Claim No: CL-2019-000752

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

IN AN ARBITRATION CLAIM
AND IN THE MATTER OF APPLICATIONS UNDER S.67 AND S.68 OF THE ARBITRATION ACT 1996
BETWEEN:

THE FEDERAL REPUBLIC OF NIGERIA

Claimant

- and -

PROCESS & INDUSTRIAL DEVELOPMENTS LIMITED

Defendant

Claim No: CL-2018-000182

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

IN AN ARBITRATION CLAIM
AND IN THE MATTER OF AN APPLICATION UNDER S.66 OF THE ARBITRATION ACT 1996
BETWEEN

PROCESS & INDUSTRIAL DEVELOPMENTS LIMITED

Claimant

- and -

THE FEDERAL REPUBLIC OF NIGERIA

Defendant

SKELETON ON BEHALF OF THE FEDERAL REPUBLIC OF NIGERIA ("FRN")

References to the Opus Hearing Bundle are given in the form {Bundle/Tab/Page} as appropriate

Time estimate for hearing: 2 hrs **Pre-reading estimate (if time allows):** 1 hr to read items at 1 and 2 below.

Suggested pre-reading

1. The respective skeletons of FRN and Process & Industrial Developments Ltd ("**P&ID**").
2. The draft consolidated order sought {**APPB/4**} (the "**Consolidated Order**"), with the residual, limited areas of disagreement highlighted in yellow.

Additional reading (if time allows)

3. The Re-Re-Amended Statement of Case {**APPA/7**}, the Amended Defence {APPA/8}, the Amended Reply {**APPA/9**} and P&ID's Response to FRN's RFI dated 17 May 2022{**APPA/15**}.
4. The Tenth and Twelfth Witness Statements of Shaistah Akhtar ("**Akhtar 10**" {**APPC/1**} and "**Akhtar 12**" {**APPC/7**}); Kobre & Kim's fifth letter of 24 June 2022 {**APPC/3**}.

A OVERVIEW

1 FRN's current applications relate to failings in relation to P&ID's disclosure, ahead of the eight-week trial commencing on 16 January 2023. As will be apparent from the Consolidated Order {**APPB/4**}, P&ID has now conceded that the vast majority of further searches sought by way of FRN's applications dated 1 and 27 June 2022 ought to be ordered. The matters that remain in dispute – highlighted in yellow in the Consolidated Order {**APPB/4**} – are limited, but significant. They concern:

1.1 *Paragraph 2 of the Consolidated Order*: FRN contends that P&ID ought to review the documents controlled by Mr Brendan Cahill arising from or in connection with, the criminal and/or regulatory investigation(s) relating to Mr Cahill in the Republic of Ireland, and provide disclosure of any such documents that fall within the Issues for Disclosure.

1.2 *Paragraph 4 of the Consolidated Order:* whilst P&ID has now conceded that it ought to provide inspection of various SMS and WhatsApp threads, FRN contends that P&ID ought to provide inspection of the group chat(s) between Mr Cahill, Mr Trevor Burke QC and Mr Seamus Andrew subject only to redactions in accordance with PD51U paragraph 16.1.

1.3 *Paragraph 4 and 8-14 of the Consolidated Order:* FRN contends that disclosure pursuant to these paragraphs ought to be required by 5 August.

1.4 *Paragraph 15 of the Consolidated Order*: FRN contends that P&ID pay its costs.

2 These matters are addressed in turn below.

B BACKGROUND

3 The eight-week trial concerns P&ID's enforcement application, and challenges by FRN under s.67 and s.68(2)(g) of the Arbitration Act 1996, in relation to arbitral awards relating to a gas processing contract (the "**GSPA**") between FRN and P&ID dated 11 January 2010. The Final Award of 31 January 2017 ordered FRN to pay P&ID damages of US$6.6 billion, as well as interest at 7 percent. The current outstanding amount is alleged to comprise some US$11 billion. This is accordingly an extremely high value dispute even by the standards of the Commercial Court.

