



Neutral Citation Number: [2022] EWHC 1663 (Ch)

Case No: BL-2019-001768

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

7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 29/06/2022

Before :

MR JUSTICE ADAM JOHNSON

Between :

(1) OCADO GROUP PLC
(2) OCADO CENTRAL SERVICES LIMITED
- and -

Claimants

RAYMOND MCKEEVE

Defendant

David Cavender QC and Alexander Brown (instructed by **Mishcon de Reya LLP**) for the
Claimants
Robert Weekes QC and Gayatri Sarathy (instructed by **Foot Anstey LLP**) for the **Defendant**

Hearing dates: 28 June 2022

Approved Judgment

This judgment was handed down by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10.30am on Wednesday 29 June 2022.

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MR JUSTICE ADAM JOHNSON

Mr Justice Adam Johnson:

1. This is a committal application, and exceptionally, the Claimants seek an order that certain parts of the hearing should take place in private. That would involve a derogation from the principle of open justice, and so is an issue to be approached with the utmost seriousness. The Claimants says that such a derogation is necessary, however, insofar as it will be appropriate during the hearing to refer to the content of certain documents which it refers to as the “*Commercially Sensitive Documents*”. I stress that the derogation is sought only where the content of the Commercially Sensitive Documents is to be referred to: it is not sought where all that is to happen is that the fact of the existence of the Commercially Sensitive Documents will be referred to. The application is supported by the Second Witness Statement of Mr Neill Abrams, who is the Group General Counsel of the First Claimant, Ocado Group Plc.
2. I should note that, in accordance with CPR 81.8(3), notice of the Claimants’ application was given to the Press Association on Wednesday, 22 June 2022. No representations have been made on the part of the Association or any individual members of the press or media organisations. As to the Defendant, Mr McKeeve, he has adopted essentially a neutral stance in relation to the Claimants’ application. As his counsel, Mr Weekes QC has indicated, this is essentially a matter for the Court.
3. Mr Abrams gives the relevant background in his Second Witness Statement. The present contempt application arises out of underlying litigation against three Defendants, Mr Jonathan Faiman, Project Today Holdings Limited (“*Project Today*”) and Mr Jonathan Hillary. The allegations in the underlying litigation included unauthorised use by Mr Faiman and Project Today of the Claimants’ confidential information. Mr McKeeve, the Defendant in the present action, was a legal adviser to Mr Faiman and Project Today. The underlying proceedings began with the service on the Defendants of a Search Order. The contempt application relates to certain actions undertaken by Mr McKeeve at the time of execution of the Search Order. In order to deal with the contempt application properly, the Claimants consider it will be necessary to refer to certain of the Claimants’ documents found in the possession of Mr McKeeve. These are the *Commercially Sensitive Documents*.
4. As to the legal principles, CPR 39.2(3)(c) and (g) provide relevantly as follows:

“A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice – ...

(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality; ...

(g) the court for any other reason considers this to be necessary to secure the proper administration of justice.”

