Judgment approved by the Court for handing down

CL-2016-000195

Neutral Citation Number: **[2020] EWHC 48 (Comm)**

Case No: CL-2016-000195

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice,
Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: Wednesday 15 January 2020

Before :

MRS JUSTICE COCKERILL DBE

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Between :

(1) MR AYOUB FARID MICHEL SAAB	**Claimant**
(2) MR FADI MICHEL SAAB	
- and -	
(1) DANGATE CONSULTING LTD	**Defendant**
(2) BARRINGTON LONDON LIMITED	
(3) MR NIGEL BROWN	
(4) MR ALEC LEIGHTON	

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Mr David Allen Q.C. and Mr Jason Robinson (instructed by **Quinn Emanuel Urquhart and Sullivan UK LLP**) for the **Claimants**
Mr Steven Kay Q.C. for the **Defendants**

Hearing dates: 21 November 2019

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Approved Judgment

Mrs Justice Cockerill :

1. This application has been made by the Claimants pursuant to paragraph 6(ii) of the Order dated 25 July 2019 (the "25 July Order"), that being the Order consequential on judgment in this matter.

2. The application was originally for further relief namely:

    i) An Order that the Defendants have failed to comply with paragraphs 3 and 4 of the 25 July Order, in that they have failed to;

        a) Deliver up all documents in their possession, custody and/or control, and

        b) Failed to provide the specific information required in their affidavits dated 20 August 2019 (the "Affidavits").

    ii) An Order requiring the Defendants within 14 days to serve further sworn affidavits which:

        a) Explain in clear and unambiguous terms, precisely (a) what and when confidential information and documentation was given to third parties, (b) how meetings with third parties at which such information was disclosed came to pass, and (c) what information and documentation was provided to the third parties and at the meetings listed in the Defendants' Affidavits, and in the meetings attended by Mr. Brown in Tanzania in 2017;

        b) Exhibit in an easy to follow format, (a) all communications leading to meetings at which confidential information or documentation was disclosed, and (b) all file notes, attendance notes, minutes e-mails, or other similar documents records what was said at such meetings;

        c) Explain all relevant fact relating to the "Whistleblowing Scheme" referred to in Mr. Leighton's Affidavit, including but not limited to the detail set out at §2(6), (8) and (9) of the draft order; and

        d) Exhibit copies of all documents / communications that mention, refer to or relate to that "Whistleblowing Scheme".

    iii) An Order requiring the Defendants within 14 days to allow an e-disclosure provider appointed by the Claimants to image the Defendants' electronic communication and storage devices so

the Claimant's legal team can review any/all documents responsive to the keywords listed.

iv) The appropriate accompanying orders which mirror the relief ordered at paragraphs 6-7 of the 25 July Order.

3. As matters developed at the hearing, that application was modified to being an application for:

i) An Order declaring the Defendants to be in breach of the Order.

ii) An Order giving the Defendants a period of time (14 days was the submission) to purge their contempt, failing which it will be open to the Claimants to apply to commit the Defendants for contempt of Court.

iii) Costs of the application.

4. The Claimants' case is that the Defendants have egregiously failed to comply with the 25 July 2019 Order.

5. I am producing this judgment because:

i) It is apparent that the Defendants assert that they have complied with their obligations under paragraphs 3 – 5 of the 25 July 2019 Order, and so challenge the application. However, the basis for this assertion was (as was often the case with their defence at trial) broad and non-specific, failing to engage with the detail of the case against them.

ii) That is an assertion which is manifestly wrong and it is troubling that it should be made at all, still less advanced on their behalf by counsel.

6. On the face of it this matter could have been dealt with orally and in fairly short order at the hearing. However, in circumstances where the Defendants:

i) Include two individuals who are not in their first flush of youth;

ii) Are, if not in person (because they have the assistance of experienced criminal counsel in the form of Mr Kay QC), quasi in person, in the sense of being unassisted by civil solicitors or counsel;

iii) Appear (from the position adopted by them and advanced on their behalf at the hearing) not to have received clear advice to date about their position; and

iv) Are likely to face as the result of any continuing non-compliance an application to commit them for contempt;

it has seemed to me that the interests of justice require that I make as clear as I can to the Defendants the view the Court takes of what they have produced so far – and enable them to understand in what respects and why I consider that they have not complied with my Order.

7. I should however make plain to them that this judgment will not necessarily be exhaustive. I will proceed on the basis of the particular breaches relied upon by the Claimants in their Skeleton Argument. However, Mr Allen QC for the Claimants has made clear that the Claimants do not consider the breaches by the Defendants to be so confined. He reserves his right to point to other breaches in any future application.