4 FRN's case is that the GSPA, the arbitration clause in the GSPA and the awards were procured as the result of a massive fraud perpetrated by P&ID. As recorded in *The Federal Republic of Nigeria v. Process & Industrial Developments Ltd* [2021] 1 Lloyd's Rep. 121 {**APPC/2/49-91**} (the "**Cranston Judgment**"), in the context of granting FRN extensions of time and relief from sanctions to bring its challenges, Sir Ross Cranston, sitting as a judge of the High Court, found:

4.1 There is a strong *prima facie* case that the GSPA was procured by P&ID paying bribes to Nigerian officials, including to a Ms Grace Taiga[1] and Mr Taofiq Tijani[2] (Cranston Judgment ¶¶196-199); and

4.2 There is a strong *prima facie* case that Mr Michael Quinn (P&ID's co-founder, alongside Mr Cahill) gave false evidence to the tribunal which gave the impression that P&ID was a legitimate business able and willing to perform the GSPA, when in fact it was not (Cranston Judgment ¶210); and

4.3 There is "at the least" a *prima facie* case that Mr Olasupo Shasore, FRN's advocate in the arbitration, was corrupted by and colluded with P&ID (Cranston Judgment ¶225) (it being FRN's case that P&ID and its associated persons colluded with and/or entered into corrupt arrangements with individuals involved in FRN's defence of the arbitration, with a view to seeking to secure a settlement and/or influencing the conduct of FRN's defence).

5 Since the Cranston Judgment, extensive (and remarkable) further evidence of wrongdoing by P&ID in relation to the arbitral process and these proceedings has emerged, with this coming predominantly as a result of FRN's pursuit of proper disclosure by P&ID both via correspondence and previous applications.[3] These matters have been reflected in amendments to FRN's pleadings, with FRN most recently having been granted permission to rely on its Re-Re-Amended Statement of Case dated 5 July 2022 {**APPA/7**}.[4] In particular:

[1] The legal director of the Nigerian Ministry of Petroleum Resources ("**MPR**") at the time it entered the GSPA, which Ms Taiga witnessed.
[2] Chairman of the Technical Committee of the MPR at the time of the GSPA.
[3] This has included FRN's disclosure applications dated 2 December 2021 and 7 January 2022, which P&ID conceded to in the form of the Consent Order of Mr Justice Foxton dated 4 February 2022 {**APPA/15**}.
[4] See also FRN's Amended Reply dated 31 March 2022 {**APPA/9**}. Insofar as the Re-Re-Amended Statement of Case is concerned, P&ID has permission to file and serve consequential amendments to the Amended Statement of Defence by 22 July 2022, with FRN to serve a Re-Amended Reply by 12 August 2022.

5.1 First, when disclosure took place on 29 October 2021, Kobre & Kim wrote to Mishcon de Reya LLP ("**Mishcon**") identifying, for the first time, that P&ID were in possession of numerous documents which might be privileged and confidential to FRN. These included privileged and confidential documents from the time of the entry into the GSPA and multiple privileged documents containing legal advice provided to FRN as to how to defend the arbitration and advising on settlement negotiations (the "**FRN Privileged Documents**"): see Akhtar 10 ¶16 {**APPC/1/7**}.[5] It is evident that P&ID obtained such documents contemporaneously.

5.2 One email thread confirms at least one of the suppliers of FRN Privileged Documents to have been Ms Olufolakemi Adelore (then Legal Director of the MPR), using her email address flakeytee@yahoo.com to communicate with P&ID's agent and middleman Mr Adetunji Adebayo.[6] However, full details of how P&ID came to obtain the FRN Privileged Documents remain obscured due to: (a) a lack of disclosure by P&ID of documents revealing the identity of the FRN individuals who improperly leaked and supplied such privileged documents to P&ID;[7] and (b) P&ID maintaining in its Response to FRN's RFI that it is unaware of the identity of the individuals who provided such privileged documents to it: see P&ID's Response to FRN's RFI at {**APPA/15/7-14**}. However, it is to be inferred that they were contemporaneously provided to P&ID by Ms Adelore and other corrupted individuals acting on behalf of FRN.

5.3 Second, it is apparent that such FRN Privileged Documents were contemporaneously shared with (among others) P&ID's representatives Mr Andrew and Mr Burke QC[8], but they did not disclose this to FRN or the tribunal at any time. Mr Burke QC and Mr Andrew assert in their witness statements for trial that during conversations

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[5] See also, e.g. {**APPC/2/353-362**}; {**APPC/2/363-364**}; {**APPC/2/365-368**}; {**APPC/2/369-387**}; {**APPC/2/388-392**}; {**APPC/2/393-396**}; {**APPC/2/526-529**}; {**APPC/2/530-532**}; {**APPC/2/547-550**} for examples of some of the privileged material contemporaneously obtained by P&ID.

[6] Mr Adebayo was a long-standing friend of Mr Michael Quinn. Under the terms of a "*Settlement Brokerage Agreement*" dated 4 July 2014, Mr Adebayo was instructed to act as P&ID's representative during the arbitration, "*to facilitate negotiations between…* [FRN] *with a view to securing an amicable settlement of the claims in favour of P&ID*" {**APPC/2/516-524**}. In return for his services, Mr Adebayo stood to receive up to 50% of any settlement figure totalling $1 billion or more, plus an additional $60 million payment for achieving a settlement of $950 million or more.

