Neutral Citation Number: [2021] EWHC 1899 (Comm)

Case No: CL-2019-000250

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**COMMERCIAL COURT**

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

Date: 08/07/2021

**Before** :

**SIR MICHAEL BURTON GBE**
**Sitting as a Judge of the High Court**

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**Between :**

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|---|---|
| **MAD ATELIER INTERNATIONAL BV** | **Claimant** |
| **- and -** | |
| **MR AXEL MANES** | **Defendant** |

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**Jasbir Dhillon QC and Stewart Chirnside** (instructed by **Mishcon de Reya LLP** ) for the **Claimants**
**George Hayman QC and Watson Pringle** (instructed by **Macfarlanes LLP** ) for the **Defendants**

Hearing date: Friday July 2 2021

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# Approved Judgment

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**Covid-19 Protocol: This judgment was handed down by the judge remotely to the parties' representatives at a hearing and release to Bailii. The date and time for hand-down is deemed to be 8 July 2021 at 2pm**

**Sir Michael Burton GBE :**

1. George Hayman QC for the Defendant brought before me, on what was otherwise the pre-trial review of this claim, fixed for hearing in October, an application to strike out passages of witness statements served on behalf of the Claimant in May 2021, namely parts of those of Messrs Patel, Umur and Akdag and the whole of that of Mr Buyukkaya, and some parts of the Claimant's expert report by Mr Ilett, reliant upon that evidence. He does so relying upon the provisions of the new Practice Direction 57AC - Trial Witness Statements in the Business and Property Courts, which have not yet, it seems, been subject to judicial consideration or the subject of any commentary in the White Book. Paragraph 1.1 of that Practice Direction reads as follows: – *"… It concerns witness statements for use at trials in the Business and Property Courts and applies to new and existing proceedings, but only to trial witness statements signed on or after 6 April 2021".*

2. The relevant passages upon which Mr Hayman relies are as follows: –

> *"3.1 A trial witness statement must contain only –*
>
> *(1) evidence as to matters of fact that need to be proved at trial by the evidence of witnesses in relation to one or more of the issues of fact to be decided at trial, and*
>
> *(2) the evidence as to such matters that the witness would be asked by the relevant party to give, and the witness would be allowed to give in evidence in chief if they were called to give oral evidence at trial…*
>
> *…*
>
> *3.4 Trial witness statements should be prepared in accordance with –*
>
> *(1) the Statement of Best Practice contained in the Appendix to this Practice Direction…*
>
> *4.1 A trial witness statement must be verified by a statement of truth… and… must also include the following confirmation signed by the witness:*
>
> *… I understand that it is not my function to argue the case, either generally or on particular points, or to take the court through the documents in the case.…"*

The relevant part of the Appendix referred to in paragraph 3.4 (1) reads as follows:

> *" 3.6 Trial witness statements should not – …*
>
> *(4) include commentary on other evidence in the case (either documents or the evidence of other witnesses)…"*

3. Paragraph 5.2 of the Practice Direction provides:

> *"If a party fails to comply with any part of this Practice Direction, the court may, upon application by any other party or of its own motion, do one or more of the following –*
>
> *(1) refuse to give or withdraw permission to rely on, or strike out, part or all of a trial witness statement…"*

4. The impugned passages all deal with quantum. The Claimant and Defendant agreed in 2015 to enter into a joint venture to develop an international franchise of restaurants under the brand "L'Atelier de Joel Robuchon". The Claimant alleges that the Defendant fraudulently induced it into transactions which led to the termination of the joint venture agreement (JVA), and in particular resulting in two heads of damage relevant to the issue of quantum recoverable for that fraud: (i) the transfer of the Claimant's interest in the company MAD Atelier SA at a substantial undervalue and (ii) the loss of the profits which the Claimant would otherwise have earned from the joint venture. The two heads are potentially intertwined insofar as dependent upon an expert assessment of the likely profitability of the restaurants which would have been operated pursuant to the JVA in London and Dubai. Both require an assessment of the 'but for' question – a conclusion as to the hypothetical profits that were likely otherwise to have been made.

5. As in any such exercise, the hypothetical assessment depends largely upon comparables. Both experts have considered some external comparables. The Defendant has not disclosed what success he had subsequently in Dubai, and so has provided no potential comparable. The Claimant's evidence, to which Mr Hayman takes exception, all of which is given by those who are and were at the time working for the Claimant group of companies and had some involvement in the joint venture, is given, by reference to their relevant experience, as to the projected restaurants in Covent Garden, Mayfair and Dubai. Mr Ilett has relied in part upon the evidence from such witnesses, as he makes clear. Mr Caldwell, the Defendant's expert witness, was instructed not to refer to such evidence, although in the event he has done so.

