IN THE HIGH COURT OF JUSTICE **CLAIM NO: HC-2016-001720**

CHANCERY DIVISION

B E T W E E N:

MR TREVOR WOOD

Applicant/Intended Claimant

-and-

(1) INDIGO BRIDGE LIMITED

(2) ALAN ESCUDIER

(3) PAUL MCMAHON

(4) DAVID WRIGHTON

Respondents/Intended Defendants

JUDGMENT

Mr Marc Glover, of Counsel, instructed by Gordon Dadds, Solicitors, appeared for the Applicant/Intended Claimant

Mr Jack Dillon, of Counsel, instructed by Batchelors, Solicitors, appeared for the Respondent/Intended Defendant

THE APPLICATION

1. By an Application Notice dated and entered on 3rd June 2016 ("the Application") the Applicant/Intended Claimant, Mr Trevor Wood, ("Mr

Wood") seeks pre-action disclosure pursuant to the provisions of CPR 31.16, and section 33(2) of the Senior Courts Act 1981 ("the 1981 Act"). The hearing of the Application took place on 25th July 2016 and judgment was reserved owing to want of time. All the parties were represented by Counsel, save for the First Respondent ("Indigo Bridge") who did not appear and was not represented. Skeleton Arguments were filed by both Counsel, to which reference shall be made below.

THE BACKGROUND TO THE APPLICATION

2. Mr Wood was a partner in a joint development scheme in respect of two properties known as 17 Shooters Hill, and 16 and 18 Langton Way, ("the Joint Venture"). The Joint Venture started in about mid-2007. The parties to the Joint Venture apparently did not encapsulate the agreement into any written form. Mr Wood has identified several issues in the case relating to the Joint Venture, two of which are (1) the identification of the precise parties involved in the Joint Venture, and (2) the precise terms of the arrangements between those parties.

3. Mr Wood contends that his Joint Venture partners include the second to fourth Intended Defendants, the Respondents to this Application. For ease of reference I shall hereafter refer to them as "Ds 2 to 4". However, Ds 2 to 4 deny that they were ever partners in the Joint Venture, and assert that the other parties to the Joint Venture agreement with Mr Wood were the first Respondent, ("Indigo Bridge"), and a Mr Steven Frost ("Mr Frost"). For Mr Wood's part, it is said by his Counsel that it is irrelevant at this stage that Ds 2 to 4 contend that they were not Joint Venture partners. There is undoubtedly a dispute on this issue which will require resolution in due course.

4. Be that as it may, the purpose of the Joint Venture was to purchase, refurbish/redevelop, and sell the land and buildings situated at 17 Shooters Hill. As part of the scheme two new properties were to be constructed on the land and then sold, these properties being identified as 16 and 18 Langton Way. It was apparently agreed that Mr Wood and Ds 2 to 4 would be entitled

to a share of 18.75% of the net proceeds of sale. This was later varied to 19.5%.

5. Indigo Bridge was incorporated on 6th August 2007 as a special purpose vehicle for the Joint Venture. Apparently, it was originally decided that Mr Wood would invest £100,000 into the Joint Venture, and it is said that Ds 2 to 4 would invest £210,000 each. However, during the development process it was agreed that Mr Wood's investment would increase to £137,000 and the investment of Ds 2 to 4 would increase to £240,000 each. In so far as Ds 2 to 4 were concerned it is contended that this additional investment would be funded indirectly by contributing labour and materials through a company known as Bryen and Langley Limited ("Bryen and Langley"), which was a building company they owned.

6. In paragraph 6 of the Skeleton Argument filed by Counsel for Ds 2 to 4 there is reference to an email from D3 (Mr McMahon) to Mr Wood dated 22nd January 2010 which refers to a spreadsheet which set out the costs of the scheme as at that date. However, in this email statements are made by Mr McMahon to the effect that the figures were not precise and comprised a mixture of fact and "guesstimates". Reference is also made by Mr McMahon to the fact that he would thereafter keep accurate records, and if Mr Wood wished at that stage to have an explanation of the figures provided, then he could ask. It is said that the inference to be drawn from this statement is that hitherto no accurate record had been kept. It is also contended that Mr Wood did not avail himself of this opportunity.

7. The Joint Venture was not a commercial success and the three properties, namely 17 Shooters Hill, and 16 and 18 Langton Way were sold between 2011 and 2013. The accountants for Indigo Bridge then duly prepared accounts which showed liabilities of £120,485 as at the 31st August 2014.

8. On 19th November 2013 Mr Wood wrote a letter to Indigo Bridge giving notice of a claim arising out of the alleged sale of 16 Langton Way at an undervalue. It is said by Counsel for Ds 2 to 4 that this has been a consistent theme throughout the correspondence, although it is said that Mr Wood has

never fully set out his case in this regard, nor the identity of the prospective respondents to his assertions.