[7] Including in circumstances where P&ID contends that Mr Adebayo's documents are not within its control.

[8] e.g. {**APPC/8/25**}; {**APPC/2/363-364**}; {**APPC/2/365-368**}; {**APPC/2/369-387**}; {**APPC/2/535-546**}; {**APPC/2/551-560**}; {**APPC/2/702-708**}; and {**APPC/2/709-714**}.

with Mr Cahill and Mr Adebayo they warned them against providing such documents[9], but (a) Kobre & Kim have recently confirmed that no notes of such alleged conversations exist;[10] and (b) if such warnings were given, they appear to have been most ineffective, in that the practice seems to have continued unabated.[11] It now transpires that Mr Burke QC is Mr Quinn's nephew; that he purportedly acted for P&ID without any written retainer in place; that he received payments totalling US$3.5 million that were not paid through his chambers, Three Raymond Buildings,[12] and that he stands to receive approx. US$750 million in the event P&ID is successful in these proceedings.[13] Mr Andrew is a solicitor who acted for P&ID during the arbitration; Mr Andrew is a current director of P&ID, and a director and owner of Lismore Capital Limited ("**Lismore**"). Lismore is the owner of 75% of the shares in P&ID[14] and stands to receive a sum in excess of US$7.5 billion in the event that P&ID is successful in these proceedings.

5.4 Third, as set out in the Re-Re-Amended Statement of Case {**APPA/7**} and Amended Reply {**APPA/9**}, considerable further evidence of corruption of Nigerian officials has emerged, including (but by no means limited to): (a) further payments to Ms Taiga from companies associated with Messrs Quinn and Cahill dating back to around 2004 at which time she was a public official working for the Nigerian Ministry of Defence as a legal advisor;[15] (b) payment from Mr Adebayo to Ms Hafsat Belgore (then Assistant Legal Advisor in the MPR) in December 2014;[16] and (c) high value cash deposits having been paid into the account of Ms Adelore.[17]

5.5 Fourth, as set out in Akhtar 10 ¶¶13-22 {**APPC/1/6-10**}, supplemental disclosure provided from P&ID as a result of the Foxton Order {**APPA/14**} has revealed that: (a) a Mr Bernard McNaughton, a former employee of companies associated with

[9] Mr Burke QC Witness Statement ¶15 {**APPC/2/168**}; Mr Andrew Witness Statement ¶60 {**APPC/2/282**}
[10] Kobre & Kim letter dated 7 July 2022 ¶2 {**APPD/48/2**}.
[11] FRN Privileged Documents appear to have been obtained from at least 2014-2017.
[12] See the Seventh Witness Statement of Shaistah Akhtar ¶56(d) {**APPC/2/31}** and the Second Witness Statement of Nicholas Charles Cherryman ("**Cherryman 2**") ¶7-8 {**APPC/2/503-504}.**
[13] {**APPC/2/605**}. See also Mr Burke QC Witness Statement ¶13 {**APPC/2/167**} and Cherryman 2 ¶9 {**APPC/2/504}.**
[14] Mr Andrew Witness Statement ¶29 {**APPC/2/273**}.
[15] {**APPC/8/137**}.
[16] Re-Re-Amended Statement of Case ¶53A {**APPA/7/26-27}.**
[17] Re-Re-Amended Statement of Case ¶72A-73 {**APPA/7/46-48}.**

Messrs Quinn and Cahill, had offered in 2020 to act as a witness and provide documents in connection with these proceedings evidencing corruption,[18] but (b) Mr Cahill and others procured Mr McNaughton's silence through entering a settlement agreement with him contingent on P&ID succeeding in its claim against FRN.[19]

C PROCEDURAL BACKGROUND

6 The parties' respective disclosure obligations under PD51U were considered at the CMC before Mr Justice Butcher on 15 April 2021. P&ID was ordered to provide extended disclosure in relation to some 34 Disclosure Issues {**APPA/10/22-33**}, including extensive Model E obligations.[20] As explained in Zuckerman on Civil Procedure at 15.42, *"Model E, "Wide Search-based Disclosure", requires disclosure of the same class of documents as Model D, plus documents which may lead to a train of enquiry which may then result in the identification of other documents for disclosure. This model therefore reflects the Peruvian Guano test…"* Disclosure is therefore required of documents that, *"it is reasonable to suppose, contains information which may—not which must—either directly or indirectly enable the party [seeking discovery] either to advance his own case or to damage the case of his adversary. A document can properly be said to contain information which may enable the party [seeking discovery] either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.*"[21]

