

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS (LONDON)
BUSINESS LIST (ChD)

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

Date: 23 January 2019

BEFORE:

MR EDWIN JOHNSON QC
Sitting as a Deputy Judge of the High Court

BETWEEN:

(1) WHITE WINSTON SELECT ASSET FUNDS LLC (a limited liability corporation incorporated under the laws of Delaware, USA)	<u>CLAIMANT (1)</u>
(2) ENGLISH CUT LONDON LIMITED (formerly White Winston London Limited)	<u>CLAIMANT (2)</u>

- and -

(1) MR THOMAS MICHAEL MAHON	<u>DEFENDANT (1)</u>
(2) S. REDMAYNE LIMITED	<u>DEFENDANT (2)</u>

This Transcript has been approved by the Judge.
The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.
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Legal Representation

Mr Guy Tritton (Counsel, Hogarth Chambers) on behalf of the Claimants
Mr Thomas Mahon (First Defendant), Litigant-in-person
Mr Wigglesworth (Advocate) on behalf of the Second Defendant

Other Parties Present and their status

Ms Georgina Collins (Solicitor, Irwin Mitchell LLP)

Judgment

Mr Edwin Johnson QC:

1. This is the hearing of a pre-trial review in this action. On the pre-trial review Mr Tritton, of counsel, appears for the Claimants. The First Defendant, Mr Mahon, appears in person

and the Second Defendant, which is a corporate person, is represented by Mr Wigglesworth. I should record that there has been no objection to Mr Wigglesworth speaking on behalf of the Second Defendant at this pre-trial review, and I have permitted him to do so.

2. The most substantial matter which I have to deal with on the hearing of this pre-trial review is an application for specific disclosure, as it is termed, which is made by the Claimants against the First Defendant. The application itself is made by an application notice dated 17 January 2019 and is supported by a witness statement of Georgina Collins of the Claimants' solicitors, which is also dated 17 January 2019.
3. A very brief background to this action, which will be coming to trial at the end of February of this year, is as follows. The dispute concerns a company which I believe was known as English Cut Limited, which went into administration on 31 July 2017. Mr Mahon, the First Defendant, was a director of that company and he is, I should also say, an experienced tailor. The business of English Cut was, I quote from paragraph 3 of the Particulars of Claim in the action:

“English Cut carried on business as a provider of high end tailored garments with particular focus on bespoke and made to measure garments for men.”

4. The allegations which are made against Mr Mahon in the action are very briefly these. First it is alleged that Mr Mahon has breached an equitable duty of confidence which he owed to English Cut by downloading and making use of customer lists, so it is alleged, which were the property of English Cut. It is also alleged, this is the second set of allegations, that Mr Mahon has acted in breach of fiduciary duties which he owed to English Cut. In relation to the alleged breach of duty of confidence in equity, it is also alleged that the Second Defendant, a company called S Redmayne Limited, was also guilty of a breach of the equitable duty of confidence together with Mr Mahon. So it is in those circumstances that the Second Defendant is also sued in the action.
5. English Cut, I should mention, is not actually the Claimant in the action. The Claimants in the action are a company called White Winston Select Asset Funds LLC, that is a company incorporated under the laws of Delaware in the United States of America, and a company which I believe was formally known as White Winston London Limited, but I believe is now known as English Cut London Limited. The Second Claimant, has, as I understand the position, been formed to take over the business of English Cut Limited, the company which has gone into administration, and the First Claimant is a company which carries on the business of an investor and, by reference to the Particulars of Claim, says that it has invested large sums in the business of English Cut Limited. The two Claimants sue on the basis, as I read the Particulars of Claim, that they are assignees of the causes of action which were vested in English Cut Limited against the two Defendants.
6. That is a brief background to the action. I should also record that an order was made by the Chancellor of this Court on 2 November 2017 pursuant to which or within which undertakings were given by the First Defendant in relation to customers or former customers of English Cut Limited. Those undertakings restricted the ability of the First Defendant to deal with those customers.
7. Directions in the action were given by Deputy Master Cousins I believe on 12 April 2018 and those directions included a direction for standard disclosure to be given by the

parties. That meant that the parties were obliged to provide disclosure of those documents on which they rely and those documents which adversely affect their own case or adversely affect another party's case or support another party's case. The obligation of standard disclosure also included, pursuant to CPR Rule 31.6, documents which a party might be required to disclose by reference to a relevant Practice Direction.

8. The case is therefore one in which there was a direction for standard disclosure. What is alleged by the Claimants is that the First Defendant, who provided a list pursuant to the standard disclosure direction, has failed to comply with his obligations of standard disclosure in certain respects. When I say in certain respects I refer to six specific categories of documents which are set out in Schedule 1 to the draft order which is attached to the Claimants' application. Those categories of documents are numbered 1 to 6 and, as I have said, the allegation is that the First Defendant has failed to comply with his obligations of standard disclosure in those respects.
9. At the outset I should record that a question arises as to what my jurisdiction is in relation to this application. The reason for this is that this Court, in relation to various types of action, including the present action, is now subject to what has come to be known as the Disclosure Pilot. That is the new disclosure regime which applies to existing proceedings as from 1 January 2019 and also applies to proceedings commenced after 1 January 2019. It follows that the Disclosure Pilot does apply to these proceedings and, looking through the Disclosure Pilot, it is not clear, in the absence of any specific transitional provisions, what the position is in relation to a situation where one has a standard disclosure order made prior to 1 January 2019, but an application is made for specific disclosure, expressed to be made pursuant to CPR Rule 31.12, after 1 January 2019.
10. At least on one reading of the Disclosure Pilot, it could be said that the Court does not have any jurisdiction to make an order under CPR Rule 31.12, because that particular provision of the CPR has been replaced by the Disclosure Pilot. Looking through the Disclosure Pilot it is equally not obvious which particular part of the Disclosure Pilot would give the Court jurisdiction to make the equivalent of an order for specific disclosure under what would previously have been the jurisdiction under CPR Rule 31.12.
11. There is paragraph 18 of the Disclosure Pilot but the difficulty with that paragraph is that it appears to apply in circumstances where there has been a direction for extended disclosure within the meaning of the Disclosure Pilot. That is not the position in the present case.
12. Mr Tritton, who as I have said appears for the Claimants, addressed me on this question of jurisdiction. His submissions were that the required jurisdiction could be found either in paragraph 18 of the Disclosure Pilot, which I have just mentioned, or in paragraph 20 of the Disclosure Pilot, which makes it clear that the Court's general case management powers are preserved. Essentially, Mr Tritton's submission to me was that, pursuant at least to Part 3 of the CPR and pursuant to my general case management powers under that Part, it ought to be possible for me to make an order for specific disclosure. He also made the submission, as one would expect, that it would be a very strange result if I was to be satisfied that there had been a failure on the part of Mr Mahon to comply with his standard disclosure obligations, but if I was then to come to the conclusion that there was nothing I could do about it, because CPR Rule 31.12 had been replaced by the Disclosure Pilot.