9. The details of Mr Wood's case are set out in in paragraph 10 of the witness statement of Paul Dench dated 3rd June 2016, (see sub-paragraphs 10.12 to 10.19 thereof). The essential feature of Mr Wood's case is that he has a suspicion that the sale of 16 and 18 Langton Way (referred to in Mr Dench's witness statement as "the Property"), was at a significant undervalue which resulted in the Joint Venture failing to produce a profit for the partners (see paragraph 10.20). In addition, Mr Wood disputes the monies that have been deducted from the proceeds of sale (namely in the region of £200,000) by Ds 2 to 4. His concerns relate to c £170,000 of transactions as identified in the final account. It is said that since the 23rd June 2014 Mr Wood has sought documentary evidence supporting the entitlement of Ds 2 to 4 to make various deductions from the proceeds of sale of the Property, which is said to have been made in respect of development costs concerning 17 Shooters Hill. His concerns have also raised issues as to expenditure of £82,091.00, and further payments made into the Joint Venture of £30,000 by each of Ds 2 to 4. He says that it is "likely" that Ds 2 to 4 will be parties to the subsequent proceedings brought by him, and the explanation of the failure to produce documentation is "weak".

10. Reference is made in the skeleton argument filed by Counsel for Ds 2 to 4 in paragraphs 9 and 11 as to the complaints made by Mr Wood, and the explanations given in response. It is submitted on behalf of Ds 2 to 4 that they have continually explained to Mr Wood on several occasions that no invoices had been rendered in respect of a number of items of expenditure arranged through the services provided by Bryen and Langley.

11. Further, it is stated that on 19th May 2015, following an invitation so to do, Mr Wood inspected the company documentation at the offices of Ds 2 to 4. For his part, Mr Wood asserts that a number of "source documents" were not available for inspection by his accountant at this meeting, although subsequently it was stated by the solicitors for Ds 2 to 4 that all documents

had been disclosed of which they were in possession. This was considered to be an inadequate response by Mr Wood.

12. Subsequently it was apparently agreed by accountants on both sides that the expenditure of £82,091 and the cash injections which were put into the Joint Venture were one and the same amount of money, (see the communications dated 8th June 2015 and 27 May 2015 at pages 57 and 59 of the bundle of documentation prepared for the hearing).

13. Thus, the request for documentation made by Mr Wood in this regard was deemed to be irrelevant by Ds 2 to 4 as no such documentation had been created and therefore did not, and does not, exist. It was said that no invoices existed in respect of the remaining items of expenditure.

14. Following the inspection on 19th May 2015 Messrs Batchelors wrote to Messrs Gordon Dadds on 24th June 2015. No response was received to this letter until January 2016 when (without further notice) Messrs Gordon Dadds forwarded to Messrs Batchelors a draft Application Notice seeking pre-action disclosure together with the witness statement (in draft) made by Mr Dench. Messrs Batchelors responded on 1st February 2016 to this draft documentation. Then nothing further was heard until a letter was received dated 25th May 2016 setting out Mr Wood's position, and stating that they had instructions to issue an application without further reference. The Application was duly issued on 3rd June 2016.

THE PARTIES' SUBMISSIONS

The case for Mr Wood

15. Essentially, it is Mr Wood's case that it is necessary for certain documents to be produced (such as suppliers' invoices) to enable him to examine forensically the Joint Venture final account. It is asserted that about £80,000 of expenditure needs to be justified, together with about £90,000 of drawings that have apparently been paid out to Ds 2 to 4. It is contended that these sums represent the repayment of earlier cash injections. It is said by Counsel that these documents are required by way of pre-action disclosure in order to

"mould" Mr Wood's case. Such invoices once produced can then assist in the formulation of Mr Wood's claim. Alternatively, if (as is submitted) that Ds 2 to 4 are correct in their assertions that they have never been Joint Venture partners, it is said that disclosure will be relevant to any alternative claim pleaded against them for monies had and received as third parties out of the Joint Venture account. It is contended therefore that the Application is made to focus the minds of Ds 2 to 4 and to bring (as it is put) *"structure to the disclosure exercise"*, including the requirement to explain why documents are no longer in a party's possession, power or control, if that be the case.

The case for Ds 2 to 4

16. Insofar as the position of Ds 2 to 4 is concerned the essential feature of their case is that they were never Joint Venture partners. Further, as has been stated on several occasions no documents exist in the categories sought by Mr Wood as the works were organised through Bryen and Langley, and no invoices exist. It is contended that this has been the consistent position of Ds 2 to 4 since the email dated 22nd January 2010, to which reference has been made above. As Counsel states in his skeleton argument at paragraph 22(b), it is somewhat farfetched for Mr Wood, and his legal advisers, to suggest that invoices may have existed at some stage, but have since been disposed of. It is submitted that this is not the correct position. Since access was first offered on 25th July 2014 it has always been the position of Ds 2 to 4 that these invoices have never existed. It is also their position that the court has no jurisdiction to compel them to embark upon an onerous search for documents held by unidentified third parties.