7 In the context of the present applications, see, in particular, P&ID's existing extended disclosure obligations to provide disclosure under Model E in respect of each of Disclosure Issues 5-9, 11, 14, 22, 27 and 32 {**APPA/10/22-33**}, which include:

7.1 Disclosure Issues 5-9: "*Did P&ID, or any individual or company associated with P&ID, make, procure to be made by any other person, or promise to make payments*" to or on behalf of various Nigerian officials, including Ms Taiga, Mr Tijani, Mr Dikko, Mr Lukman or Mr Ibrahim?;

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[18] See McNaughton's email of 20 January 2020 {**APPC/2/347-352**} and email of 29 September 2020 {**APPC/2/440**}.
[19] See {**APPC/2/436**}, {**APPC/2/439**} and {**APPC/2/429**}. Payments made for the purpose of persuading a witness not to cooperate with, or give evidence for, another person constitute a perversion of the course of justice: see, for example, *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2013] EWHC 581 (Comm), at ¶¶11, 12, 22.
[20] PD51U provides, "*Under Model E, a party shall disclose documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the Issues for Disclosure or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure (because those other documents are likely to support or adversely affect the party's own claim or defence or that of another party in relation to one or more of the Issues for Disclosure."* It is further provided that, "*Narrative Documents must also be searched for and disclosed, unless the court otherwise orders."*
[21] *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano* Co (1882) 11 QBD 55 at 63, CA.

7.2 Disclosure Issue 11: "*Did P&ID, or any individual or company associated with P&ID, make or procure to be made, or promise to make, payment to any other Nigerian official involved in the negotiation, approval, and/or performance of the GSPA?*";

7.3 Disclosure Issue 14: "*Did Mr Quinn give perjured evidence in the arbitration? If so, did P&ID or Mr Cahill know that Mr Quinn's evidence was untrue?*";

7.4 Disclosure Issue 22: "*Did P&ID have any intention of performing the GSPA when it entered into the Agreement, or subsequently? Did P&ID know that it would not have been able to perform the GSPA when it entered into the Agreement, or subsequently?*";

7.5 Disclosure Issue 27: "*Did P&ID collude with and/or communicate with and/or enter into a corrupt agreement with and/or make payments to Mr Shasore and/or any other person directly or indirectly involved in the FRN's defence (including Ms Adelore and Mr Oguine), before, during or after the arbitration, with a view to influencing the conduct of the FRN's defence in the arbitration? In what circumstances did the FRN engage Mr Shasore (and/or his firm) in respect of the arbitration? Did Mr Shasore conduct the arbitration in a manner contrary to Nigeria's interests and/or instructions, and if so, why?*"; and

7.6 Disclosure Issue 32: "*Did P&ID induce Ms Taiga or any other Nigerian official to depart from the terms of the FRN's model arbitration clause in the GSPA?*"

D THE ORDER NOW SOUGHT

D1 The Consolidated Order {APPB/4}

8 Continued shortcomings in relation to P&ID's disclosure necessitated FRN issuing its most recent disclosure applications dated 1 and 27 June 2022. The relief sought has now been largely conceded by P&ID. The matters not agreed – highlighted in yellow in the Consolidated Order – are addressed in turn below.

D2 Paragraph 2 of the Consolidated Order {APPB/4/2}

9 The background to this is that, in December 2021, it was reported in the press {**APPD/17/1-3**} that:

9.1 "*An Irish septuagenarian has been arrested by the police in Ireland as part of an investigation into the alleged bribery of Nigerian officials in relation to an energy deal that gave rise to one of the*

biggest lawsuits in the world. The culprit, who is connected to the company, Process & Industrial Development (P&ID), allegedly paid a Nigerian official to help secure a contract to convert excess gas from the country's oilfields into energy";

9.2 "*The involvement of the police came about as a result of independent inquires by a member of the Garda National Economic Crime Bureau (GNECB) into an Irish-based company that was closely linked to P&ID. The investigation discovered 'what, in our opinion, is potential bribery and corruption', a senior source told The Irish Times";*

9.3 *"[The man] has since been detained on suspicion of conspiracy, contrary to section 71 of the Criminal Justice Act 2006, a rarely used provision that allows the police to investigate offences committed outside the State."*[22]

10 Kobre & Kim has since confirmed that the individual in question is Mr Cahill. FRN accordingly seeks an order pursuant to PD51U paragraphs 17.1 and/or 18.1 that: "*P&ID, through Kobre & Kim, is to conduct a reasonable search of documents within the control of Mr Cahill arising from or in connection with, the criminal and/or regulatory investigation(s) relating to Mr Cahill in the Republic of Ireland, and provide disclosure of any such documents that fall within the Issues for Disclosure within 14 days of the date of this Order*".