The Affidavits and the Need for Further Particularisation and Specificity

8. Paragraph 4 of the 25 July 2019 Order required the Defendants to serve sworn affidavits:

> "… detailing in relation to each and every disclosure of confidential information to a third party, either during the course of their Engagement or after the end of their Engagement:
>
> (1) The specific information and/or documentation disclosed;
>
> (2) The date, or dates, on which such information and/or documentation was disclosed;
>
> (3) The identity of the party or parties to whom that information and/or documentation was disclosed; and
>
> (4) The format or means by which that information and/or documentation was disclosed, i.e. whether orally, in writing and/or by provision of documentation."

9. Paragraph 5 of the 25 July 2019 Order then stated:

> "…. Each of the Defendants are required to exhibit to the affidavits referred to at paragraph 4 above copies of all communications evidencing each and every disclosure of confidential information to a third party, including emails and other correspondence leading to meetings at which

confidential information or documentation was disclosed….".

10. One point to note here is that this formulation was not contentious at the Consequentials hearing. There was a dispute about whether the information should be given by way of witness statement or affidavit; but there was none about the ambit of the disclosure, or the ambit of the evidence to be given by the Defendants.

11. I understand from Mr Brown's *sotto voce* comments to Mr Kay QC during the course of this hearing that he now considers it impossible to comply with the 25 July Order. That is echoed by paragraph 38 of his fourth witness statement responding to the criticisms of Mr Leighton's lack of disclosure: "*I do not think it would have been practical for Mr Leighton to have printed and formally exhibited the relevant documents if that is what is being suggested.*"

12. If that is the case, that is a point which should either have been raised at the Consequentials hearing or, once the supposed impossibility was apprehended – and before the deadline for compliance – by way of an application to the Court to amend the 25 July Order. There has still been no application to amend the Order 25 July. I must and do therefore proceed on the basis that the 25 July Order encapsulates the obligations of the Defendants.

13. I would add that the passage to which I have referred from Mr Brown's witness statement reinforces the concerns I have expressed above that the Defendants have (whether willfully or from a lack of advice) not to date comprehended the obligations which they are under pursuant to the 25 July Order.

14. The Claimants submit that the affidavits are woefully inadequate, lack any specificity whatsoever and "*are in large part so vague, incomplete and/or unhelpful as to be of no use or value at all*".

15. I consider these submissions below. Overall:

    i) I consider that the Defendants have plainly failed to provide the requisite level of detail in their affidavits. To be clear:

        a) The words used are "detailing" not "outlining" or "summarising" and "specific" not "approximate". What is required is detail, or particularity, as it is sometimes called.

        b) The Defendants' avowed belief that the Claimants understand what was given is not relevant here. That belief does not in any way qualify the order made (whose terms were consented to).

c) The purpose of the 25 July Order is to enable the Claimants to understand exactly what information was given to whom in what format. So, the Claimants should be able to identify exactly (or as exactly as the Defendants can recall) the documents handed over to each recipient.

d) It can be tested this way: from what is given could the Claimants identify from out of the documents disclosed, the individual documents handed over? This is the test applied by the Court of Appeal in the context of letters of request where specific documents are sought. I have in mind here such authorities as *Re Asbestos Insurance Cases* [1985] 1 WLR 331, and *Tajik Aluminium Plant v Hydro* [2005] EWCA Civ 1218 [2006] 1 Lloyd's Law Rep. 155.

e) This should be put beyond doubt by compliance with the terms of paragraph 5 of the 25 July Order which requires *"copies of all communications evidencing each disclosure".*

f) The Claimants should be able to understand as nearly as possible exactly the information given in verbal or other non-documentary forms of disclosure.

ii) I consider that the Defendants have plainly either failed to understand or have comprehensively failed to comply with the disclosure requirement in paragraph 5 of the Order.

iii) However, on the other hand the Claimants have to some extent overreached in what they are claiming to be entitled to:

a) They are not entitled to duplicative information. So, if a document by document disclosure is made by reference to each individual provision of information, they are not entitled to (i) a list setting that out or (ii) details of the information contained in the documents.

b) Complaint is repeatedly made of inability to interrogate the information/documents. The test is not their ability to interrogate the documents or information. What they are entitled to is a detailed picture of what was provided so that the Claimants can understand the dissemination of their confidential information and consider their options as regards each disclosure.

c) The criticisms at Bunting 7 paragraph 23 are not valid. The fact that disclosure was made pursuant to an Order is irrelevant. It cannot therefore be within the 25 July

Order to require the Defendants to detail the context of the Order, why it was granted and so forth.