6. Mr Hayman relied upon the authority of Sir Terence Etherton C in **JD Wetherspoon plc v Harris** [2013] 1 WLR 3296 at [39]–[41], ruling out evidence from a factual witness, Mr Goldberger:

> *" 39. Mr Goldberger would not be allowed at trial to give oral evidence which merely recites the relevant events, of which he does not have direct knowledge, by reference to documents he has read. Nor would he be permitted at trial to advance arguments and make submissions which might be expected of an advocate rather than a witness of fact. These points are made clear in paragraph 7 of Appendix 9 to the Chancery Guide 7th ed (2013)…*
>
> *40 Nor would Mr Goldberger be permitted to give expert opinion evidence at the trial. A witness of fact may sometimes be able to give opinion evidence as part of his or her account of admissible factual evidence in order to provide a full and coherent explanation and account…..Mr Goldberger, however, has expressed his opinions on market practice by way of commentary on facts of which he has no direct knowledge and in which he*

> *cannot give direct evidence. In that respect he is purporting to act exactly like an expert witness giving opinion evidence. Permission for such expert evidence has, however, been expressly refused.*
>
> *41 I recognise, of course, that these rules as to witness statements and their contents are not rigid statutes. It is conceivable that in particular circumstances they may properly be relaxed in order to achieve the overriding objective in CPR r 1 of dealing with cases justly. I can see no good reason, however, why they should not apply to Mr Goldberger's witness statement in the present proceedings."*

7. Mr Hayman also refers to a decision of Mr John Kimbell QC sitting as a Deputy High Court Judge in the Chancery Division in **Buckingham Homes Ltd v Rutter** [2018] EWHC 3917 (Ch), who followed Etherton C in concluding (in a case where, as in **Wetherspoon**, no provision had been made for independent expert evidence) that the witness statement was "*self-evidently an expert's report*" and given by someone who could not give evidence of any primary facts in issue in the proceedings and was (at [30]) "*an independent third-party who has been asked to look at the documents in the disclosure and to provide commentary on them*".

8. The **Buckingham** case plainly has no relevance to this case where (i) there is provision for an expert's report (ii) the witnesses in question are not independent witnesses asked to look at the documents in the disclosure and provide a commentary on them, but themselves played relevant roles at the material time for the Claimant and for the joint venture. Mr Dhillon QC, who appears for the Claimant, also relies upon **Wetherspoon** itself for his case that the judicial approach to such evidence is flexible, and that there are exceptions to the practice even insofar as it otherwise applies, as is plain from **Wetherspoon** at [40] and certainly [41]. Mr Hayman however asserts that, in relation both to **Wetherspoon** and to the authorities to which Mr Dhillon has referred, including Court of Appeal authorities, which I cite below, they all antedated the new Practice Direction, and, although he does not go so far as to suggest that the Practice Direction overrules such earlier authorities, he submits that they must be read in the light of it.

9. I agree with Mr Dhillon that the new Practice Direction does not change the law as to admissibility of evidence or overrule the directions given by the previous authorities, including in the Court of Appeal, as to what may be given in evidence. In particular:

   i) There is support in those authorities, as will be seen, for such hypothetical evidence as to what would or could have happened itself being evidence as to matters of fact, and hence falling within paragraph 3.1(1) of the Practice Direction;

   ii) Mr Hayman did not refer to paragraph 3.1(2), which I have included in my citation above and upon which Mr Dhillon relied, which itself makes it clear that in addition to matters of fact the witness statement may include evidence which a witness *"would be allowed to give in evidence in chief if they were called to give oral evidence at trial*". Hence the test is one of admissibility at trial.

iii) Reference in witness statements to documents does not necessarily amount to "*commentary"*, because paragraph 3.2 of the Practice Direction requires identification of documents to which the witness has been referred for the purpose of giving his statement.

iv) The 'sanction' in paragraph 5.2 is in any event discretionary.

10. I shall therefore address the questions raised by Mr Hayman by reference to the authorities upon which Mr Dhillon has relied, which I do not regard as overtaken by the new Practice Direction. The Practice Direction is obviously valuable in addressing the wastage of costs incurred by the provision of absurdly lengthy witness statements merely reciting the contents of the documentary disclosure and commenting on it, which is expressly abjured by the statement which is now required under paragraph 4.1 of the Practice Direction. But it was not in my judgment intended to affect the issue of admissibility.

11. Apart from emphasising the non-prescriptive effect of **Wetherspoon**, Mr Dhillon refers to the following:

i) S3(2) of the Civil Evidence Act 1972 confirms that there is no blanket rule that witnesses who are not independent experts cannot give opinion evidence:

> *"(1) subject to any rules of court made in pursuance of… this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.*
>
> *(2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived*."