11 Such documents plainly fall within P&ID's existing Model E obligations (see Section C above), and P&ID has not sought to deny otherwise. In short, if the Irish investigation has uncovered evidence of corruption and Mr Cahill has copies of the same, such documents are directly relevant to the Disclosure Issues as to whether P&ID, or any individual or company associated with P&ID engaged in corruption with Nigerian officials. Moreover such documents may also lead to a train of enquiry which may then result in the identification of other documents for disclosure.

12 Mr Cahill's original objection to providing such documents was a professed concern that FRN had allegedly breached the restriction against collateral use by providing the Irish Garda with certain ICIL (Ireland) bank statements asserted to have been derived from P&ID's disclosure in these proceedings. This allegation has been comprehensively rebuffed in a witness statement signed by a statement of truth by a Partner of Mishcon de Reya: as

[22] Section 71 of the *Irish Criminal Justice Act 2006* provides (inter alia) that, *"a person who conspires, whether in the State o elsewhere, with one or more persons to do an act – (a) in the State that constitutes a serious offence, or (b) in a place outside the State that constitutes a serious offence under the law of that place and would, if done in the State, constitute a serious offence, is guilty of an offence…"*

set out in Akhtar 12 ¶¶11-12 {**APPC/7/5**}, the ICIL bank statements in P&ID's disclosure are held on an e-discovery platform and have not been accessed by or otherwise provided to individuals at FRN or to any investigative authorities.

13 This objection having been shown to be without merit, P&ID changed tack and asserted in correspondence on 7 July 2022 that, "*Mr Cahill has not agreed to provide our client with copies of any Irish investigation documents in his control and our client therefore is unable to search or give disclosure of them.*"[23] However, P&ID has failed to serve any evidence in support of this bare assertion and it is, in any event, to be firmly rejected in light of the evidence properly set out in Akhtar 10 ¶24(a) {**APPC/1/11**}. In particular:

13.1 It seems that Mr Cahill's ceasing to be an employee and controlling shareholder of P&ID occurred in 2017 as part of a restructuring to raise funding for P&ID's continued pursuit of enforcement and these proceedings. If the effect of this had in fact been that Mr Cahill's documents were no longer within P&ID's control, permitting such a situation to occur would represent an egregious failure of disclosure obligations on the part of P&ID. However, the reality is that such documents in fact remain within P&ID's control.

13.2 Mr Cahill, together with Mr Quinn, co-founded P&ID. Mr Cahill retains a very significant interest in the outcome of these proceedings: he personally stands to receive a sum in the region of US $2.25 billion if P&ID is successful.[24] Whatever his apparent lack of official title since the restructuring, Mr Cahill holds himself out as continuing to represent and act on behalf of P&ID: just for example, in Mr Cahill's email to Mr McNaughton dated 18 June 2020 {**APPC/2/471**}, Mr Cahill described P&ID as "*we*" and explained how he was "*dealing with ongoing issues with the case*", how he was working on behalf of P&ID to "*conclude an agreement with one or other of the potential founders*", and how he was "*negotiating a settlement*" on behalf of P&ID with General Danjuma. P&ID have failed to address this email in any evidence despite it having been expressly relied upon in Akhtar 10 ¶24(a) {**APPC/1/11**}. It is plain that Mr Cahill remains, at least, an agent of P&ID and his interests are aligned with those of P&ID.

[23] {**APPD/47/2**}.
[24] {**APPC/2/605**}.

13.3 Further still, Mr Cahill has provided a witness statement on behalf of P&ID for trial[25] and repeatedly previously provided documents to P&ID for the purpose of it providing disclosure in these proceedings: when disclosure involving his documents has been committed to by P&ID in correspondence or required by a Court order, he has never hitherto then failed to (at least purport to) provide such documents.[26] When push comes to shove, if the disclosure sought at paragraph 2 of the Consolidated Order is ordered by the Court, it can be inferred that Mr Cahill will comply, not least given (a) his interest in the outcome of the proceedings; (b) his continuing to act on behalf of P&ID; and (c) his previous provision of documents. As such, it can be properly deemed and inferred that his documents are within P&ID's control: *Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd* [2021] EWHC 849 (Ch) at [46] and [50]-[56]. The suggestion that Mr Cahill's documents are not within P&ID's control is an artificial construct, contrary to the reality.[27]

14 Accordingly, paragraph 2 of the Consolidated Order should be ordered; it is necessary for the just disposal of the proceedings, reasonable and proportionate. Moreover, this is a case in which there has been or may have been a failure adequately to comply with the existing order for Extended Disclosure and P&ID's Model E obligations therein. If P&ID then fail to comply with such order, that is something which can be pursued further as appropriate.