17. It is submitted that pre-action disclosure is neither desirable nor appropriate in the present case as it will not dispose fairly of the anticipated proceedings, or assist in the resolution of the dispute as no documentation will be obtained at the end of the exercise. In other words, any such order will have no practical effect because such documents will not be forthcoming. It will also not help the parties to save costs.

18. It is also submitted by Counsel that Mr Wood can and should have already pleaded his case as he is already able to plead a claim based on an alleged sale at an undervalue, and to plead the other items of expenditure he seeks to have investigated. There has been quite considerable delay in seeking to issue and serve the Application, and it is noted that there have been three unexplained long delays in correspondence from Mr Wood's solicitors totalling over 17 months (see paragraph 29(c)) of Counsel's skeleton argument). Also, it is submitted that the scope of the disclosure sought is far too wide and unfocussed. Paragraph 1(a) of the draft Order seeks a wide range of categories, which, if they exist, could run into thousands of documents.

19. For all these reasons, it is submitted on behalf of Ds 2 to 4 that the Application should be dismissed.

THE LEGAL POSITION

20. CPR 31.16 provides the basis for seeking pre-action disclosure before proceedings have started. In effect, there is a two-stage process. The first stage is to establish whether the jurisdictional thresholds contained in sub-rule (3)(a) to (d) are satisfied, for the reasons set out in paragraph 3 of submissions made by Counsel on behalf of Mr Wood. It is submitted that the jurisdictional threshold has been attained, which is said to be low. The second stage of the process is that relating to discretion of the Court. Counsel for Ds 2 to 4 submits that this procedure is entirely inappropriate.

21. A further aspect raised by Counsel for Ds 2 to 4 is that in any event the Court has no jurisdiction when regard is had to section 33 of the 1981 Act. This section refers to the powers of the High Court exercisable before commencement of the action. Sub-section (1) specifies that on the application of any person in accordance with rules of court, the High Court shall in such circumstances as may be specified in the rules have power to make an Order providing, inter alia, for the inspection of property which may become the subject matter of subsequent proceedings in the High Court or as to which any question may arise in such proceedings. Reference is also made to sub-section

(2). The point made by Counsel is that the High Court does not have jurisdiction in any event insofar as this Application is concerned as the amount by way of recovery of the sums sought is so small that the proceedings should not be issued in the High Court, but rather the County Court.

22. I am not prepared to make any ruling on this submission as to jurisdiction. If proceedings are eventually commenced in the High Court, and on the assumption that they proceed, not having been the subject matter of summary judgement or strike out, then they can always be transferred to Central London Civil Justice Centre if the value of the claim is low.

CONCLUSIONS

23. Drawing together the various strands set out above, I have concluded that this case for pre-action disclosure has absolutely no merit. It is an inappropriate use of the pre-action disclosure process. My reasons are as follows: -

(1) It has been consistently reiterated by the solicitors acting on behalf of Ds 2 to 4 that no documents of the categories sought exist. The whole Joint Venture exercise seemed to have been run in a somewhat lackadaisical fashion, and much of the works appear to be organised through the third party, namely Bryen and Langley. No invoices were apparently ever rendered, and that is the consistent position manifested by Ds 2 to 4.

(2) The scope of the disclosure sought is very broad, and is unfocussed. Once proceedings are commenced against properly identified defendants, the standard disclosure process will reveal the identity of such relevant documents that do exist.

(3) Even though the suggestion has been made, and subsequently repeated on a number of occasions, there is no evidence to suggest that Ds 2 to 4 are somehow hiding documents to impede disclosure. The truth seems to be rather more mundane in that invoices were never raised because

of informal arrangements made at critical times, which has meant that documents which could have been relevant were never apparently created.

(4) Pre-action disclosure is not desirable in such circumstances as, in my judgment, it will not help to dispose fairly of the proposed proceedings as it will be a fruitless exercise. Further, it will not help the parties to save costs, rather it will cause further costs to be incurred.

(5) In any event, it would seem that it is quite possible for Mr Wood to plead a case against Ds 2 to 4 on the basis of sale at an undervalue, together with the recovery of items of expenditure, irrespective of the categories of documents which he asserts exist.

(6) In my judgment, this pre-action disclosure Application is no more and no less than a fishing expedition on the part of Mr Wood, as the proposed claimant.

24. In such circumstances, I do not consider that this is a case where I should exercise my discretion in favour of the Applicant.

Edward F Cousins

Deputy Chancery Master

28th November 2016