Commercial Court Orders Indemnity Costs Against Claimant for Disclosure Failures

13 September 2023

INTRODUCTION

In *Finsbury Food Group Plc v Axis Corporate Capital UK Ltd & Ors* [2023] EWHC 1559 (Comm), the Commercial Court criticised the solicitors representing the Claimant, Finsbury Food Group Plc ("Finsbury") for the dissatisfactory approach they had taken to disclosure in the proceedings. The Court ordered that all costs incurred as a result of the Claimant's late disclosure during the trial and consequent adjournments of the trial were to be paid to the Defendant insurers on the indemnity basis. The case serves as a salient reminder to legal practitioners of the potential cost consequences of failing to diligently conduct the disclosure process.

BACKGROUND

The case concerned a claim by Finsbury against the Defendant insurers (the "Underwriters") under a Buyer-Side Warranty and Indemnity Insurance Policy (the "Policy"). The Policy was issued in connection with Finsbury's acquisition of a specialist manufacturer of gluten-free bread, Ultrapharm Ltd ("Ultrapharm") for £20m under a Share Purchase Agreement (the "SPA") dated 31 August 2018.

Finsbury claimed that Ultrapharm had breached certain warranties in the SPA that were provided by its CEO, for having failed to adequately disclose that there had been price reductions and recipe changes to some of Ultrapharm's products prior to the acquisition. They alleged that the reductions and changes reduced the overall value of Ultrapharm's business by over £3m and claimed against the Underwriters under the Policy.

At trial, Finsbury's claim was dismissed and the Underwriters were entirely successful. This article focuses on noteworthy comments raised in the judgment by Mr Persey KC (sitting as a judge of the High Court) concerning Finsbury's disclosure failures in the run-up to trial and the standard of the witness statements filed in support of its claim.

JUDGMENT

Disclosure Failures

Attention was first drawn to Finsbury's disclosure failures during the Underwriters' written opening submissions. The Underwriters submitted that at the point of trial, "*neither they nor the Court could have any confidence that Finsbury's disclosure was complete*". Finsbury had acknowledged in their written opening that there "*had been some substantial grounds for criticism in relation to some of the complaints about disclosure that had been made*".

During Finsbury's oral opening, however, the Court was told that a further four relevant documents had just been disclosed and that it was suspected that there might be more. Accordingly, Mr Persey KC adjourned the trial by one week and made orders for disclosure. It subsequently became clear that the scope of the undisclosed documents by Finsbury's legal representatives was wider than had first been appreciated. Mr Persey KC adjourned the trial by a further week and ordered that all of the costs caused by Finsbury's disclosure failings during the trial and the consequent adjournments were to be paid by Finsbury to the Underwriters on the indemnity basis.

Approximately 2,000-2,200 further documents were disclosed by Finsbury after the trial had commenced, a number of which the Court was satisfied were directly relevant to the issues in the case. Finsbury's legal representatives accepted that the shortcomings in the disclosure process were their responsibility. They attributed these shortcomings to: (i) a failure to properly instruct and oversee paralegals who carried out the initial disclosure on the issues in the case; and (ii) a failure of the subsequent Technology Assisted Review ("TAR") to discover additional relevant documents because the training set of documents skewed the TAR from finding documents relevant to the issues.

Mr Persey KC noted at [16] that this was "*profoundly unsatisfactory*", commenting that the solicitors' approach to disclosure "*fell far below that which was required. The initial discovery should not have been left to paralegals who had no real understanding of the issues in the case. The Training Set for the TAR should have been properly prepared and directed towards the full range of issues*". The judge concluded on the matter that it was fortunate the Court and parties were able to accommodate the postponed hearing date so that the further disclosure exercise could be carried out.

Witness Statement Shortcomings

Mr Persey KC also criticised the witnesses of fact for having "*signed witness statements in an almost identical format*". He also noted that the content of the statements covered very selective and limited matters.

The judge also criticised the oral witness evidence provided by Finsbury's witnesses. Most notably, a Finsbury divisional finance director "*accepted in her oral evidence that parts of her witness statement were wrong*" and that they were based on documents that Finsbury's solicitors had picked out for her. Finsbury's business director was also criticised for "*sticking to and repeating the contents of his witness statement even when shown documents that contradicted what he had said in it*".

Ultimately, the judge concluded that the evidence of the six witnesses called on Finsbury's behalf was unreliable and he did not accept it, save for where it was consistent with the contemporaneous documents.

COMMENT

The decision is an important reminder to parties and their legal advisors about the cost consequences of failing to diligently conduct the disclosure process. Practice Direction 57AD requires parties to undertake any search for documents in a responsible and conscientious manner. Legal representatives are also under a duty to take reasonable steps to advise and assist their client to comply with its disclosure duties. It is important for legal advisors to liaise closely with their client to ensure that the disclosure process is properly managed and overseen in order to avoid potential cost ramifications.

The judgment is also an important reminder to legal practitioners of the requirements of trial witness statements under the separate Practice Direction 57AC ("PD 57AC"). In particular, PD 57AC emphasises that witness statements should be written in the witness's own words. PD 57AC also states that witness statements should be prepared in such a way as to avoid so far as possible any practice that might alter or influence the recollection of the witness other than by providing documents as a refreshment of memory.

Legal practitioners should therefore be aware that witness statements containing identical or very similar wording will suggest that the statements are not, in fact, the witnesses' own evidence and that the witnesses may have been improperly influenced. Similarly, legal advisors should be careful not to provide prospective witnesses with a limited snapshot of the available documents that are not representative of the totality of the witness's evidence. Should these issues arise at trial, the court may cast doubt on the credibility and reliability of these witnesses and their statements, undermining the evidence given and, potentially, a party's entire case. Indeed, this judgment records that this likely occurred with Finsbury's divisional finance director who accepted that parts of her witness statement were wrong and were based on "*documents that* [Finsbury's

solicitors] *had picked out for her*". For more detail on PD 57AC, see our full analyses here and here.

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