D3 Paragraph 4 of the Consolidated Order {APPB/4/2-3}

15 There has in general been limited retention of mobile phone messages by P&ID's custodians.[28] What limited disclosure (consisting of just a total of 172 individual messages[29]) that has been given to date – predominantly derived from a back-up of Mr Cahill's phone – has been revelatory. Thus the disclosed messages include (*inter alia*): (a) messages between Mr Cahill and Ms Taiga (the legal director of the MPR at the time of entry of the GSPA) in which she relayed to Mr Cahill that "*Papa*" (Mr Quinn) had informed her of the "*good news*

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[25] {**APPC/2/227-261**}.

[26] Thus, for example, P&ID's Disclosure Certificate of 17 January 2022 {**APPA/13/1**} records that, "*Mr Cahill has confirmed to the Defendant's solicitors (Kobre & Kim) that: (i) he has no potential data sources that were not searched; (ii) he has not lost any potentially relevant data source; and (iii) there were no limits in terms of the documents retained on the data sources that he provided to the Defendant to be searched.*"

[27] It is also, and in any event, unquestionable that the Court has jurisdiction to order parties to request that a third party voluntarily produce their documents: *Phones 4U (in administration) v EE Ltd* [2021] 1 WLR 3270 and *Bank St Petersburg PJSC v Arkhangelsky* [2015] EWHC 2997 (Ch), [2016] 1 W.L.R. 1081 at [45].

[28] For example, it seems Mr Andrew himself has no back up of his WhatsApp messages predating October 2018: see Kobre & Kim's second letter of 11 May ¶4 {**APPD/28/2**}.

[29] Kobre & Kim's fifth letter of 24 June ¶8 {**APPC/3/6**}.

of the commencement of settlement" and that she "*ke[pt] remembering Papa telling me Grace u will be so wealthy u will travel all over d world*";[30] (b) messages between Mr Cahill and Mr Adebayo in which Mr Adebayo supplied a photograph of an FRN Privileged Document;[31] and (c) requests for, and arrangement of payments to or for the benefit of, Ms Taiga.[32] It is plain that the mobile phone messages include highly relevant and particularly insightful content, perhaps because, in the expectation of secrecy[33], the users let their guard down.

16 However, it has now been uncovered that there has been a serious and major failure in relation to P&ID's disclosure of WhatsApp/SMS messages. In short:

16.1 As confirmed in *Veasey v. MacDougall* [2022] EWHC 864 (Ch) at [70]-[73], PD51U paragraph 13 provides that a party is to produce disclosable electronic documents to the other side by providing electronic copies in the documents' native format. Thus, as in *PrivatBank v. Kolomoisky* [2022] EWHC 868 (Ch), where WhatsApp or SMS messages appear in native format in chains or threads, that chain or thread stands to be disclosed as a single document if part of the chain or thread is disclosable. This is no idle matter; it has practical importance: in particular, it means that any redactions can then only occur in accordance with PD51U paragraph 16.1: *PrivatBank v. Kolomoisky* at [8].

16.2 By contrast, it has now been revealed that P&ID has not disclosed the WhatsApp/SMS messages in their native format. Rather, as Kobre & Kim belatedly explained in their second letter of 4 March 2022 at ¶5, the messages "*were processed and loaded on to the review database as individual messages rather than as full threads*".[34] Thus P&ID adopted an approach whereby it artificially broke the original threads into distinct messages, only reviewing the particular messages that happened to be responsive to the keywords and not providing inspection of (or even reviewing) the rest of the thread when a message that had been part of the single thread triggered a keyword and was disclosable. P&ID has now revealed in its fifth letter of 24 June at ¶8 that, "*We understand from KLDiscovery that the 172 SMS and WhatsApp messages disclosed by our client fall within 33 distinct "threads". In total, these 33 threads contain 34,429*

[30] {**APPC/2/639**} and {**APPC/2/638**}.
[31] {**APPD/52**}.
[32] {**APPC/2/641**}; {**APPC/2/642**}; {**APPC/5/92**}; {**APPC/8/54**}; {**APPC/8/70**}.
[33] Ms Taiga refers in one of the messages to using an "*incognito number*" to communicate {**APPC/2/643**}.
[34] {**APPD/9/2**}. See also Kobre & Kim's letter dated 15 March 2022 ¶21 {**APPD/13/5**}.

