



Neutral Citation Number: [2023] EWHC 1595 (TCC)

Case No: HT-2021-000363

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT LIST (KBD)**

The Rolls Building  
7 Rolls Buildings  
Fetter Lane  
London EC4A 1NL

Date: Friday, 16<sup>th</sup> June 2023

Before:

**MRS. JUSTICE O'FARRELL**  
Remotely via Microsoft Teams

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Between:

**IBM UNITED KINGDOM LIMITED**  
- and -  
**(1) LZLABS GMBH**  
(a company incorporated in Switzerland)  
**(2) WINSOPIA LIMITED**  
**(3) LZLABS LIMITED**  
**(4) MARK JONATHAN CRESWELL**  
**(5) THILO ROCKMANN**

**Claimant**

**Defendants**

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**MR. MATTHEW LAVY KC, MR. JAMES WEALE and MR. JACOB HADDAD**  
(instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimant**

**MR. ROGER STEWART KC , MR. JAANI RIORDAN and MR. THOMAS OGDEN**  
(instructed by **Clifford Chance LLP**) for the **Defendants**

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**Approved Judgment**  
**(On Application)**

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,  
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**MRS. JUSTICE O'FARRELL:**

1. This is the claimant's application dated 31st May 2023 to vary orders of the court, namely:
  - i) an order that the date for particulars of the breaches alleged by the claimant, ordered by Waksman J at the CMC on 21st October 2022 to be provided by 23rd June 2023, be extended to 31st August 2023; and that the date for responses to the defendants' requests for further information, specifically requests 36-38, ordered to be served by 23rd June 2023, also be extended to be served by 31st August 2023;
  - ii) an order that the claimant should have an extension of time for service of its expert evidence, currently ordered to be served by 29th September 2023, until 24th October 2023, with consequential amendments to the timetable; and
  - iii) amendments to the confidentiality order made by Waksman J, dated 2nd December 2022, a matter that is largely agreed but subject to one outstanding issue, on which I will hear the parties in due course.
2. In terms of the application by the claimant for extensions of time for service of particulars and its expert evidence, the background is the order made by Waksman J at the CMC on 21st October 2022, whereby the claimant was ordered to provide particulars of its breaches relating to its allegations of reverse engineering and/or copying.
3. The breaches were pleaded at paragraphs 23-26 of the re-re-amended particulars of claim but stated expressly to be by way of inference, pending disclosure and provision of further information. At paragraph 27, the claimant identified specific facts and matters on which it then relied as evidence giving rise to the inferences in the proceeding paragraphs.
4. The order by the judge at the CMC was that particulars of all breaches should be provided by 23rd June 2023. The remaining timetable was fixed with that date in mind, leading up to a trial which is currently fixed to start on 9th April 2024.
5. The application for the extensions of time is supported by two witness statements of Ms. Vernon, namely her eighth and her ninth witness statements, together with a report from Keystone, a company providing support services for the analysis of the various technical disclosure documents, a joint statement of Barry Landy, Adam Porter and Jonathan Weissman, dated 14th June 2023, and a statement from Ronald Alepin, dated 14th June 2023, dealing with the difficulties faced by the experts in analysing the disclosed technical documentation and the need for further time in order to consider and identify the pleaded allegations of breach.
6. The application is opposed by the defendants as explained by the 15th witness statement of Ms. Scott, supported by expert reports from Professor Donaldson and Mr. Wilkinson, who consider whether or not the claimant's experts need additional time in order to properly analyse the relevant textual information.

