Ref. IL-2018-000095

Neutral Citation Number: [2021] EWHC 3553 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(BUSINESS & PROPERTY COURT)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London

Before THE HONOURABLE MR JUSTICE MEADE

2nd DECEMBER 2021

IN THE MATTER OF

(1) MR EDWARD CHRISTOPHER SHEERAN MBE
(2) MR STEVEN MCCUTCHEON
(3) MR JOHN MCDAID
(4) SONY/ATV MUSIC PUBLISHING (UK) LIMITED
(5) ROKSTONE MUSIC LIMITED
(6) SPIRIT B UNIQUE JV SARL
(7) KOBALT MUSIC COPYRIGHTS SARL (Claimants/Respondents)

- v -

(1) MR SAMI CHOKRI
(2) MR ROSS O'DONOGHUE
(3) ARTISTS AND COMPANY LIMITED (Defendants/Applicants)

JESSE BOWHILL and RAYAN FAKHOURY (instructed by Brais & Krais Solicitors) appeared on behalf of the Claimants/Respondents
MR ANDREW SUTCLIFFE QC and TOM RAINSBURY (instructed by Keystone Law) appeared on behalf of the Defendants/Applicants

APPROVED JUDGMENT

MR JUSTICE MEADE:

1. This is an application by the defendants in relation to the claimants' disclosure. The general circumstances of the action are set out in the earlier judgment of Nugee J (as he then was) and I will not repeat them. The relief sought is set out in the draft order under 10 categories of documents and this is my judgment in relation to numbers 1-7.

2. In my view the DRD that was drawn up in this action suffers from quite a significant shortcoming in that many of the requests are framed in terms which are very general, such as for example the requests for the issue for documents relating to whether the first and third claimants had the opportunity to access or did access all the defendants' works prior to the creation of the composition. In my view the requests should not have been drawn up in that way and they contravene the guidance given by Andrew Baker J in *Pipia v BGEO* [2020] 1 WLR 2582. Nonetheless, more specific instances were given of the requests for documents, or categories of documents, for each request under each issue and in many respects the parties have proceeded by reference to those, although not all, since - as I will come on to relate - diaries are not enumerated in any of the example lists and yet are accepted by both sides to be the proper subject of disclosure, at least potentially.

3. The defendants rely on a number of what they say are shortcomings with the claimants' disclosure and the application was put under paragraph 17 and 18 of PD51U, although at the hearing, as I understand his submissions, Mr Sutcliffe QC, who appears for the defendant, really relies on paragraph 17, which is as follows:

> "17. Failure adequately to comply with an order for Extended Disclosure
>
> 17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to—
> (1) serve a further, or revised, Disclosure Certificate;
> (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;
> (3) provide a further or improved Extended Disclosure List of Documents;
> (4) produce documents; or
> (5) make a witness statement explaining any matter relating to disclosure.
>
> 17.2 The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4).
>
> 17.3 An application for any order under paragraph 17.1 should normally be supported by a witness statement."

4. This requires me to proceed in to two stages: first of all, I have to identify whether there has been a failure to comply (17.1), and if so I must be satisfied by the party applying for an order - which is the defendants - that making some curative order of the type referred to in 17.1 (1)-(5) is both reasonable and proportionate. The principles that I have applied so far are not really in dispute between the parties. What is in issue before me today is their application, and the parties also disagree about whether the DRD was properly drawn.

5. Mr Sutcliffe defends the DRD and Ms Bowhill for the claimants accepts the shortcoming that I have identified with it but, as I say, I am satisfied that it should not have

been drawn up in the form that it was. I am also satisfied that to consider making an order under paragraph 17 of the Practice Direction I need more than just a general suspicion that there may have been a shortcoming in relation to disclosure and I was referred, by Ms Bowhill, to the decision of Mr Robin Vos QC (sitting as a deputy High Court Judge) in *Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd* [2021] EWHC 849 (Ch) as to the standard to apply.

6. In my judgment there must indeed be some basis for going behind the process which has been carried out. Speculation is not enough. Something is needed to show that there is a likelihood (as opposed to a possibility) of further relevant documents existing.

7. In the run-up to this application and the hearing before me today, and triggered by the imminence of the hearing I am satisfied, a number of problems have come to light with the claimants' disclosure and in my view they have to be seen as a whole.