16. Dealing now specifically with the affidavits:

The Leighton Affidavit

17. Item 1:

i) "*Information and/or documentation disclosed*". The answer: "*Verbal account given of issues that we discovered at the bank*" does not detail as required the specific information disclosed. While I accept that by implication what is being said is that no documents were disclosed, the reference to a "*[v]erbal account*" and "*issues*" does not comply with as requirement to "*detail ... the specific information disclosed*.".

ii) "*Format of Disclosure by Fourth Defendant*". It is said that "*Invoices*" and "*schedules of work*" were disclosed. Again, this does not amount to "*detailing*" the "*specific"* documentation disclosed. It would need to detail which invoices, and which schedules of work.

18. Item 2: "*[v]erbal account*" (third column) and "*verbal discussions*" (fifth column): Does not detail as required the specific information disclosed.

19. Item 4 :

i) "*Extensive disclosure of documents*". Again, this does not amount to "detailing" the specific documentation disclosed. I do not however accept (as the Claimants' submissions suggest) that if specific documentation is identified, the content of the documentation needs also to be provided. The use of "and/or" makes it permissible to detail documents provided only, so long as there was no information provided in addition to the documents.

ii) Format of the disclosure: the information that disclosure was made pursuant to an Order does not answer the question of the format in which the information was provided. Was it provided orally or by documents?

20. Item 5:

i) "*all e-files and e-mails relating to our investigation that were held no my laptop at the time*". This does not detail as required the specific documentation disclosed. The detail provided should be sufficient to enable the Claimants to identify each of the documents provided. This may be done by reference to the specific disclosures required by Paragraph 5 of the 25 July

Order, in which case it would be expected that any list would include document dates and the parties to the documents, to enable the specific documents to be identified. However, it could conceivably also be done by reference to a specific drive containing the relevant documents in an identified folder.

ii) Again, however I do not consider that if this information is provided it is necessary (i) in addition to provide details of the information contained in those documents or (ii) their dates and the parties to them.

iii) "*Forensic image of files*": If the other information is provided I am not persuaded that more detail is needed.

21. Item 8 "*PowerPoint Presentations*".

i) Again, this does not detail the specific documents;

ii) Format: the Claimants suggest that there is an oddity in that the fifth column refers only to a presentation to the Cyprus Central Bank, and makes no mention of the other parties to whom disclosure is said to have been made in the fourth column. This should probably make clear whether, as would naturally be inferred, it is the case that all the other parties named were present at the same presentation.

22. Item 12: "*Verbal discussions at meeting where Kroll submitted their report to Head of Financial Crime Unit*": This does not amount to detailing the specific information as required. A compliant answer should explain the content of those discussions or identify the confidential information disclosed thereby.

23. Items 15-17: "*Full copy of all files relating to our investigation*". Again, this is not an answer which complies with the order to detail specific documents.

The Brown Affidavit

24. On this basis the following fail to detail specific documents (or where applicable information):

i) Item 1: *"documents relating to Cyprus civil claims re unpaid invoices".*

ii) Item 2:

a) *"Description of work carried out at the Bank".*

b) *"provided data which was contained in affidavits".*

iii) Item 3:

a) *"background info and verbal".*

b) *"numerous questions by a panel of some 10-15 people"*.

iv) Item 4: "*[e]ntire laptop*" download by Kroll Ontrack in May 2015.

v) Items 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 18, 19, 20 and 21: "*Description of work carried out at the Bank*".

vi) Item 9:

a) *"Extensive interview questioning regarding Money Laundering and Terror Financing"*.

b) *"Aware of Taint review and multi-agency liaison"*.

vii) Item 25: *"Details of Money Laundering"*.

25. So far as Mr. Brown's Fourth Witness Statement is concerned, this indicates that Mr Brown's answer to the items concerning verbal disclosures is that (a) the Defendants are unable to recall granular details of their disclosures, and (b) it is not Mr. Brown's practice to take notes of meetings.

26. This is not good enough to justify the significant failures set out above. The impression given is that the Defendants have either not properly understood the 25 July Order, and have been labouring under the misapprehension that a broad summary is sufficient for compliance, or that they have made no real attempt to comply with the 25 July Order.

27. The answers given ought to at least be able to replicate the level of detail given at trial and in their original (lengthy and detailed) affidavits given to the Central Bank of Cyprus. If necessary of course they could do so (in part at least) by specific reference to specific pieces of evidence at trial.

28. I do accept the submission that it is unattractive for the Defendants, having consented to the 25 July Order in those terms, now to say that they cannot recall any details of the various disclosures they have made since 2015. It is also, in the context of the evidence given, not credible. Full details may escape the Defendants' recollection, but they can certainly explain in detail what they can recall and what they cannot by reference to the evidence in the case.

29. Specific issue has been taken with Mr. Brown's suggestion that it is his general practice not to take notes of meetings. The evidence in the case does not entirely bear this out, since there are meeting notes. While it may be the case that what Mr Brown means is that he often does not take notes and to the best of his recollection he did not take notes of these meetings, that is not what he says. What he

does say is not on its face and without further explanation a credible answer.

