IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Case No: E90BM261

Birmingham Justice Centre
33 Bull Street
Birmingham
B4 6DS

Date: 6 July 2023

Before :

District Judge Griffith

- -

Between :

Kevin Wilson	**Claimant/ Respondent**
- and –	
Ryan Jones	**1st Defendant**
Liverpool Victoria Insurance Company Limited	**2nd Defendant/ Applicant**

- -

Mr Beasley, counsel (instructed by Thompsons Solicitors) for the **Claimant**
Mr King, counsel (instructed by DWF Law LLP) for the **2nd Defendant**

Hearing date: 2 February 2023

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JUDGMENT

District Judge Griffith :

1. This judgment is in the respect of the 2nd Defendants application dated 22 November 2022 seeking permission to disclose/rely on certain documents within these proceedings to be used in contribution proceedings against Birmingham Heartlands NHS Trust. The documents are pleadings, expert evidence, Claimant's medical records and Claimant's witness statement. The application is supported by a witness statement of the 2nd Defendant's solicitor, Claire Pritchard. The Claimant has not adduced evidence in response but the application is opposed.

2. I have heard oral submissions from counsel and considered a written skeleton argument from Mr Beasley. I was also handed copies of further documents, being a series of emails between the parties solicitors between March and June 2022, a letter of claim in respect of contribution proceedings dated 2 March 2022 and supplementary medical report by Mr T Redfern dated May 2020.

3. The background to, purpose of and the law relating to the application are clearly and succinctly set out in Ms Pritchard's statement. That should be read in full as part of my judgment but I will not replicate it here. In essence, the Claimant brought proceedings against the 2nd Defendant in respect of a road traffic accident whereby he sustained severe injury, such being settled by consent on 2 February 2021 and encompassed within an order of 17 February. During the investigations, the 2nd Defendant obtained evidence indicating that the standard of care received by the Claimant during NHS treatment was deficient. Such issues were raised by their expert Mr Redfern. They chose not to commence contribution proceedings against the NHS Trust at any time, prior to settlement, as the solicitors were conscious of the delay that would cause and the additional expense. They could have made it a condition of settlement that the Claimant co-operate in the contribution proceedings but felt that would be heavy handed and did not do so. On the face of it these are reasonable considerations and would have benefitted the Claimant to some degree. However, they now wish to use the said documents in the separate contribution proceedings but the Claimant does not agree. It is submitted on his behalf, albeit with no evidence from the Claimant himself, that he has put the matter behind him and moved forward in his life, he having found it a very upsetting and stressful process for him and his wife. He would not wish to become involved in further litigation. Indeed, those points were made when the matter was being canvassed between the solicitors by email as mentioned above.

4. At the start of the hearing I dealt with the Claimant's first ground of challenge concerning the court's jurisdiction to deal with the application and I determined that in favour of the Defendant. This judgment therefore deals with the second ground of challenge that the court should not exercise its discretion and grant permission for collateral use of this documentation on the basis that special circumstances are not made out (if this is a prospective application) and that the circumstances do not

amount to a rare occasion, using a more stringent test (if this is a retrospective application).

5. The law is not contentious and the 2nd Defendant takes no issue with case law and extracts set out in paragraphs 10 and 14 of the skeleton argument.

6. CPR 31.22 sets out the restrictions on the subsequent use of disclosed documents as follows:

> *"(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where—*
>
> *(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;*
>
> *(b) the court gives permission; or*
>
> *(c) the party who disclosed the document and the person to whom the document belongs agree."*

7. CPR 32.12 sets out the restrictions on the use of witness statements for other purposes as follows:

> *"(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.*
>
> *(2) Paragraph (1) does not apply if and to the extent that—*
>
> *(a) the witness gives consent in writing to some other use of it;*
>
> *(b) the court gives permission for some other use; or*
>
> *(c) the witness statement has been put in evidence at a hearing held in public."*

8. I was referred to the commentary in the White Book at 31.22.1 and 32.12.1. The parties agree the test to be applied is the same for both documents and statements, that the court needs to be satisfied there are special circumstances constituting a cogent reason for permitting collateral use and the burden to demonstrate this is on the applicant.