8. There is a complicated dispute under paragraph 1 of the draft order - which paragraph is agreed but is still relevant to my overall assessment - which concerns the format in which some music files from the recording studios in question were provided and although, as I say, that paragraph had been agreed, the way in which that has been dealt with in my view evidences a certain stubbornness and awkwardness on the part of the claimants. More significantly, it has turned out that diary entries provided by the claimants in disclosure were not in fact (as have been said) the original diary entries but copying out in manuscript of certain manuscript diary entries by a Mr Howells, which is unfortunate and regrettable and has not given the defendants the complete picture to which they were entitled.

9. Furthermore, certain recordings of events that took place at the time when 'Shape of You' was first recorded on 12 October have come to light in the last day or so which were not found because they do not have filenames that were responsive to any of the search terms agreed between the parties. Furthermore, I should say that I find it significant that at least one of the diary entries that have been focused on in the run-up to the hearing suggests that 'Shape of You' may have been begun as a composition - and I stress "may" - before 12 October 2016.

10. Finally, I asked Ms Bowhill to what extent the songwriter claimants (the first three claimants) and Mr Sheeran (the first claimant) in particular had engaged with the disclosure process themselves and I was informed that Mr Sheeran's disclosure had been undertaken not by him but by his manager, which was a view that I have already thought was quite likely from my pre-reading for this case and which is not necessarily a sign of impropriety but certainly is a matter of concern when it turns out that other individual claimants had their files on their phones which were not identified.

11. All of this taken together leads me to have real and significant concerns about the claimants' disclosure, but that does not mean in any view that I should simply go ahead and order disclosure of the categories of documents sought because I am expressly required by paragraph 17 to consider whether it is proportionate, so I will go through the categories briefly.

12. The draft order paragraph 2 is in relation to diaries for a number of listed individuals. There has clearly been a problem with diaries and I am not satisfied that the first claimant in particular, and possibly the third claimant - I will come back to that - have really engaged with this and I will make the order sought under paragraph 2.

13. I recognise that it is more than possible that this will result in a nil return because when, for example, the first claimant really turns his own mind to it, it will be confirmed that there similarly are no diary entries, but I am satisfied from the individual event which Mr Howells' diaries and the aggregate effect of the problems with the claimants' disclosure - to which I have referred already - that it is proportionate to make that order.

14. Paragraph 3 of the draft order as follows:

> "3. The First Claimant is to search for and produce in their native format all recordings and notes relating to Shape of You which are or have been in his control, including those recorded or held on any mobile phone, tablet, laptop and at Gingerbread Man Studios (in Suffolk and/or London). This includes any recordings or notes relating to any earlier versions or parts of what became Shape of You, even where it was known by a different name or did not yet have a name."

15. It is said that in fact the reference to 'Gingerbread Man Studios' which appears in the credit for 'Shape of You' at one point is an error and that no recording took place there, but this has not been verified by Mr Sheeran himself, and although there is some evidence that nothing happened at Gingerbread Man Studios, that may turn out to be wrong. It may turn out to be right, but that is a matter to be explored at trial. Taken with the possibility - which I think is a real one - from the diary entry preceding the recording session on 16 October, I think there is a real question about whether Mr Sheeran had done any work on the 'Shape of You' (whether under that name or a different name) prior to 16 October.

16. For all these reasons and because he does not appear to have personally engaged with the disclosure process much (if at all) so far, I think it is appropriate to order paragraph 3.

17. Again, it is possible that this will turn out to be a nil return. It may be that Mr Sheeran, when thinking about it personally, will conclude that he is absolutely certain that no work was done before 16 October (in which case there will not be any additional documents in all likelihood), but I think it is a reasonable inquiry to be made and it is on a topic which is potentially central to the issues in the action.

18. Paragraph 4 is as follows:

> "4. Unless already required by paragraphs 1 and 3 above, the First, Second and Third Claimants are to search for and produce in their native format all Voice Notes and/or other ambient recordings relating to Shape of You, Photograph and Strip That Down which are or have been in their control. This includes the Voice Notes and ambient recordings relating to any earlier versions of parts of what became these compositions, even where they were known by different names or did not yet have a name."

19. In my view this paragraph is also appropriate, not least because the voice notes that have turned up right on the eve of this hearing would fall within this paragraph. Again I acknowledge that it is possible that nothing will result and I note Ms Bowhill's submissions that in particular in relation to the third claimant that may be the case. But this is a request which, in my view, focuses on the specific problems that have come to light as a result of this application.