7. Mr. Lavy KC, leading counsel for the claimant, submits that the claimant needs an extension of time, in circumstances where the Source Code Computers were only set up in Clifford Chance's offices on 16th May 2023 and were not operational until 18th May. Given the limited time now available until the deadline of 23rd June, it is simply impossible for the claimant to comply with the timetable set out in the current orders. The claimant has incurred difficulties in meeting those deadlines for reasons which were then not anticipated back in October 2022.
8. At the date that the particulars were ordered to be provided by 23<sup>rd</sup> June 2023, extended disclosure was ordered to be given by 17th March 2023. The experts for the claimant have to undertake a huge task. The allegation of reverse engineering requires the claimant's expert, Mr. Alepin, not only to analyse the SDM code alongside the IBM Source Code, but also to consider an audit trail in order to identify similar or the same functionality and to understand how that replicated functionality was obtained by the defendant. That is a very painstaking, time-consuming task. It cannot be done just by comparing the IBM Source Code with the latest version of the SDM code. It is necessary for Mr. Alepin to comb through the previous versions of the CPX, which was of course the subject of consideration, both by Waksman J, at earlier hearings, and by this court at the hearings on 10th and 11th May. It is submitted by Mr. Lavy that the task that the claimant's expert is required to undertake simply cannot be completed in time so as to enable the final particulars of the allegations of breach to be provided to the defendant in a pleading and consequentially, in the claimant's expert evidence.
9. Mr. Lavy also submits that the problem has been compounded by difficulties encountered with obtaining disclosure from the defendant, such disclosure being provided in tranches; in particular, the delay in providing the SDM Source Code and the IBM Source Code on separate computers but in the same room, which was not achieved until 16th May. He points to the joint statement of the experts which indicates, at item 1 in the table, at Part A, "Matters Agreed", that the defendants' experts agreed that it was necessary to have the SDM and the IBM code in the same room. In those circumstances, he submits, it cannot now be challenged that that is a relevant source of technical disclosure for Mr. Alepin to consider. Such exercise cannot be undertaken within the short period of time remaining until 23rd June 2023.
10. Further, it is said by the claimant that the extension of time that is sought will have no impact on the trial date of 9th April, partly because the judge, Waksman J, when fixing the trial date, had built in a reasonable buffer between the conclusion of the evidence stages of the procedural timetable and the trial date. This means that the trial timetable can, in effect, be pushed back by up to two months without affecting the trial date.
11. It is also said that there is no real prejudice to the defendant if the court grants the extension as sought. The defendant can simply have the same amount of time that was always envisaged for the purpose of responding to the expert evidence provided by the claimant and also can have further extensions for the service of its factual witness evidence. All those matters, it is said by the claimant, can be accommodated within the current timetable so as to ensure that the defendant has sufficient time to prepare for the trial and the trial date can be maintained.
12. Mr. Stewart KC, leading counsel for the defendants, opposes the application for any extension of time on the basis that, primarily, the trial date will be imperilled if this extension is granted. That will cause serious prejudice to the defendants because either

they will have to respond to, as yet, an unknown case, both in terms of size and extent and details, within a compressed timetable in order to hold 9th April trial date; alternatively, they will suffer prejudice, in that if the trial date is put back it could well take place at the same time as the defendants face proceedings in the United States; a trial that is currently set to take place towards the end of 2025.

13. Mr. Stewart submits that there is no good reason for the delay to the provision of these particulars. The claimant has brought it on itself through various delays between the October CMC and today's date.
14. He is critical of the evidence put forward by the claimant through its experts and support experts. Although it is said by Keystone that a further two to three months from the end of May is required to analyse the technical data, he points out that there is no clear estimate from Mr. Alepin as to how long he would need to provide the relevant particulars and his expert report. In those circumstances, the defendants can have no confidence either that the extension now sought is, in fact, needed, or that the particulars will, in fact, be provided by the end of August 2023 as currently promised.
15. Mr. Stewart makes a valid point that, at the moment, the defendants do not have full and proper particulars of the alleged breaches of the ICA. Although the defendants have responded where they could to the specific allegations set out in paragraph 27 of the re-re-amended particulars of claim, they have no more than the relatively sketchy pleading of the case based on inference, at this stage.
16. In my judgment, the defendants are entitled to full and proper particulars of the breaches, and the further information that has been ordered by the court. The defendants need to be able to understand the detail of the allegations that are being made against them and they are entitled to know the case that they have to meet.
17. Mr. Stewart submits that the case put forward by Mr. Alepin in his first report was that the analysis of the source data would be manageable and was not a significant or unwieldy task, provided that relevant sections of the source code were selected rather than a full-scale review. He submits that Mr. Alepin, in his second report, is now seeking to carry out a much wider review of the source code. That appears to stray beyond the ambit of the expert issues.
18. For those reasons, Mr Stewart submits that the extension should be refused.
19. The principles to be applied by the court are well established. First of all, the court has a very wide case management power to extend or shorten the time for compliance with any rule, practice direction or court order: CPR 3.1. When considering whether or not to do so, the court has to have regard to the overriding objective set out in CPR 1.1, namely, that the court should deal with cases justly and at proportionate cost. That includes, so far as practicable, ensuring that the parties are on an equal footing and can participate fully in proceedings and that parties and witnesses can give their best evidence, saving expense, dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party, ensuring the case is dealt with expeditiously and fairly, allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases and enforcing compliance with rules, practice directions and orders.