I do not regard subsection (2) as qualifying or restricting the effect of (1).

ii) There are authorities which exemplify that witnesses of fact may be able to give opinion evidence which relates to the factual evidence which they give, particularly if they have relevant experience or knowledge. Such witnesses are not independent, and to that extent such evidence would need to be tested by reference to cogency and weight: **ES (By her mother and litigation friend DS) v Chesterfield and North Derbyshire Royal Hospital NHS Trust** [2003] EWCA Civ 1284 esp at [31]–[32], [41] and **DN (By his father and litigation friend RN) v London Borough of Greenwich** [2004] EWCA Civ 1659 esp at [25]-[26].

iii) This is particularly so where the evidence given is as to a hypothetical situation as to what would or could have happened: **Kirkman v Euro Exide Corporation (CMP Batteries Ltd)** [2007] EWCA Civ 66 esp at [13], [16]–[20] and **Rogers v Hoyle** [2015] QB 265 esp at [61]–[62] per Leggatt J (upheld in the CA). This is well illustrated in **Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd** [2016] 1 CLC 712 CA at [92].

iv) Smith LJ in **Kirkman** at [19] considers that such hypothetical evidence is evidence of fact. Mr Hayman submits that this is limited to evidence as to what the person giving evidence himself, or possibly his company, could or would have done, but in my judgment it is not so limited and extends, provided that the witness can give evidence by reference to personal knowledge and involvement, to what would or could have happened in the counterfactual or hypothetical circumstances. This is particularly so in relation to quantum, where the Court is trying to "*do its best on the material before it*" (**Capita Alternative Fund Services (Guernsey) Ltd v Drivers Jonas** [2012] EWCA Civ 1417 at [80] per Moore-Bick LJ) (and this Mr Dhillon submits must apply a fortiori in relation to a fraud claim, such as this). Thus Jackson J in **Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd** [2008] EWHC 2220 (TCC) at [671] stated: "*As a matter of practice in the TCC, technical and expert opinions are frequently expressed by factual witnesses in the course of their narrative evidence without objection being taken. Such opinion evidence does not have the same standing as the evidence of independent experts… However such evidence is usually valuable and it often leads to considerable saving of costs*": and at [672] "*Having regard to the guidance of the Court of Appeal and the established practice in TCC cases, I conclude that in construction litigation an engineer who is giving factual evidence may also proffer (a) statements of opinion which are reasonably related to the facts within his knowledge and (b) relevant comments based upon his own experience"*. This was approved by Beatson LJ in **Globe** at [92] as not confined to TCC cases, and also in **Rogers** by Christopher Clarke LJ in the Court of Appeal at [64]. This is clearly illustrated in **Parabola investments Ltd v Browallia Cal Ltd** [2011] QB 477 CA at [23] per Toulson LJ, where the evidence related to the amount by which a trading fund had been depleted as a consequence of a fraud and a sum reflecting the lost opportunity to trade: "*The next task is to quantify the loss. Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather it estimates the loss by making the best attempt it can to evaluate the chances, great or small… taking all significant factors into account."*

12. I am fortified in my view that for the purpose of the 'but for' analysis (which both experts address– Mr Caldwell in terms in his Section 10.4), the Claimant is entitled to put before the experts, and in due course before the judge, its evidence as to what could or would have happened, by the following conclusions:

i) The Claimant would inevitably, in my judgment, have given instructions to its expert as to what it considers would have happened. Those instructions would have been incorporated into and addressed by the expert in his report; but by setting out that same information in witness statements there is not only much greater transparency but it enables the Defendant's Counsel to cross-examine the witnesses and seek to challenge or destroy their reliability, rather than getting at it indirectly through the expert. In **Parabola**, a non-independent witness as to the profit which the claimant would have made was strongly challenged in cross-examination, though in the event his evidence was accepted by the claimant's expert and the Judge– see per Toulson LJ at [10] and [25].

ii) For the same reason, whether or not Mr Hayman's challenge is properly made to an expert's report under this Practice Direction relating to witness statements, even if the passages in the witness statements were struck out, the Claimant's instructions to the same effect would still be before the experts, to be tested by them.

iii) It was common ground before me that if there had been documents setting out projections or forecasts they would have been admissible. They could be challenged as unreliable, but they would be before the experts and the judge. Subject only to the inevitable criticism that oral evidence to the same effect may be less reliable, I see no difference.

iv) It is clear that the experts would have looked at comparables by way of what the Defendant subsequently did in Dubai (or might have done) had they been available (Caldwell 10.43), but they are not.

13. The evidence by the Claimant's witnesses, which Mr Hayman seeks to exclude, may turn out to be self-serving or unreliable, particularly if not supported by documents, but is not in my judgment inadmissible and is either itself factual evidence or evidence of opinion given by those with knowledge of the facts and by reference to the factual evidence which they each give, albeit that Mr Buyukkaya was not regarded by the Claimant as sufficiently important to be a custodian for the purposes of disclosure. It does not seek to get round the absence of expert evidence (as in **Buckingham**), but rather enables the independent expert evidence to be better tested. I have read the passages in question and I am satisfied that they are all admissible and should not be struck out.

14. I dismiss the application.