9. There is no issue that the Claimant's medical records and witness statement were disclosed in these proceedings. There is no evidence, however, to suggest that these documents have been read to or by the court or referred to at a hearing. The application is therefore made on the basis of a court giving permission.

10. As set out in the note in the White Book 2022 Volume 1 (page 1100),

> *"The courts power pursuant to CPR.31.22 to permit collateral use is a general discretion to be exercised in the interests of justice and having regard to all circumstances of the case. Good reason had to be shown, and the court had to*

be satisfied there was no injustice to the party compelled to give disclosure... The court will only grant permission.... if there are special circumstances...."

11. The 2nd Defendant argues that it dealt reasonably in settling the claim without the added delay of bringing the NHS Trust into the proceedings, despite having some evidence linking a delay in providing treatment to the Claimant to his longer term prognosis. They argue it is reasonable and proportionate for the 2nd Defendant to now pursue a separate claim for contribution pursuant to the Civil Liability (Contribution) Act 1978 and they are entitled to do this at any stage subject to limitation. They submit it is essential they use these documents (all those subject to the application) in being able to present their case properly against the NHS Trust. Further, in dealing with any concerns the Claimant may have about his medical records being disclosed in other proceedings, they point out that it was the NHS Trust that provided care to the Claimant and these records will actually be held by the Trust and, therefore, there is unlikely to be any material prejudice to the Claimant. I have some sympathy with the 2nd Defendant here in that the records are already available to be seen by the NHS Trust and, should they be disclosed in these proceedings, would be limited in the main to being seen by the Trust itself, their solicitors and experts, and solicitors/experts for the 2nd Defendant who have already considered these documents anyway. Although it has been submitted in brief terms that the medical records and witness statements are private in nature, there is no evidence from the Claimant to say this is a concern for him and I note there is no reference to any such concern in the series of emails referred to. Rather the focus was on the emotional stress and wanting to put the litigation behind him. I find that the latter is the key objection.

12. The 2nd Defendant also points to the clear evidential link between the current proceedings and the prospective contribution proceedings arising from the same facts and evidence and this is clear. They are inherently linked and, although separate claims, we are not concerned here with documents in one case being used for a wholly divorced purpose. Indeed, a degree of overlap can be seen clearly in the detail within the letter of the claim for a contribution dated 2 March 2022 including the importance of the medical records and medical evidence, in particular. I have not seen the Claimant's witness statement to gauge the degree of relevance of that content.

13. There is no guidance within the rules or practice directions as to what may amount to "special circumstances" and neither have I found the references to various cases in the White Book notes to be of much use. This is hardly surprising as we are concerned with a general discretion having regard to all the circumstances of the case and, therefore, each decision will be fact sensitive. On the assumption that I am dealing with a prospective application, I would be satisfied that the 2nd Defendant has demonstrated there are special circumstances constituting a cogent reason for a collateral use. There is a high degree of connection between the two cases with an overlap of legal representation on the Defendant's side, medical records already being in the possession of the 2nd Defendant and

such being likely to be disclosable within contribution proceedings in any event, even if by an order for non-party disclosure. The question of confidentiality of those records does not appear to be a concern for the Claimant. I understand his desire to put this matter behind him but I find the prejudice to the 2nd Defendant, in not being able to use these records, would be more detrimental, on balance, as they may be deprived of fully arguing their case against the NHS Trust.

14. I am conscious of a brief extract of Mr Justice Eder in the ***Tchenguiz*** case [at paragraph 18] where he stated that *"...the burden of proof lies on the applicant seeking permission and the bar is high...."* This was a prospective application. I further recognise that the test to be applied, as stated in paragraph 10 of the skeleton argument is a stringent one.