5. There is a very helpful summary of the key principles in the Judgment of Murray J. in Taher v Cumberland [2019] EWHC 2589 (QB). The following points bear emphasis, which the Claimants have drawn attention to in their Skeleton Argument:
 - i) The general rule is that committal applications are heard in public. Derogations from this rule can only be justified in “*exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice*” (at [68]).
 - ii) Any derogation “*must be justified by clear and cogent evidence and any restriction imposed must be no more than is strictly necessary to achieve the purpose of the derogation*” (at [69]).
 - iii) It is also necessary to consider proportionality, i.e. whether the purpose of the derogation “*can be achieved by a lesser measure or combination of measures, such as imposing reporting restrictions, anonymising the parties or restricting access to court records.*” (at [71]).
6. In his written submissions to the Court, Mr Weekes QC has drawn attention to the guidance on the importance of the open justice principle contained in the Practice Guidance (Interim Non-disclosure Orders) reported at [2012] 1 WLR 1003. Among other points, he has emphasised that derogations from the principle of open justice can only be justified in exceptional circumstances, and that exclusion of the public must be no more than the minimum strictly necessary to ensure justice is done
7. Against that background, I have determined that I should accede to the Claimants’ application so far as it concerns the need to sit in private when the Court is referred to the content of the Commercially Sensitive Documents. That is for the following reasons.
8. First, I am satisfied on the basis of Mr Abrams’ Witness Statement that the Commercially Sensitive Documents are confidential and of commercial importance, for the reasons he gives. That is to say, they contain currently relevant commercial and operational information likely to be of interest and value to competitors. I need say no more about the detail of them in this public judgment.
9. Second, I accept the proposition that there would be a basic unfairness and injustice in the content of the Commercially Sensitive Documents being aired in public. One purpose of the Search Order and of the underlying proceedings was to seek to protect the Claimants’ confidential and commercially sensitive information. Mr Abrams’ evidence is that the Claimants have gone to great lengths to protect the confidential information contained in the Commercially Sensitive Documents. The Claimants say it would be wrong and unjust for that information now to be referred to publicly in the present committal proceedings, in a manner that risks unwinding the effect of the efforts already undertaken by them, including their having obtained the Search Order. I agree. I do not consider that any lesser form of order would address the point appropriately, because reference to the content of the Commercially Sensitive Documents in open Court risks information about such content finding its way into the hands of a competitor. That is just the vice the underlying proceedings and the Search Order were intended to prevent.

10. Third, I am comforted by the assurance given that it is unlikely the contents of the Commercially Sensitive Documents will feature heavily during the trial. Thus, Mr Abrams says they may only be referred to for very short periods of time. Mr Cavender QC, Leading Counsel for the Claimants, has said in his written submissions that only minimal reference to the content of the Commercially Sensitive Documents will be needed during the course of the trial. Thus, I am satisfied that the restriction proposed is proportionate and is no more than is necessary to achieve the intended purpose of continuing to protect the confidential information contained within the Commercially Sensitive Documents.
11. Having dealt with that point, I must also deal with a further, related issue. The Commercially Sensitive Documents I have referred to are in fact a sub-set of a slightly larger overall set of what the Claimants describe as “*Confidential Documents*”. The additional Confidential Documents, over and above the Commercially Sensitive Documents, were also found in the possession of Mr McKeeve. Unlike the Commercially Sensitive Documents, they are no longer currently in operation. Thus, Mr Abrams presses a rather less urgent case in relation to these documents. He says only that they are of “*some commercial sensitivity, and potentially of use to competitors*”.
12. The upshot is that, as regards these additional Confidential Documents, over and above the Commercially Sensitive Documents, the Claimants do not seek any direction for the Court to sit in private.
13. Instead what are sought, as regards the entire collection of Confidential Documents, including the Commercially Sensitive Documents, are the following:
 - i) An order under CPR 5.4C(2), requiring any application by third parties to obtain copies of any of the Confidential Documents from the court file to be made in three clear days’ notice.
 - ii) An order pursuant to CPR 31.22, prohibiting the subsequent use of any of the Confidential Documents other than for the purpose of the present proceedings.
14. I am satisfied that the Orders sought should be made.
15. As regards the Commercially Sensitive Documents, this result follows from the conclusions I have already expressed. As regards the balance of the Confidential Documents, the relief sought is justified on the basis of Mr Abrams’ evidence as to why such documents are potentially of interest to competitors. In any event, in my view the relief is proportionate in terms of the identifiable risk. It allows a party who wishes to obtain copies of any Confidential Documents to apply for that purpose, and to vary the terms of the Order to be made under CPR 31.22. However, in such event the present parties are to be given notice. That structure holds an appropriate balance between the interest in promoting open justice and the interest of the Claimants in protecting their confidential information. That being so I will make the Orders sought.