13. It seems to me that the right answer is that, at least as a matter of the general case management powers of the Court, I do have the ability to make at least the equivalent of an order which could previously have been made under CPR Rule 31.12, in order to ensure that Mr Mahon does comply with his standard disclosure obligations, assuming of course that I am satisfied that there has been a failure to comply with those obligations. In those circumstances, I accept the general submission made by Mr Tritton, on behalf of the Claimants, to the effect that I do have the jurisdiction to make an order, which I will describe as an order for specific disclosure, in order to ensure that Mr Mahon does comply with his standard disclosure obligations, if I am satisfied that there has been a failure in that respect.
14. Having come to the conclusion that I do have the jurisdiction to make an appropriate order, I come on to the question of whether I should make such an order. I have already made reference to the terms of CPR Rule 31.6, which set out what is required in terms of standard disclosure. I now refer to the categories of documents which are set out in Schedule 1 to the draft order attached to the application. It is not necessary for me to go through the categories individually. Suffice it to say that having heard from Mr Tritton and also having heard from Mr Mahon, who spoke in an articulate and persuasive fashion on his own behalf in response to the application for specific disclosure, I am satisfied that in relation to the categories of documents set out in Schedule 1 they are categories of documents which ought to have been covered in Mr Mahon's disclosure list. On the basis of the evidence which I have read and on the basis of the submissions which I have heard, I am satisfied that these particular categories of documents, as set out in Schedule 1 to the draft order attached to the Claimants' application, have not been covered in the existing disclosure list provided by Mr Mahon.
15. It seems to me that the relevant categories of documents should be the subject of an order requiring specific disclosure because it seems to me that they are categories of documents which are likely either to support or undermine the case of Mr Mahon and, by parity of reasoning, either to undermine or support the case of the Claimants. It is also clear to me that disclosure in relation to these categories of documents is required. Indeed, it seems to me that disclosure in relation to these categories of documents is important for a fair trial of this action. It is obviously important that the Court hearing the trial of this action has before it all the relevant documents, and it seems to me that categories 1 to 6 in Schedule 1 to the draft order do contain highly relevant documents in that respect.
16. I am therefore satisfied that the specified categories of documents do fall within the standard disclosure obligations of Mr Mahon and, given that I am also satisfied that they are not currently covered by the disclosure list provided by Mr Mahon, it seems right to me that there should be an appropriate order made which requires that omission to be made good.
17. There is one other point which I should mention, which is this. As I have said, the trial of this action is due to commence at the end, as I understand the position, of February of this year. This is the pre-trial review and it does follow that this application is made at a relatively late stage. However, it seems to me that it would be wrong to refuse an order on the basis that the application is made late in the day. An explanation of why the application has come to be made now is provided by Ms. Collins in her witness statement and I accept that that explanation provides a reasonable explanation of why this particular application was not made earlier. In those circumstances I have not thought it right to refuse the application on the basis that it is made late in the day.

18. In those circumstances there will be an order made for specific disclosure in relation to the categories of documents set out in Schedule 1 to the draft order. I reserve for further discussion, which will happen shortly, the precise terms of the order which should be made. As matters stand, the order which is sought is simply an order for provision of the documents listed in Schedule 1 or, if those documents do not exist, the requirement for a sworn statement that the documents do not exist or that the Defendant no longer has possession or control of the documents and, where the Defendant no longer has such possession or control of the documents, in whose possession these documents are and when the documents ceased being in the Defendant's control.
19. It seems to me that that is not the appropriate form of order. A point which has been made to me by Mr Mahon, in relation to at least one of the categories of documents, is that there are no documents to disclose in that category. In those circumstances it does not seem to me to be appropriate to be making an order that Mr Mahon produce certain documents. Rather, it seems to me that it is important that Mr Mahon should go on the record, I have in mind by way of a witness statement, identifying what documents are or have been under his control in relation to the specified categories and if documents have been under his control but are no longer under his control saying what has happened to them. If it should be the case that one of the categories turns out to be an empty set, where Mr Mahon has no such documents under his control and has never had any such documents under his control, then Mr Mahon can go on the record in the witness statement to confirm that that is the position, and thus the Claimants will have the confirmation to which it seems to me they are entitled, should that turn out to be the position once Mr Mahon has conducted the required search for the documents.
20. Subject to finalising with the parties the precise form of order that should be made, my decision is that there should be, using the following expression in a general sense, an order for specific disclosure made on this application.