distinct messages."[35] There has accordingly been a serious disclosure failure by P&ID: (a) not only was P&ID's approach at odds with the requirements of PD51U paragraph 13 in that inspection of the full threads should have been given as a result of a message within that thread having triggered a keyword and been disclosable, but in practical terms it means that a wealth of potentially very relevant mobile phone messages have hitherto entirely escaped review, and the 172 individual messages that have been provided for inspection have been provided in a vacuum; and (b) in any event, having identified the potential disclosability of messages to be found within particular mobile phone message threads or group chats, it was a breach of P&ID's Model E obligations not to fully review the documents within such threads/groups.

17 P&ID has now rightly conceded that it should (a) provide inspection of each of the threads identified in the Consolidated Order at paragraph 4(a)-(c) and (g)-(i), subject only to redactions in accordance with PD51U paragraph 16.3; and (b) provide clarity on what other threads exist.[36]

18 However, FRN seeks a further element of relief pursuant to PD51U paragraphs 17.1 and/or 18.1, which is disputed. Namely, P&ID maintains that it should not have to provide inspection of the group chat(s) between Mr Cahill, Mr Burke QC, and Mr Andrew from which a number of individual messages triggered keywords, proved to be disclosable and have been provided for inspection. P&ID's objection is that it is disproportionate for it to have to provide inspection of such group chat(s) as it will entail it now having to review (it is said) up to 56,250 individual messages for redaction of potentially privileged messages within such thread(s).[37] This objection is to be rejected on numerous grounds:

18.1 First, the short answer is that there has hitherto been an egregious disclosure failing by P&ID, with it having already been ordered to provide extended Model E disclosure and with the rules requiring that it should have provided inspection of the native threads when providing inspection in October 2021. P&ID has failed to comply with

[35] {**APPC/3/6**} By Kobre & Kim's letter dated 13 July, it is now said that the documents derived from 35, not 33, threads.
[36] For the avoidance of doubt, all FRN's rights are reserved to seek inspection of further threads once the information to be provided pursuant to paragraph 4(a) of the Consolidated Order has been given, including with FRN's rights fully reserved in relation to any threads or messages not hirtheto reviewed and/or not provided for inspection at all.
[37] Kobre & Kim's letter dated 7 July 2022 ¶9 {**APPD/47/2**}. There is considerable confusion caused by P&ID as to how many messages are actually in this group/thread, with Kobre & Kim's letter dated 13 July now stating that the 56,250 number arises from "*KLDiscovery [having] applied different search criteria not solely targeting x-threads containing messages already disclosed*".

its existing obligations. If P&ID now chooses to redact (insofar as it is properly permitted by PD51U paragraph 16.1 to do so) certain individual messages in a group chat when providing inspection of the chat, that is a matter for it. But such redaction exercise cannot be used as an excuse to avoid providing inspection of a disclosable chat/thread, that should *already* have been disclosed in accordance with the rules. Nor, having got copies of and identified that messages within the group chat(s) between Mr Cahill, Mr Burke QC and Mr Andrew may be disclosable, can P&ID then avoid reviewing the content of those chats given its Model E obligations. It is reasonable and proportionate that P&ID be kept to its existing disclosure obligations.

18.2 Second, P&ID itself accepts that not all messages in the group chat are likely to be subject to claims of privilege. The reality is that it is highly probable that new, relevant messages will be revealed once the group chat is provided by way of inspection:

18.2.1 The current, very limited individual messages from the group chat that were made available for inspection (having happened to be captured by the keywords) include messages between Mr Cahill, Mr Burke QC and Mr Andrew (*inter alia*): (a) sharing within the group an FRN Privileged Document which it seems came via Mr Adebayo;[38] (b) Mr Cahill forwarding messages to the thread from Ms Ise Taiga (a daughter of Ms Grace Taiga) in which it is suggested that covert means be used to make payment for the benefit of Ms Grace Taiga;[39] (c) Mr Cahill forwarding messages to Ms Grace Taiga to the thread in which he confirmed covert payments had been made.[40]

18.2.2 These messages are noteworthy: (a) they confirm that messages within the group chat, upon review, may well not be subject to valid claims to privilege; (b) they highlight the likelihood of further significant messages being revealed when the full group chat is provided for inspection; (c) the full group chat will also provide important context in relation to the individual messages that have already been provided for inspection.

