranches of 5,000 or 10,000 documents when ready, the first of which it is anticipated will be ready by 15th November, 2019. This will ensure that the pool of documents for the Plaintiff and his legal team to review will be regularly replenished and that the Plaintiff's review of CML's documents will be uninterrupted. As a result the Plaintiff will suffer no prejudice by virtue of the extension of time being granted."*

41. He also was critical of the reasons advanced by Advocate Turnbull for discovery not being provided in tranches. He could not see how issues of privilege would apply to over 100,000 documents.

Decision

42. I firstly ordered the defendant to provide a list of all discoverable documents from a review of the 1,595 documents that the defendant accepted could be released from the PRC by 24th January 2020. There was no reason not to provide discovery of any relevant documents that the defendant released for review by Walkers.

43. I further ordered that the defendant by Friday 7th February 2020 was to provide a list in English of the 8,777 documents which were potentially discoverable but which the defendant did not wish to disclose. The defendant as part of this order was required to describe as far as possible each document individually and why inspection was being withheld by reference to any applicable secrecy laws in PRC. This was so that the plaintiff could understand why documents were being withheld and take advice on the defendant's approach. At present, the opinion from Ning Ren was simply a statement of the relevant statutes without an analysis as to why and how those statutes applied to the present case, or applied to categories of documents that would otherwise be disclosable. The plaintiff was entitled to know why documents were being withheld so that ultimately, if advised to do so, the court could be invited to rule on whether the defendant had made out any grounds relied upon to withhold documents.

44. In reaching this conclusion, I wish to emphasise that no discourtesy is intended to the PRC or its laws. However, this is a case before the Royal Court of Jersey where both parties have accepted the Royal Court has jurisdiction. The Royal Court is therefore entitled to determine, having regard to appropriate opinions from Chinese lawyers about whether or not grounds exist which might override the normal discovery rules, which grounds the Royal Court should recognise. It is

therefore important that what the defendant intends to produce or withhold and the reasons why are made clear.

45. I further ordered disclosure to take place on a fortnightly basis with further lists of documents being produced of the documents that were being disclosed and of lists of documents being produced which were potentially relevant but which were being withheld.

46. I further required the defendant by Friday, 3rd April, 2020 to provide a further affidavit from a suitably qualified lawyer within Ning Ren to set out with as much detail as possible all of the legal explanations relied upon as to why any potentially relevant documents have not been disclosed and why they had been withheld for inspection.

47. I required the opinion to come from a named lawyer because the opinion as a matter of Jersey procedural law is expert evidence which must come from an individual and must be in compliance with Practice Direction RC17/09 on expert evidence in particular the obligations of an expert contained in Schedule A.

48. I further ruled that discovery should be completed by Friday, 20th March 2020. This was because of how long the defendant had already taken to comply with discovery obligations. The defendant itself had stated it was aware of its discovery obligations in October 2018. Directions for discovery had also first been issued in June 2019. Nine months to produce relevant documents was therefore more than ample time for the present dispute. While the dispute is reasonably complicated, ultimately it is about whether the position of the plaintiff as CEO was undermined or not and therefore whether his resignation on the basis of various alleged repudiated breaches of contract was justified.

49. I further made it clear that, if the orders I issued were not complied with, then the defendant was at risk of having its sanctions imposed including its answer struck out. While a strike out of an answer with judgment being entered is a serious step, if that is the only means by which the Royal Court can enforce compliance with its orders, then such a sanction may be an appropriate step for the Court to take. Whether such a sanction is ordered in this case is of course a matter for another day, but I made it clear to the defendant's advocates that they should be under no illusion that any non-compliance with orders I issued would be a very serious matter and could well attract significant sanction.

50. I also ordered the defendant to pay the costs of the hearing on the indemnity basis and ordered a payment on account of costs of £15,000 within 14 days. This was for the following reasons which justified indemnity costs:-

(i) At the previous hearing, the defendant had agreed to use its best endeavours to make disclosure. I was not satisfied that this obligation had been met because of the length of time it took to retain Consilio and because of delays in information being provided by the defendant or its parent company to Consilio for review. At times the defendant or its parent company has not responded with the urgency required by a best endeavours obligation.

(ii) The opinions provided from Ning Ren to date did not explain in sufficient detail why potentially discoverable documents were being withheld. Nor was there any explanation of what processes were being followed to determine whether any state secrecy provisions applied to particular documents. This did not help in formulating a timetable.

(iii) The defendant had also not explained why any law of the PRC concerning protecting commercial secrets applied to the present case, which was primarily about the internal decision making processes of the defendant, and whether the position of the plaintiff had been undermined. The position of third parties who might have commercial secrets which required protection was not clear at present.

(iv) At the last hearing I had expected discovery documents outside the PCR to take place in tranches, which was the impression created by paragraph 78 of the first affidavit of Advocate MacDonald. This had not occurred.

(v) I was also not satisfied by the explanation that discovery in tranches was permissive in nature only; this was not the impression I was left with after the last hearing at all.

(vi) I was also not persuaded by the explanation that no further discovery in tranches was possible because of a review of privilege for over 100,000 documents. The process of using an experienced e-discovery provider such as Consilio involves identifying which documents are or may be privileged. While I accept that questions of privilege can and will arise during a review process, this does not mean that every document that is disclosable will have to be re-reviewed. There is technology available for a party to identify which documents may be privileged without having to hold up the entire disclosure process.

(vii) The defendant's unsatisfactory approach had led to further delay.

51. Finally, because of possible concerns about confidentiality I made express orders that any documents disclosed could only be used for these proceedings and that any material used in any witness statements or referred to at trial would not become public simply by being referred to at any trial or as a result of being referred to in any witness statement. This is subject to any different order the trial judge may make once the trial court had the benefit of hearing all the evidence. I also made it clear that any breaches of these orders could be referred to the Royal Court as a contempt of court.

52. As a consequence of the above orders, the deadline for the exchange of witness statements was extended further.

Authorities

Practice Direction RC17/08

Royal Court Rules, 2004, as amended

Haddad v GB Trustees & Anor [2018] JRC 227

Practice Direction RC17/09