20. Paragraph 5 is as follows:

> "5. Unless already produced on 28 March 2021, the First, Second and Third Claimants are to search for and produce all communications to/from the First to Third Claimants or others concerning the writing, creation and recording of Shape of You, Photograph and Strip That Down, whether sent by email, text message, WhatsApp, Facebook or Twitter or otherwise."

21. This is an extremely broad category of documents. I was shown only the sketchiest evidence of there being any problem in relation to it, focusing on an individual email where I found it hard to understand precisely what it was said was missing, but in any event I do not see any real evidence of a systematic or serious problem and ordering this inquiry would be a very broad one which, in my view, would be very unlikely to pay any real dividends in terms of addressing the issues in the case.

22. Paragraph 6 is as follows:

> "6. The Claimants are to search for and produce: (1) all communications, audio and/or audio-visual files which were sent/received by or on behalf of the Claimants in respect of Songwriter and the NYT Documentary ("the Documentaries"); and (2) all edits and outtakes of the Documentaries, which are or have been in their control."

23. On this one I accept Ms Bowhill's submissions for the claimants that it is highly unlikely that there is anything at all in these categories that have not been produced and I therefore conclude that the defendants fail at the first stage within paragraph 17. But, even if that were not the case, this is not proportionate and unlikely to produce useful results, in my judgment.

24. Paragraph 7 is a slightly more complicated one because it refers to the first, second and third claimant's social media activity. The problem here is that records of the position on their Twitter, Instagram and Facebook accounts as they stood in 2015 and 2016 no longer exist and the defendants have reacted to that by seeking a list of their current Twitter, Instagram and Facebook followers and friends.

25. It seems to me that that is a disproportionate way to proceed, but I raised with Ms Bowhill the question of whether it was not pragmatic for the first, second and third claimants to address themselves to the specific Twitter, Instagram and Facebook accounts that have been identified in the evidence and the correspondence and to satisfy themselves by looking at their current Twitter, Instagram and Facebook accounts that they do not believe they followed any of those at the relevant time in 2015 and 2016.

26. I do not consider that I can compel the claimants to do that, but I invite them to consider doing that. And if they are unwilling to do that or omit to do that, then conclusions may be drawn against them at trial. I would suggest to them very strongly that the pragmatic thing for them to do is simply to put in a witness statement for each of them confirming the position, for which I give permission, if they wish to take advantage of it.

27. I should say one or two other specific things.

28. First of all, there is a date or an event referred to in one of the videos that I have been invited to look at called 'Album Delivery Day' and it is obvious to me that Mr Sheeran (if no

one else) will know what 'Album Delivery Day' was. In the video that I was invited to watch reference is made to an additional song being in his contemplation then and I direct that Mr Sheeran must identify to the defendants, if he is able to, and to the best of his ability, what 'Album Delivery Day' was. I must say that my own appreciation from all the materials in the case that it is all too likely that 'Album Delivery Day' was after 16 October 2016, in which case it will not be relevant, but it is an important question that has been asked and it will be very easy for Mr Sheeran to respond to it.

29. Secondly, I have said already that Ms Bowhill has said that Mr Sheeran's manager undertook the disclosure exercise on his part. In my view that is unsatisfactory and I order, of my own motion, that Mr Sheeran is to make a witness statement, when the claimants comply with my order in relation to paragraphs 1-5 of the draft order, stating that he has personally satisfied himself that his disclosure obligations have been met.

30. In the course of his reply submissions Mr Sutcliffe QC said that the same question arose over the third claimant, Mr McDaid and, on reflection, I think that that is a reasonable question - and in a moment I will ask Ms Bowhill to find out what the position is with Mr McDaid - and if he delegated the disclosure exercise to his manager, then I am going to make the same order in respect of him. I appreciate that both these gentlemen are very busy people, with recording and song-writing careers and performing careers to pursue, but they did initiate these proceedings and it is important that people in their position take responsibility for their own disclosure.

31. Finally, I should say that I have made certain comments about the nature of the parties' cases in the course of this judgment, but whether they are right or wrong is a matter for trial and I am not expressing any view about who is likely to win or lose at trial. That is not my function on this hearing and that is not what I do.