15. Although I have not seen the witness statement, having dealt with very many of these cases and having seen Claimant witness statements in support, I am well aware of the likely content and this would most likely include a description of his injury, the treatment he received, the degree of symptomology, disability and scarring of the shoulder. He will inevitably have set out his financial losses, in addition. When making a contribution claim it will be of significant benefit to the 2nd Defendant in presenting their case if they are able to refer to the evidence they were faced with when making a settlement. Again, the balance of prejudice in not having that lies with the 2nd Defendant in my view. I note the 2nd Defendant has confirmed it will not be calling the Claimant to give evidence and that is a reassurance for him. Of course, they can't speak for the NHS Trust but the prospect of him being further involved is obviously reduced.

16. On the basis of this being a prospective application I would grant permission for these two categories of document.

17. However, I now need to deal with the issue as to whether this is in fact a retrospective application and the effect that would have on my decision.

18. The Claimant submits the 2nd Defendant has already contravened the rules by using the medical records and witness statement for the collateral purpose of reviewing and setting out formally their contribution claim.

19. The question arises as to whether the 2nd Defendant has already used the documents within the meaning of the rules. As I have said, the legal principles set out in the skeleton argument are agreed and paragraph 9 refers to such being comprehensively reviewed in the case of ***Lakatamia Shipping Company Limited v Nobu Su [2020] EWHC 3201 (Comm)*** at [44] to [66]. What constitutes "use" of document is very broad. Further, Christopher Clarke LJ, in ***IG Index v Cloete [2014] EWCA Civ 1128*** at [40] stated that "use" comprised:

"(a) ..... use of the document itself eg. by reading it, copying it, showing it to somebody else (such as the judge);

(b) Use of the information contained in it. I would also regard "use" as extending to referring to the documents and any of the characteristics of the document, which includes its provenance."

20. Further, Mr Justice Knowles espoused a similar sentiment in ***Tchenguiz v Grant Thornton [2017] EWHC 310 (Comm)*** where at [31] he found, *".....if the review of documents that were disclosed in litigation is in order to advise on whether other proceedings would be possible or would be further informed, then the review would be a use for a collateral purpose."*

21. Further, in paragraph [57] of ***Lakatamia***:

"That reflects the fact that it is not only use, but even review which can be a collateral use." In *Libyan Investment Authority v Societe Generale SA [2017] EWHC 2631 (Comm)*, at [35], Teare J recorded *what seemed to be common ground between the parties that permission of the Court would be needed before any of the parties could internally review the documents to see whether they could be used for collateral purposes."*

22. Further, at paragraph [60] of ***Lakatamia***:

"It seems quite clear (were it not self-evident) that using information and/or documents from one set of proceedings to threaten a third party falls squarely within the scope of the restriction on collateral use."

23. I need to apply this to the case before me on the facts as known. It is clear from the case summary in the bundle setting out the chronology, together with the bundle of emails previously referred to, that the first request from the 2nd Defendant for authority to use medical records in the contribution claim was 22 March 2022 more than a year after the claim had settled. By that stage the letter of claim to the NHS trust had been sent on 2 March 2022. It is clear from the detailed allegations made that a review of medical evidence and records would have taken place prior to drafting. For example, item 2 on page 2 of the letter states *"There is no evidence within the Birmingham Heartlands Hospital records....."*

24. The Claimant also points to paragraph 5 of the statement of Ms Pritchard stating that the Applicant has obtained expert evidence to support the contention being made against the Trust and as stated in the letter of claim. The evidence obtained is not specified in either case and, of course, could be the pre-settlement evidence, to include the supplementary report dated May 2020. There is no evidence to suggest that further medical evidence has been obtained post-settlement and, indeed, Mr King confirmed that to be the case. Nevertheless, it is highly likely that both the medical records and the witness statement would have been reviewed by 2nd Defendant's solicitors prior to, and for the purpose of, formulating the letter of claim. The witness statement is referred to in one of the emails previously referred to, being 1 June 2022. Going back to the medical records, I note also that the detail within the allegations of negligence set out in the letter of claim go beyond the commentary of Mr Redfern in his report and clearly indicate, in my view, that the medical records were also reviewed. This action, I find, amounts to a use for the collateral purpose

and that was undertaken prior to permission being sought. Similarly, the sending of the letter of claim itself constituted collateral use. These actions should not have been undertaken. I find, therefore, I am considering this as a retrospective application.