[38] {**APPC/2/640**}. See also trial Witness Statement of Seamus Andrew ¶119 {**APPC/2/300**} where he appears to acknowledge that this FRN Privileged Document was received via Mr Adebayo on behalf of P&ID.
[39] {**APPC/5/94**}.
[40] {**APPC/5/95**}.

18.2.3 It seems likely that in fact many documents within the chat(s) will not be capable of being subject to valid claims of privilege on the part of P&ID: (a) in the face of a previous threatened "iniquity exception" application, P&ID has confirmed[41] that it is not claiming privilege in (i) documents containing or evidencing the circumstances in which FRN Privileged Documents came to be obtained; or (ii) documents containing or evidencing the contemporaneous sharing or discussion of the contents of FRN Privileged Documents; (b) just because a communication may have been copied to a lawyer does not make it privileged, the dominant purpose of that communication must have been to obtain or give legal advice or for the dominant purpose of conducting litigation;[42] and (c) Mr Andrew is a current director of P&ID, whilst Mr Burke QC appears to have acted as his uncle's man of business[43] and certainly appears to have been involved in matters going well beyond that of a legal advisor,[44] such that it simply does not follow that messages between Mr Cahill and such individuals will necessarily attract privilege.

18.3 Third, that ordering inspection may entail a redaction review by P&ID of the group chat (even if that consists of 56,250 individual messages) is not, in any event, disproportionate in the circumstances of the current case: (a) it is important to keep in mind that P&ID's review would be a review of threads of (likely) very short individual SMS/WhatsApp messages, not lengthy distinct documents, something obscured by the headline figure of total messages in the threads; (b) this is an extremely high-value (US $11 billion) dispute, leading to an eight-week trial, with vast legal expenditure on all sides, and P&ID can be expected to resource itself sufficiently to complete such review within a reasonable time; (c) there is a strong likelihood of inspection of the group chat yielding very probative documents which it is important are available at trial, including in light of the existing documents that have come from that group chat (see above, and also note the very limited existing disclosure concerning which FRN individuals were the source of the FRN Privileged Documents being provided to P&ID, which documents in this group chat may throw light upon).

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[41] Paragraphs 2 and 3 of the Consent Order dated 7 February 2022 {**APPA/14/3**}.
[42] *R. (on the application of Jet2.com Ltd) v Civil Aviation Authority* [2020] Q.B. 1027.
[43] {**APPC/8/118**}.
[44] Including being party to arrangments for payments to be made to Grace Taiga: see, for example, {**APPC/8/46**} and {**APPC/8/47**}.

D4 Paragraphs 4 and 8-14 of the Consolidated Order {APPB/4}

19 In considering *when* disclosure should now be given, it is important to keep in mind that disclosure should have taken place by 29 October 2021. Paragraphs 4 and 8-14 of the Consolidated Order should require that the information and supplemental disclosure be provided by 5 August 2022. This is some two months after the applications were issued.[45] This is an extremely high-value dispute and P&ID can be expected to resource it sufficiently to enable the disclosure to now be provided in short order, especially given the potential for such disclosure to then necessitate further searches or applications. Of course, if (as sought) P&ID is ordered to provide inspection of the group chat(s) between Mr Cahill, Mr Burke QC and Mr Andrew, some greater time could be allowed for this particular inspection.

D5 Paragraph 15 of the Consolidated Order {APPB/4/5}

20 Disclosure was required to be given on 29 October 2021 with P&ID having various Model E obligations, but – as evidenced by the extensive further searches that P&ID have now conceded it will conduct as recorded in the Consolidated Order – there were significant shortcomings in P&ID's disclosure. In any event, insofar as the 1 June application is concerned, it was only after FRN had filed its Reply evidence that, by its first letter dated 7 July {**APPD/47**}, P&ID substantially conceded the relief sought. Even then P&ID has continued to resist various aspects of the relief sought as addressed herein. Insofar as the 27 June application is concerned, it was issued in circumstances where P&ID, by its letter dated 13 June 2022 {**APPD/39**}, rejected FRN's requests made by letter dated 20 May 2022 {**APPD/32**} and refused the searches it has now conceded, by its second letter dated 7 July {**APPD/48**}, it will conduct. In the circumstances, FRN's costs should be summarily assessed and P&ID should be ordered to pay FRN such costs within 14 days.

E CONCLUSION

21 For the reasons set out above, the Consolidated Order should be granted in the form sought.

TOM FORD
Essex Court Chambers
14.07.2022

[45] Moreover, when P&ID agreed on 7 July {**APPD/48**} to the searches at what are now paragraphs 9-14 of the Consolidated Order, it did so on the basis that such disclosure was to occur within 28 days (i.e. by 4 August).