(There followed further submissions)

MR JUSTICE MEADE:

32. I now have to deal with paragraphs 9 and 10 of the draft order. Paragraph 9 is to do with redacted documents and paragraph 10 is to do with some privileged documents, but they overlap, for reasons I will touch on.

33. I will first deal with what is referred to as to 'TLC/No Diggity Chain,' which is a chain of emails, the addressees of which, or persons copied into which, included Mark Krais, of the claimant's solicitors, and Peter Oxendale, who is a well-known musicologist expert, and so those are specific emails in an email chain in disclosure which have been redacted on the basis of privilege.

34. Paragraph 10 of the draft Order relates to documents evidencing the instructions and communications relating to the preparation of the "Oxendale letter", that being the form in which Mr Oxendale provided his opinion. The issue here is one of privilege.

35. Mr Sutcliffe's submits that there was no privilege in the first place and, if there was, it has been waived; that even if the relevant transaction was the provision of the report by Mr Oxendale, the instructions are the subject of a collateral waiver of privilege.

36. Ms Bowhill responds that there is privilege because there was the existence of litigation privilege because it was anticipated that, at least in the shape in which it was originally proposed, 'Shape of You' might infringe the copyright in 'No Scrubs.' I am sure that Ms Bowhill is right about that and so I address this on the basis that there was initially privilege.

37. The next step, as I see it, is to identify the relevant transaction, and I must do this against a backdrop of an assessment of what is fair and a realistic assessment of the purpose for which the material is being advanced. It is very clear the purpose for which it is being advanced is that the claimants want to say that when they appreciate a potential copyright problem in the preparation of a song that they are writing they act responsibly and get clearance or, alternatively, modify their work so that there is no question of reproduction and clearance is unnecessary. It was in pursuit of this sort of professional approach, it is said, that Mr Oxendale was approached.

38. Against that background, I think it is very clear that the transaction was the totality of the giving of instructions to Mr Oxendale and his provision in response of his report and it makes no sense to me to regard the provision of the report as a separate transaction from the instructions when the whole purpose is to get across on behalf of the claimants that they acted professionally and part of that professional behaviour, if it is to be proved, must be an appropriate, honest and transparent engagement with Mr Oxendale in the first place.

39. So, without having to consider the question of collateral waiver, I identify the transaction in totality as the giving instructions and receipt of the report. The waiver extends to that transaction and I therefore make the order sought by the defendants in relation to the 'No Diggity Chain' and the instructions to Mr Oxendale.

40. Taking this slightly out of order, there was also a chain of emails concerning "Photograph" where it was said that redactions had taken place on the basis that they were covered by without prejudice privilege. It did not seem to me that this was sustainable since it is part of the claimants' narrative that they did indeed settle a dispute over Photograph and these emails would tend to evidence that that took place and, adopting a pragmatic approach on taking instructions during the hearing, Ms Bowhill - I am sure rightly - conceded on that point.

41. Finally, there are two other email chains, referred to as 'The Liam Payne Chain' and 'The Studio chain,' where an explanation for the redaction has been given in paragraphs 106 and 108 of the second witness statement of Simon Goodbody. At paragraph 103 Mr Simon Goodbody confirms that the relevant documents were redacted pursuant to paragraph 16.2 of the PD51U and he accepts that it was an oversight and an error not to give the explanation when giving extended disclosure. He says that was an honest oversight - and I accept that evidence - and he goes on to explain what happened. He says both in relation to the 'Liam Payne Chain' and 'The Studio Chain' that the redactions were done because the passages contained private communications which have no bearing on any of the issues in dispute between the parties and are therefore both are irrelevant and confidential.

42. Although, obviously, I cannot see what is under the redactions, I think his explanation is plausible. It is quite common for people to put at the beginning or the end of an email some personal observation about their family life - or something like that - and it is, in my view, entirely plausible that the redactions that took place are that sort of thing. And since

Mr Goodbody is a solicitor who has turned his mind to this specifically, I accept his evidence.

43. I will say that in relation to the emails of 15 January 2017 the position is a bit more striking because the contents of whole emails are redacted, but I still accept what is said by Mr Simon Goodbody. They are very short emails and they just happen to be part of the same string in which something relevant was to be found, therefore I will not make an order in relation to the 'Liam Payne Chain' or 'The Studio Chain.'

This transcript has been approved by the Judge