Delivery Up Order and the e-Disclosure Process

30. Detailed submissions have been made by the Claimants as to what they see as "*significant and serious gaps in the Defendants' Delivery-Up documents*". I deal with these in tabular form below.

	Complaint	**Conclusion**
1.	No minutes or file notes of any meetings with third parties have been disclosed in circumstances where the trial bundles contained around 20 very detailed meeting notes prepared by the Defendants during their engagement.	While this seems surprising, I do not on the material presently before me consider that I can conclude that there has on the balance of probabilities been a failure of disclosure. The notes I recall are not really of the same sort as those said to be missing.
2.	The Defendants have failed to produce a single document or explanation of the circumstances (dates, locations etc) in which confidential information came to be disclosed to at least fifteen third parties.	Though substantive communications may have been in person or by phone, the response suggests there should be *"more logistical"* emails. These should have been disclosed pursuant to the part of the Order that says *"Each of the Defendants are required to exhibit to the affidavits .... copies of all communications evidencing each and every disclosure of confidential information to a third party, including emails and other correspondence leading to meetings at which confidential information or documentation was disclosed...."*.
3.	There are no communications or correspondence between the Defendants' Cyprus lawyers (ID Law) by whom confidential information was disseminated to third	Documents held by ID Law are documents held by the Defendants' agents, and as such were covered by the Order. Any failure to disclose these documents was a breach of the Order. Any instruction to destroy these

	parties, and those third parties.	documents, as opposed to delivering them up, was a breach of the Order.
4.	No correspondence with certain third parties has been provided	See 2 above.
5.	Drafts of the Defendants' affidavits.	The Defendants have asserted common interest privilege. The explanation for how that common interest privilege is said to arise is not satisfactory and the documents would therefore fall to be disclosed under the Order. If the Defendants wish to rely on common interest privilege to resist disclosure of these documents they will need to make good that assertion by detailed legal argument.
6.	No documents have been provided showing how meetings with third parties came to pass.	See 2 above.
7.	No documents relating to Mr. Brown's Tanzania meetings have been disclosed.	There does not seem to be material upon which I could conclude that there has been a breach of the Order in this respect.

Time for compliance

31. The Claimants sought only 14 days to be given for compliance. Although this was the period agreed to in the original 25 July Order history suggests that it was not an adequate period of time, given the complexity of the material. Now, the next step if there is a failure of compliance will be an application in relation to contempt. It is therefore important that the Defendants have sufficient time to comply.

32. Accordingly, the period for compliance will be 28 days.

Costs

33. There have, as I have made clear, been a number of fairly serious breaches of the 25 July Order which I made four months ago. The Claimants have had to pursue this application to get the Defendants to engage with proper compliance. It follows that the Defendants must pay the costs of the application.

34. Mr Kay QC for the Defendants did not seriously argue against this position, and on the question of quantum was content to leave that matter in my hands.

35. I have looked at the costs schedule which seeks £96,288.50. There appears to be some fat in the amount sought. By way of example: Mr Pantlin has spent the best part of three working days on Mr Bunting's first witness statement and the best part of two days on Mr Bunting's reply statement, I am not persuaded that attendance of two senior lawyers and two counsel was necessary for this hearing, or that so much counsel time was necessary for advice/conference/documents when two such senior lawyers were involved on the solicitors side.

36. The kinds of reductions that suggests, indicates a percentage reduction along the lines one would expect for assessment on the standard basis. I therefore assess the recoverable costs at: £72,500.

Post-hearing logistical issues

37. Since the hearing I have received (under protest from the Claimants) communications from the Defendants asking that I order that (or provide an indication to the effect that) the Claimants provide an export of the delivery up documents to the Defendants along with the associated document metadata to assist in their compliance with the requirements of the affidavit.

38. I am not minded to make any such Order, not least because if such an order were sought I would need fuller information from both parties, and this would necessitate an application.

39. However, to the extent that the Claimants seek particulars of the documents which accompanied particular verbal disclosures, or which comprised individual documentary disclosures, there will need to be some mechanism put in place for this to be done, if and to the extent that the Defendants no longer have any confidential documents in their possession.

40. As I understand it the position is that since paragraph 7 of the 25 July Order has not yet been triggered, the Defendants sill have soft copies of the Delivery Up Documents, so this is unlikely to be a major issue. There may be some issue as regards hard copy documents, but given the volume of these documents I do not consider that any particular provision requires to be made in terms of timing for access to these documents. Plainly the Claimants will, to the extent necessary, need to facilitate access to these documents. I am informed by the

Claimants that they are prepared to provide access at Quinn Emanuel's offices on business dates and times to be agreed between the parties (with at least 24 hours' notice). That appears to be satisfactory.