20. In this case, I am satisfied that the claimant has established that it needs further time in which to plead its allegations of breach and to provide its expert evidence in support of those allegations. The evidence put forward by the claimant and its expert, Mr. Alepin, identifies the difficulties that have been posed by the late disclosure of key technical data; in particular, the late availability of the SDM and IBM Source Code in the same room, that the experts all agree is necessary.
21. I have taken into consideration the points raised in the reports of Professor Donaldson and Mr. Wilkinson but it is not for the defendants' experts to dictate how the claimant's experts should investigate and analyse the disclosure that has been ordered by this court and, indeed, has, to a large extent, now been given. Fairness requires the court to allow the claimant both to determine what expert evidence it wishes to put before the court in support of its pleaded case, and also a reasonable and fair opportunity to properly plead out the allegations.
22. Further, the court considers that a piecemeal approach to this exercise, by maintaining the existing deadlines but permitting subsequent amendments or particulars, would be inefficient, waste costs and is likely to result in further court time being taken up and probably overall delay to the proceedings. Holding the claimant to an unrealistic timetable is unlikely to produce results that the defendants naturally claim they wish, which is a speedy resolution of this matter.
23. I have considered the potential prejudice to the defendant. However, it seems to me that, at this stage, the timetable can be revised so that the defendants continue to have the same opportunity to respond to the new and/or more detailed allegations and expert evidence. It is necessary for the defendants to have an opportunity to provide factual witness evidence after they have seen the fully pleaded case. But, that can be accommodated within a revised timetable that will give them sufficient time to prepare for the trial and will enable the trial date to be kept
24. For all those reasons, the court will grant the claimant an extension of time for service of the particulars and response to the RFI.
25. The date that I am going to fix for the pleadings and further information is 18th August 2023, slightly earlier than the date sought, on the basis that Keystone is suggesting two to three months. That seems to give a little bit of margin for bringing the date forward a bit. It is not arbitrary. It seems to me that if the further information and particulars can be provided by mid-August rather than the end of August, it will make it easier to fit into the timetable the subsequent steps without causing difficulty to either of the parties.
26. For that reason, I will grant the extension of time for the particulars and further information to 18th August 2023.
27. Given the lack of time available, I am not going to fix the rest of the timetable at this stage. I am going to invite the parties to discuss it. If they can reach agreement and submit a consent order, the court is likely to look favourably on it. If they cannot reach agreement, they should submit their competing dates and the court will determine it on the papers.

28. The costs of this application should be costs in the case. The claimant is seeking a significant indulgence from the court. It needed to be brought before the court because it has a significant impact on the timetable. The court is not in a position to determine exactly who might have been at fault. I suspect it is neither. These things have just arisen because there has been a significant amount of disputed issues between the parties. Some have taken a number of court hearings to resolve and others have been resolved through some fairly extensive correspondence. The court simply has to deal with the application that is before it. It is an application for an extension of time. The court has ruled in the claimant's favour but it is an indulgence. The appropriate order is costs in the case.

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