25. In this regard I was referred to 31.22.3 in the White Book, which provides:

*"**In Miller v Scorey [1996] 1WLR 1122**...the court held per curiam that while it may be that the court has jurisdiction to grant retrospect leave to use disclosed documents for the purpose outside the claim in which they were disclosed, the circumstances in which it would be proper to exercise it would be rare. In the **ECU Group Plc v HSBC Bank Plc [2018] EHC 304 (Comm)** Andrew Baker J considered that in assessing such an application the question whether prospective permission would have been granted, if such an application had been made, was an important consideration. It was not however a necessary or sufficient condition for the grant of retrospective permission. He further noted that the court had a number of sanctions at its disposal where there had been a failure to seek prospective permission, including adverse costs orders. The grant of retrospective permission will be rare, but maybe appropriate if no prejudice has been caused to any other party; and it is also relevant to consider whether the breach was inadvertent, whether if a proper application had been made timeously it would have been granted, and the proportionality of debarring the applicant from using the documents:..... Lakatamia Shipping Co Ltd v Hobu Su [2020] EWHC 3201 (Comm)...."*

26. Further, at paragraph [61] of ***Lakatamia*** it was stated that in retrospective applications the permission would only be exercised in "limited circumstances".

27. It is clear the test for retrospective applications is a more stringent one and is regarded by the courts as being a serious matter to have contravened CPR 31.22. Considering the commentary in the ***ECU Group Plc*** case, as I have found, had this been a prospective permission it would have been granted and this is an important consideration but not necessary or sufficient in itself. I am also conscious of the fact that I can reflect the concern of the court by making an adverse costs order. I have already found that the balance of prejudice would lie with the 2nd Defendant and, whilst it cannot be guaranteed, I think it unlikely the Claimant will be involved further in this matter.

28. Finally, and importantly, there is the question of proportionality in debarring use of the documents. There is no direct evidence from the Claimant as to the likely effect on him although there is a brief mention indirectly via an email from his solicitor. I find the balance is against the detriment to the 2nd Defendant in not being able to use these documents in the contribution claim, in the context of the main claim that was settled for £365,000 plus £194,000 costs. These are significant sums and the 2nd Defendant would be adversely affected in trying to recover a proportion of these sums from the NHS Trust if they were unable to use these documents. That would be a disproportionate response.

29. Taking into account the more stringent test, and the reference to it being a rarity, when I look at all the circumstances of this case and the particular points I have mentioned, I remain of the view that these two categories of document can be disclosed and used in the contribution proceedings.

30. I now need to return briefly to the first two categories of document being pleadings and expert evidence. The submission is made in the context of a CCMC having taken place in October 2019. So far as the expert evidence is concerned, we are clearly talking of the Claimant's evidence rather than the Defendants. Although it was not the subject of submission at the hearing, it seems to me that a party can disclose its own document under CPR 31.22(1)(c). If I am wrong about that, the only medical report that could not have been referred to after CCMC is Mr Redfern's supplemental report May 2020. There is no evidence from the 2nd Defendant as to precisely which expert evidence was referred to in the CCMC. However, having myself dealt with very many such hearings for this type of claim, I find it highly likely that the medical evidence attached to the Particulars of Claim, at the very least, would have been referred to or read by the court, such a hearing of course being in public. In respect of those expert reports, therefore, I find they are within CPR 31.22(1)(a) and may be used in the contribution claim. It almost goes without saying that the pleadings would certainly fall within the same exception.